

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27324

Gerald Pesall, Appellant,

v.

Montana-Dakota Utilities, Otter Tail Power, Schuring Farms, Inc., Bradley Morehouse,
and the South Dakota Public Utilities Commission, Appellees

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT P. MYREN

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Appellees Montana-Dakota Utilities Co. and Otter Tail Power Company

(“collectively Applicants”) agree with Appellant Gerald Pesall’s (“Pesall”) jurisdictional statement.

STATEMENT OF THE ISSUES

I. Did the Commission Unlawfully Delegate its Authority By Adopting a Condition of the Permit Giving the Commission the Authority to Monitor and Assess the Applicants’ Implementation of their SCN Mitigation Plan?

The Circuit Court held the Commission did not unlawfully delegate its authority.

SDCL 49-1-17 (repealed by 2009 SB 62)

In the Matter of the Nebraska Power District, 354 N.W.2d 713 (S.D. 1984)

II. Did the Commission Issue its Ruling on the Application for the Permit within 12-Months As Required by SDCL 49-41B-24?

The Circuit Court ruled the Commission complied with SDCL 49-41B-24 by granting the permit within 12-months of the filing of the application for the permit.

SDCL 49-41B-24

STATEMENT OF THE CASE

This case involves an appeal from the decision by Public Utilities Commission of the State of South Dakota (“the Commission”) granting a facility permit to Applicants to construct a 345kV electric transmission line. Applicants filed an application for the facility permit on August 23, 2013. (FOF 2).¹ Pesall intervened as a party on October 18, 2014.

¹ Cites to ‘AR’ refer to the certified record from the administrative proceedings before the Commission. Cites to ‘TR’ refer to the evidentiary hearing transcript. Cites to ‘Ex.’ refer to exhibits at the evidentiary hearing. Cites to ‘FOF’ refer to the findings of fact issued by the Commission in the Decision.

The Commission held an evidentiary contested case hearing on June 10 and 11, 2014, on the Application. (AR 5562-6133). Following the evidentiary hearing, the Commission, issued a Final Decision and Order (“the Decision”) granting the permit. (Applicants-App 3-19). The Decision contained 82 Findings of Fact and 20 Conclusions of Law. *Id.*

Pesall appealed the Decision to the Circuit Court in Day County. The South Dakota Circuit Court for the Fifth Judicial Circuit, Honorable Judge Myren presiding, affirmed the Commission’s Findings of Fact and Conclusions of Law, with slight modifications, and affirmed the issuance of the permit. (Applicants-App 1, 33-47). As indicated at the oral argument, Judge Myren reviewed the extensive administrative record. (Applicants-App 32). Based upon his review of the record and the written and oral arguments of the parties, Judge Myren affirmed the Decision at the hearing. In 14 pages of transcript, Judge Myren stated his reasons for rejecting Pesall’s argument and affirming the Decision. (Applicants-App 33-47). Pesall now appeals to this Court.

STATEMENT OF FACTS

A. Background of the Project

The Decision allows the construction and operation of 160 to 170 miles of 345kV electric transmission line between a substation near Ellendale, North Dakota, and a substation near Big Stone City, South Dakota (“the Project”). The Project is jointly owned approximately 50 percent each by Montana-Dakota Utilities Co. (“MDU”) and Otter Tail Power Company (“OTP”). (FOF 2, 5).

The Project’s 345-kV electric transmission line will run south from Ellendale and enter South Dakota in northern Brown County. (FOF 11). The transmission line will

then route through Brown, Grant, and Day Counties before terminating near Big Stone City in Grant County, South Dakota. (*Id.*). Approximately 150 to 160 miles of transmission line will be located in South Dakota. (*Id.*). The Project is estimated to cost between \$293 and \$370 million in 2013 dollars. (FOF 13).

B. Procedural History Prior to Contested Case Hearing before Commission

On August 23, 2013, the Applicants filed the Application. (FOF 2). Before filing the Application, the Applicants conducted an extensive route selection process that considered several factors. (FOF 25). As part of the route selection process, Applicants engaged in over a year of public input and outreach. (Ex. 1, at § 8.1). Based on this route selection process, Applicants selected the route in the Application. (FOF 25)

After filing of the Application, the Commission scheduled and held three separate public input hearings. (AR 1040-43). At these hearings, the Commission heard over 10 hours of public comments regarding the Project.

