

1	STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) SS	
2	COUNTY OF DAY)	FIFTH JUDICIAL CIRCUIT
	* * * * *	* * * * *
3)
4	GERALD PESALL,) CIV. 14-53
)
5	Appellant,)
) ORAL ARGUMENT HEARING
6	VS.) ADMINISTRATIVE APPEAL
)
7	MONTANA DAKOTA UTILITIES, OTTER)
	TAIL POWER, SCHURING FARMS, INC.,)
8	BRADLEY MOREHOUSE, AND THE)
	SOUTH DAKOTA PUBLIC UTILITIES)
9	COMMISSION,)
)
10	APPELLEES.)
)
	* * * * *	* * * * *
11		
12	<u>DATE & TIME:</u>	December 23, 2014
		2:00 p.m.
13	<u>BEFORE:</u>	THE HONORABLE SCOTT P. MYREN
		CIRCUIT COURT JUDGE
14		Brown County Courthouse
		Aberdeen, South Dakota 57401
15		
16	<u>LOCATION:</u>	Brown County Circuit Courtroom
		Brown County Courthouse
17		Aberdeen, South Dakota 57401
18		
19		
20		
21		
22		
23		
24		
25		

1 Mr. Smith, can you hear me?

2 MR. SMITH: I can, Your Honor.

3 THE COURT: And did you want to make other
4 identifications on the record?

5 MR. SMITH: Well, I'm John Smith, commission counsel for
6 the South Dakota Public Utilities Commission representing
7 the South Dakota Public Utilities Commission this docket.
8 With me in the room today, and we're on speaker phone, is
9 Commissioner Chris Nelson. And that's it.

10 THE COURT: Thank you. And I'll just make sure on the
11 telephone line, was there any other party or any other
12 person that wished to appear before the Court on this
13 matter? If so, just speak up.

14 There are no other appearances being noted on the
15 record.

16 And there is a voluminous record here. I've had the
17 opportunity to review the entire record. And paying
18 particular attention, of course, to the evidentiary hearing
19 and the exhibits that were presented there. And I've also
20 received various briefings from all the parties, which I've
21 had a chance to review.

22 So with the understanding that I've been through all of
23 that material, I will let each of the counsel make their
24 argument. And then as I, I think I explained earlier, I
25 will go back around one additional time for each of the

1 go back over those because they've been covered in either my
2 initial remarks or in the briefs. So that would conclude
3 the remarks, Your Honor.

4 THE COURT: Each of the parties has made their various
5 arguments to the Court. I've had a chance to review the
6 record, and I've had a chance to review the written
7 arguments of the parties.

8 I intend to make a decision, but first I want to check
9 with the court reporter to see if she needs a break or if
10 she's read to proceed. Kristi?

11 COURT REPORTER: Go ahead, Your Honor.

12 THE COURT: This will be the decision of the Court. I'm
13 going to, I'll ramble a little bit here, but hopefully I'll
14 be able to bring it all together so that you're sufficiently
15 clear about the Court's ruling and the reasons for the
16 ruling.

17 First I'll start out with my understanding of my role in
18 this particular process. This is an appeal from the
19 decision of the Public Utilities Commission. The Public
20 Utilities Commission in this particular process is a
21 quasi-judicial body. And my job is to review the process
22 that they employed and the decision that they made.

23 To the extent that they have made findings of facts, I
24 will be applying the clearly erroneous standard. If I find
25 that any of their factual findings were not supported by the

1 evidence, that there is no way that someone could have made
2 that factual finding, that would be a clearly erroneous
3 finding, and then I could reverse that finding or reject it.

4 To the extent that they have applied the law, it's my
5 understanding that my role here is to see if they have
6 accurately applied the law. I don't believe that I am bound
7 by their determination of the law. It's my -- I can
8 determine the law just as well.

9 I do recognize that the Public Utilities Commission is a
10 specialized agency that has some expertise in dealing with
11 these sort of things. Presumably they have dealt with --
12 and I can tell from the testimony that they've dealt with
13 the transmission line issue a number of times in the past.
14 This is the first appeal that I have addressed as a circuit
15 court judge where we're dealing with it. So I mention that
16 because I want the record to reflect that I am giving them
17 the deference that I believe they're entitled to receive as
18 that specialized administrative agency.

19 I want to talk briefly about the process because I have
20 a couple of concerns about it that I just want to put on the
21 record because it's important about how I'm, what I'm
22 considering when I make my decision.

23 In the past, in my years before I became a circuit judge
24 and a magistrate judge, I was an administrative law judge.
25 In all three of those roles I've never had the opportunity

1 to appear before an appellate body reviewing one of my
2 decisions and try to convince them that my decision was
3 right. The reason that we don't do that is because the
4 decision that is being reviewed is the decision that the
5 Court entered at the time that it made that decision.

6 So in this circumstance, the decision of the PUC is
7 the ~~the~~ the decision they made that day, while each of the
8 commissioners gave some brief general remarks, there is no
9 written decision in the sense that a court would normally
10 do, but then the PUC's formalized decision comes in the form
11 of its findings of fact and conclusions of law.

12 So here is the awkward part that I'm commenting about,
13 is that Mr. Smith was the hearing officer that conducted the
14 hearing on behalf of the PUC. And then I gather from his
15 remarks at the adjunct hearing that took place after the
16 initial evidentiary hearing, he was also the person as
17 general counsel for the PUC who was drafting the findings of
18 fact, conclusions of law, and order. I may or may not be
19 exactly right about that, but that's the impression that I
20 have.

21 And then here today he's arguing on behalf of PUC, and
22 in his argument he's trying to tell me why the PUC made
23 certain decisions. Now, the awkward part about that is if
24 we had an attorney who was simply arguing it, they could
25 probably make an argument like that and try to infer what he

1 thought the argument was, but that wasn't what I was getting
2 today. What I'm getting today on the record is we made this
3 decision and we did this, and he's explaining why he made
4 various decisions.

5 So I comment on that only -- I recognize it happens and
6 everything. All I'm commenting on it is to mention that
7 ~~what I'm doing in my review is reviewing the decision that~~
8 the PUC made and not the decision that the general counsel
9 may have made or the reasoning that the general counsel had
10 for doing it. It's what the PUC said in their written
11 findings of fact and conclusions of law that control here,
12 not their explanations through general counsel afterwards.

13 So here is -- I'm going to go into a little bit of
14 detail on some of these things. I probably don't need to,
15 but I'm going to so that you're all aware that I have
16 actually considered these things. The fact that I don't
17 mention every single issue that has been addressed by the
18 parties in their briefing doesn't mean that I haven't
19 considered it; it just means that I'm trying to cover, to
20 give you sufficient specificity so you know that I'm aware
21 of all of the issues, but not specifically addressing every
22 single tiny one.

23 The first things I'm going to address are the claims
24 that there are findings of fact that are clearly erroneous.
25 Those essentially break down into a couple different groups,

1 about four different groups of findings that Mr. Pesall has
2 contended were clearly erroneous.

3 The first group are findings number 14 and findings
4 number 21 through 23. Those are the findings that relate to
5 the PUC's determination that this project, that there is a
6 public need and a public benefit.

7 ~~In finding 14 the PUC finds that the project "will be~~
8 used by area utilities to transport electric supply to and
9 from lower voltage transmission and distribution lines for
10 delivery to retail customers." As I explained, I've had a
11 chance to read through the entire record and, in particular,
12 the administrative hearing record, the evidentiary hearing.
13 The issue is whether there is evidence to support that
14 finding, not whether I would make the same finding. That's
15 not what clearly erroneous is. What clearly erroneous is
16 there is, is there is no way any fact finder could look at
17 the evidence in this record and come to that finding. And
18 clearly there is evidence that supports that finding, and a
19 fact finder could have made that decision. And so that
20 finding, those, number 14 was not clearly erroneous.