On October 18, 2014, Pesall filed for intervention. (AR 1477). The Commission granted Pesall party status on November 6, 2013. (AR 1513).

The Project crosses one parcel of Pesall's farm ground. (FOF 6). Only two monopole² structures will be placed on Pesall's property. (Exs. 21A-C, TR 290). The poles will be more than one-half mile from Pesall's residence. (*Id.*). Additionally, the structures will be placed on open farm ground with no other obstructions. (FOF 36; Exs. 21A-C). Based on Pesall's testimony, the Commission expressly found Pesall's objection is less an objection to the issuance of the Permit but instead an objection to

² The monopoles used on the Project are a single steel power pole between 125 and 155 feet tall with a concrete base with a diameter between 6 and 11 feet wide. (Ex. 1, at § 23.1).

placement of the transmission line on his property. (FOF 37).³

In addition to Pesall, on May 1, 2014, the Commission granted intervenor status to the following landowners: Schuring Farms, Inc., Bradley Morehouse, James McKane, III, Clark Olson, and Kevin Anderson. (AR 3525). Intervenors McKane, Olson, and Anderson did not participate in the evidentiary hearing, present any evidence for consideration, or state whether they objected to issuance of the permit. (FOF 9). Intervenor Schuring Farms, Inc., through its owner Randy Schuring, and Bradley Morehouse participated and presented evidence at the evidentiary hearing on the permit. Neither Schuring Farms, Inc., nor Morehouse appealed the Decision or participated in the appeal to the Circuit Court.

As part of the discovery in this contested case, Applicants answered 48 separate data requests from the Commission Staff and 32 interrogatories from Pesall. (Exs. 2-4). During the discovery process, Pesall raised concerns regarding the spread of Soybean Cyst Nematode (“SCN”)⁴ from construction of the Project. Pesall’s identification of SCN raised a new issue for the Applicants. (TR 33). In Applicants’ prior experience of constructing, operating, and maintaining over 5,700 miles of transmission lines in North Dakota, South Dakota, Minnesota, Montana, and Wyoming, the construction and maintenance of transmission lines had not materially contributed to the spread of soil borne pests. (Ex. 5, at Interrogatory No. 9). Additionally, before Pesall, none of the 500

³ Statutorily, the Commission cannot determine the route for the Project. (COL 17). *See also* SDCL 49-41B-36.

⁴ SCN is a parasitic microscopic worm that feeds on the outside of the roots of soybean plants. (TR 229-233). Each female SCN can generate up to 200 eggs, and because the eggs are cysts, the eggs can survive up to 10 years after the death of the female SCN. (*Id.*). Each pregnant SCN female is the size of a newspaper period. (*Id.*) Anything that spreads soil can spread SCN. (*Id.*).

landowners who attended the Project's open houses expressed any concern over SCN. (TR 153). As a result, when Pesall raised the spread of SCN as a concern, the Project investigated SCN and developed an appropriate mitigation plan. (TR 33; Exs. 16B, 16C, 23).

Before the evidentiary hearing on the permit, the Applicants and the Commission Staff entered into a settlement stipulation ("Settlement Stipulation") in which the Commission Staff recommended issuance of the permit subject to the conditions in the Settlement Stipulation. (CR 5646-61; Ex. 301). The Settlement Stipulation contained 33 separate conditions for issuance of the permit, including among other things, Condition 17 relating to the SCN Plan. Condition 17 states: "Applicant shall develop and implement a mitigation plan to minimize the spread of [SCN], consistent with Exhibit 23, in consultation with a crop pest control." (Ex. 301, at ¶ 17).