21 Similarly on 21 through 23, those are findings that
22 relate to tax revenue. Mr. Pesall claims that they're
23 clearly erroneous because he claims the commission didn't
24 take into account the economic burden imposed by the
25 project. In those findings the PUC finds that the project

1 will result in some revenue for the various communities
2 along the route of the path and that there is an economic
3 benefit as a result. And although they didn't specifically
4 lay out a balancing of the burdens, it's clear that the PUC
5 in its process determined that the net effect was an
6 economic benefit from the project. Their decision, that
7 ~~factual finding is supported by evidence in the record.~~
8 It's not clearly erroneous.

9 The second group of findings is findings 28 through 30.
10 Those relate to the reasonableness of the applicant's
11 mitigation plan.

12 Number 28, the PUC found, "The applicants have developed
13 reasonable mitigation plans to mitigate any environmental
14 concerns arising from the construction or operation of the
15 project." For the same rationale that I explained before,
16 that is supported by evidence in the record.

17 On most factual findings in any record there are going
18 to be contradicting evidence, and the finder of fact is
19 going to weigh that evidence. And as long as it is possible
20 for a finder of fact to have weighed the evidence and come
21 to the factual finding that they did, it's not clearly
22 erroneous. That's the case with findings of fact both 28,
23 29 and 30.

24 29 and 30 were findings that, where the, where the PUC
25 said, "No evidence was introduced to demonstrate any effect

1 of the project on property values." I want to talk about
2 that because clearly that's not accurate in the truest sense
3 of the word because there was evidence that was presented.
4 Mr. Pesall and Mr. Schuring both testified that they thought
5 that having this, this line come across their land would
6 result in a reduction or a devaluation of their properties.

7 I think, at least my reading of the overall decision is
8 that the department -- or that the Public Utilities
9 Commission, what they meant in the finding when they said
10 there was no evidence is that they meant there was no
11 creditable evidence. There was no evidence upon which that
12 they chose to rely.

13 Now, here is my explanation for that. I do a lot of
14 findings of fact and conclusions. I'm a judge, and I don't
15 have any qualms about calling someone lacking in credibility
16 if that's my determination. Here what we have is three
17 commissioners that make a decision, and it's a rather
18 general decision when they actually issue, they approve the
19 permit. And then they rely upon their counsel to write up
20 these findings of fact, and it's their job to review them
21 before they get entered. But they're not judges in the same
22 sense that a law-trained person like myself is. And so they
23 don't have exactly the same artfulness probably with
24 language that we would come up with writing findings of fact
25 on such a regular basis like we do as judges and attorneys.

1 So it's my reading of that particular finding that what
2 they've done is they've determined that Mr. Pesall was not
3 creditable, but they -- that they did not believe that his
4 testimony was entitled to significant enough weight that it
5 outweighed the other evidence that they had. The reason
6 that I say that is if you read that finding, in the next
7 sentence they talk about the fact that it's speculative.

8 And here is where it becomes important. Mister, I think
9 it was Mr. Pesall, the attorney here today, argued that he
10 thinks that it's not relevant talking about the testimony
11 that Mr. Pesall, his client, had given where he said if this
12 wasn't coming across my land, I wouldn't be here. The
13 reason that it's important is because the Public Utilities
14 Commission and members have to weigh evidence. And when
15 they're weighing evidence, they have the ability to observe
16 witnesses testifying, they have the ability to determine
17 whether they're credible, and they have the ability to
18 determine whether they have the ability to observe and
19 recollect testimony.

20 And in the whole -- and I have the same impression from
21 having read through the entire record. In the whole I have
22 the, I am left with the impression that Mr. Pesall, the
23 client, was interested in keeping this project off of his
24 property regardless of what he had to say. I -- if I had
25 been the finder of fact, I probably would have disregarded

1 his testimony, also. That's what I conclude that the
2 department -- or the Public Utilities Commission did in
3 here, and that's what they were trying to explain. They
4 perhaps didn't do it as artfully as possible. So to the
5 extent that they said no evidence was introduced to
6 demonstrate any effect on the project -- of the project on
7 property value, I read that to mean no creditable evidence
8 was presented. And with that minor addition in the reading,
9 their finding is not clearly erroneous.

10 The other group that I'm going to address are findings
11 of fact 35 through 57. Those relate to the impact on
12 property values, farming activities, and the spread of SCN.

13 Mr. Pesall testified that having the project on his
14 property would impact his property values, would impact his
15 farming activity, and would impact the spread of SCN. And
16 for the exact same reasons I described at more length
17 before, it's clear to me that the Public Utilities
18 Commission essentially chose to disregard his testimony on
19 those. They found that he was not creditable; that they
20 would not, that his evidence was not sufficient; that his
21 testimony was not reliable enough that they, that they would
22 rely upon it in making a different decision.

23 Again, it's essentially the exact same analysis as I had
24 applied before. It's his under-no-circumstances attitude
25 that undermine his credibility and that make it possible for

1 the department to disregard his, his testimony or to find
2 that it is not entitled to sufficient weight that it
3 outweighed the other evidence that was on the record that
4 supported those findings. So those findings are not clearly
5 erroneous.

6 And then the last group was findings of fact 71 through
7 81, and I've reviewed the record. There is evidence
8 sufficient to support those. They're not clearly erroneous.

9 I'm going to talk about the admission of the MISO
10 studies. Again, the Public Utilities Commission is a
11 quasi-judicial body. There are some rules that -- the
12 administrative rights say that the rules of evidence are
13 somewhat relaxed in those proceedings. So they don't
14 necessarily apply the exact same rules that we do, and
15 they're not nearly as, or they don't have to be as precisely
16 applied as we would in a formal court proceeding. What's
17 important is whether they have provided such regularity in
18 their rulings and in their application of the law that the
19 evidence that comes before them is reliable.

20 The MISO studies were offered during the testimony of
21 Mr. Weiers. Mr. Weiers, it is true, was an employee of one
22 of the applicants, but he was identified as an expert
23 witness, and he's testifying as an expert witness. And
24 specifically what he's testifying about is how this project
25 is going to be built out, how it's going to be constructed.

1 And he's clearly providing the PUC with testimony in the
2 form of an expert. And in the process of his testimony he
3 explains that part of his knowledge as an expert comes from
4 participating in the creation of these MISO studies and that
5 the particular MISO studies that were ultimately admitted
6 into the record were utilized by him in formulating the
7 opinions that he's providing. That's perfectly appropriate.

8 There is no reason that he couldn't do that. If he had
9 appeared in my court and wanted to tell -- and one of the
10 parties offered documentation of this type that the expert
11 relied upon, it would be admissible into evidence. Now,
12 that wasn't the reason that was given at the time. It was a
13 little bit less precise from the department, from the PUC.

14 Here is my understanding of the law. The evidentiary
15 rulings of a judge, or in this case, a hearing officer, are
16 reviewed for essentially an abuse of discretion. If the
17 judge had, if the judge's decision was, in admitting the
18 evidence had some basis, there was some way that it could
19 have been correct, then the court should not throw that
20 ruling out. And it's my determination that the ruling was
21 ultimately correct; that the MISO studies were properly
22 admitted. It is clear that this quasi-judicial body, the
23 PUC, was quite familiar with those MISO studies, and it is
24 clear from the evidence in the record that they had
25 sufficient familiarity with them; that they were comfortable

1 with the genuineness, the authenticity of the documents.

2 There was an argument that in one of the conclusions of
3 law that the PUC shifted the burden to the, to the
4 objectors. That particular one, again, it's my ruling that
5 what that was was essentially an inartful conclusion. It
6 wasn't a shifting of the burden. What they were indicating
7 was that there was sufficient evidence in the record that
8 they believed established that particular point. And that
9 having established it they were, they were reviewing the
10 record to see if there was anything else that would
11 contradict that, and they were simply mentioning or noting
12 that there was nothing presented to contradict it.

13 I do the same thing in issuing my decisions. I will
14 frequently comment on the absence of contradictory evidence.
15 It doesn't mean you're shifting the burden. It's just a
16 comment on the nature of the evidence that you're
17 considering.