C. Contested Case Hearing

The Commission held an evidentiary hearing on the Application on June 10 and 11, 2014. One of the key issues at the evidentiary hearing related to the spread of SCN. Substantial evidence indicated that the construction of the Project will not materially increase the spread of SCN. (FOF 40-41). Although SCN is present in Brown, Grant, and Day Counties, there was no evidence presented indicating whether the specific parcels on the Project route are infected with SCN. (FOF 40). At the time of the evidentiary hearing, even Pesall did not know whether his property is infected with or free of SCN. (TR 246). Additionally, no academic studies confirm construction of transmission lines causes the spread of SCN. (TR 246). Conversely, Dr. Tylka, an expert witness testifying on behalf of Pesall, admitted that SCN is spread by wind, water

erosion, birds, typical farming practices, and even boots. (FOF 41; TR 244-45, 256-57, 259-60, 270-71). Once a field is infected with SCN, there is no way to determine how the field was infected. (TR 256-57). Further, even if infected, farmers can employ mitigation techniques to reduce the impact of SCN, such as growing non-host crops, including non-host crops in a crop planting rotation, and planting SCN resistant variety seed. (FOF 46; TR 248).

Despite the lack of evidence indicating Project construction will actually spread SCN, Applicants investigated SCN and created a mitigation plan after Pesall raised the issue. (TR 34-36; Ex. 23). As part of the SCN Mitigation Plan, Applicants will test each parcel of tilled ground that the Project crosses to determine if the parcel is infected with SCN. (*Id.*). Depending on the test results, Applicants will choose the most appropriate mitigation technique for the parcel. (Ex. 23; TR 34-36, 83-85).

Based upon the testimony at the evidentiary hearing, the Applicants and the Commission Staff entered into an Amended Settlement Stipulation which was entered into the record without objection. (Ex. 301A). The Amended Settlement Stipulation did not change Condition 17 relating to the SCN Mitigation Plan.

Following the evidentiary hearing and post-hearing briefing, the Commission issued 82 Findings of Fact and 20 Conclusions of Law in the Decision. (Applicants-App 3-19). Regarding the SCN Mitigation Plan, the Commission concluded that Condition 17 of the Amended Settlement Stipulation relating to the SCN Mitigation was not sufficient. As a result, the Commission modified Condition 17 in Finding of Fact 47. (FOF 47). Based upon the modified Condition 17, the Commission expressly found that Applicant's SCN Mitigation Plan will reasonably minimize the risk of spreading SCN during the

construction. (FOF 48). Because Applicants bore their burden of proof, the Commission granted the facility permit on August 22, 2014. (Applicants-App 14).

ARGUMENT

Pesall's appeal of the Commission's decision granting the facility permit is governed by SDCL 1-26-36. *See In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26, 744 N.W.2d 594, 602. This Court reviews the Commission's factual findings under the clearly erroneous standard. *Id.* Conclusions of law are reviewed *de novo*. *Id.* This Court also has recognized that the Commission is an administrative agency with expertise. *In re W. River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 25, 675 N.W.2d 222, 229-30. As such, courts "give 'appropriate deference to [Commission's] expertise and special knowledge in the field of electric utilities.'" *Id.* (quoting *In re Northern States Power Co.*, 489 N.W.2d 365, 370 (S.D. 1992)).

I. The Commission, Which Granted the Facility Permit Subject to 33 Separate Conditions, Did Not Delegate Its Authority to a Private Party But Instead Properly Exercised its Authority to Oversee the Construction of the Transmission Line.

Following a two-day evidentiary hearing involving testimony from nine witnesses, and after considering a docket exceeding 8,000 pages, over a 100 pages of prefiled testimony, and hundreds of pages of exhibits, the Commission granted the facility permit. In granting the permit, however, the Commission exercised its regulatory authority to impose 33 separate conditions on the facility permit. (Ex. 301A). These 33 conditions were memorialized in an Amended Settlement Stipulation with the PUC Staff. (*Id.*). Concluding the condition in paragraph 17 of the Amended Settlement Stipulation addressing the SCN Plan was not sufficient, however, the Commission further exercised its regulatory authority in Finding of Fact 47 to further modify Condition 17 as follows:

After Applicant has finished the soil sample field assessment in accordance with the specifications for such assessment prepared in consultation with an expert in the proper methodology for performing such a sampling survey, Applicant shall submit to the Commission a summary report of the results of the field assessment and Applicant's specific mitigation plans for minimizing the risk of the spread of soybean cyst nematode from contaminated locations to uncontaminated locations. At such time and throughout the construction period, one or more Commissioners or Staff shall have the right to request of Applicant confidential access to the survey results to enable the verification of the survey results, assess the appropriateness of the mitigation measures to address such results, and monitor the execution of the plan during construction.