18 There are two additional arguments that I want to
19 address. The second-to-the-last is the argument that there
20 was an improper delegation of authority.

21 Mr. Pesall very properly raised this issue regarding
22 SCN, the soybean nematodes. And it's a good thing that he
23 did because it gave everyone an opportunity to learn about
24 it and gave the PUC an opportunity to address his concerns
25 regarding that.

1 This is a \$250 million project or something in that
2 neighborhood. It is literally impossible for the Public
3 Utilities Commission to create a permit that covers every
4 precise, tiny detail in the one year that they have within
5 which they have to issue that decision. There always are
6 going to be things that are open. What the Public Utilities
7 Commission has the authority to do, in my opinion, under the
8 law, is to set up requirements, things that the applicant
9 has to comply with and, if necessary, set up a process
10 making sure that they comply with that. That's what they
11 did with this, with the SCN study.

12 What they required the applicants to do is conduct a
13 detailed study of the properties involved, taking soil
14 samples from them on, sufficient to gather the information
15 about which properties were infected, the level of
16 infection, even within properties which portions might be
17 infected and which portions weren't, and then develop a
18 mitigation plan to make sure that parcels that were not
19 infected will not become infected, and that the infection on
20 any individual parcels won't be unnecessarily spread into
21 portions that weren't.

22 It's a completely reasonable thing that they've done.
23 It's not a delegation of authority. The PUC has kept the
24 power to, to follow up on that. They didn't specifically
25 say, applicants, you go out and do what you want. They

1 said, you need to address this problem. It's not possible
2 for us to do that right now because you have to conduct
3 these surveys, these soil surveys. And then based on what
4 you find, you'll have to develop a mitigation plan. It
5 seems completely appropriate to me, and it's not an illegal
6 delegation of their authority.

7 ~~Then, then the last issue that I want to address is the,~~
8 which I think no one has essentially argued about today, but
9 it's in the briefing, so I'll address it, and that's the,
10 exceeding the 12-month limit. And essentially the argument
11 is that by leaving open the opportunity to address the SCN
12 soil survey at a later date that they've gone beyond the
13 survey and -- or gone beyond the period of time for the
14 granting of the permit.

15 The permit has been granted. The SCN study is a
16 condition to the permit. The fact that the PUC has retained
17 the ability to review that process and make sure that there
18 are no further, and that there are no impacts that are too
19 much for the project doesn't mean that they have exceeded
20 the 12-month limitation.

21 So for all the reasons that I've provided, it is my
22 finding that the, that the Public Utilities Commission did
23 not make any clearly erroneous findings. All of their
24 findings are adopted by the Court with the minor exception
25 of the addition of the word creditable on those findings

1 where they have found that there is no evidence as I
2 outlined in my decision where there was evidence. It just
3 wasn't that, it was that they weren't finding that it was
4 creditable. And then that they have accurately applied the
5 law. I see no problems with their application of the law to
6 the facts of this case. So I'll affirm their decision.

7 ~~What I'm going to propose is I'm going to have --~~

8 Mr. Welk, I'm going to have, I'm going to propose having you
9 draft an order, the orders to follow up on this. If there
10 is, if it's ordinarily done in a different way, I would
11 entertain some suggestions about that.

12 Mr. Welk, would that work for you?

13 MR. WELK: Yes. It will be -- normally it's capped
14 under 1-26-36 as a judgment, Your Honor. And so with the
15 Court's ruling today, we'll make the modifications, and I'll
16 be glad to send that around to counsel before it's submitted
17 to you. If there is any -- and if we can't agree to the
18 form of the order, then we can compete, we can submit to the
19 Court competing orders, if that's acceptable to you.

20 THE COURT: It will work for me.

21 Mr. Pesall, does that process work for you?

22 MR. PESALL: I think that process is probably the most
23 reasonable way to approach it, Your Honor. Thank you.

24 THE COURT: Mr. Smith?

25 MR. SMITH: Yes, Your Honor. That's fine with me.