(FOF 47). According to the Commission, this additional language was necessary for the Commission to “exercise its oversight authority over the development and execution [of the SCN Plan] during construction.” (*Id.*). The Commission thus granted the facility permit provided Applicants comply with amended Condition 17. (Applicants-App 11).

Disregarding the Commission’s proper exercise of its regulatory authority, Pesall argues that the Commission wrongfully delegated its authority regarding SCN mitigation to the Applicants. (Pesall’s Brief at pp. 12-18). The Commission, however, never delegated any regulatory authority to Applicants (or any other private party).

Regarding SCN, Applicants proposed a mitigation plan. (Ex. 23). The PUC Staff, which negotiated the Amended Settlement Stipulation, did not simply accept the Applicants mitigation plan. Instead, paragraph 17 of the Amended Settlement Stipulation imposed an additional requirement that Applicants consult with a crop pest control expert in developing its mitigation plan. (Ex. 301A). Then, in granting the permit, the Commission further modified the required SCN Mitigation Plan in Finding of Fact 47. (FOF 47). The Commission thus properly exercised its authority to issue the permit subject to conditions imposed by the Commission. *See* SDCL 49-1B-24 (requiring the

Commission to issue a written ruling on the application for the permit within 12 months and expressly acknowledging the Commission can grant a permit “upon such terms, conditions, or modifications of the construction, operation, or maintenance as the commission deems appropriate”).

Finding of Fact 47 imposed additional requirements on the Applicants relating to the SCN Mitigation Plan. Finding of Fact 47 required the Applicants to file their recommended mitigation plan to prevent spread of SCN. (*Id.*) It also reserves the power of both the Commission and PUC Staff to “assess the appropriateness of the mitigation measures” (*Id.*). Ultimately, the requirements imposed by Condition 17, as amended by Finding of Fact 47, are the only conditions relating to SCN mitigation for issuance of the permit. These conditions are imposed by the Commission; not a private party.

Essentially ignoring Commission’s adoption and modification of Condition 17, Pesall argues that the Commission wrongfully delegated its authority to private parties. Pesall then argues that the Decision must be reversed based upon this Court’s decision *In the Matter of the Application of the Nebraska Power District*, 354 N.W.2d 713 (S.D. 1984) (“the MANDAN Case”). (Appellant’s Brief (“Pesall’s Brief”) at pp.14-19). The MANDAN Case does not, however, require reversal of the permit here.

As an initial matter, the unlawful delegation issue in the MANDAN Case rests upon SDCL 49-1-17, which has been repealed. *See* 2009 SB 62. Relying on testimony before the State Affairs Committee, Pesall argues the repeal of SDCL 49-1-17 was of no moment. (Pesall’s Brief at pp.16-17). This Court cannot resort to legislative history to breath life back into SDCL 49-1-17 because the unequivocal repeal of that statute is

unambiguous. *See Jensen v. Turner County Bd. of Adjustment*, 2007 SD 28, ¶ 5, 730 N.W.2d 411, 413 (stating that legislative history can only be considered when construing ambiguous statutes).

Further, even if the unlawful delegation portion of the MANDAN Case survived the repeal of SDCL 49-1-17, no wrongful delegation occurred here. In the MANDAN Case, the Commission granted a facility permit but rejected the Applicants' proposed mitigation plan for replacing subsoil. As stated in Finding of Fact 29 in the MANDAN Case, which is quoted on page 14 of Pesall's Brief, the Commission granted the permit in the MANDAN Case but gave landowners *carte blanche* authority to devise conditions regarding top soil preservation and mitigation:

[Applicants] would be required as a condition of construction to send written notice to each affected landowner as soon as practicable after issuance of a permit. The written notification of topsoil treatment options would be on a form approved by the South Dakota Public Utilities Commission, and would set forth specific landowner options with regard to separation and stockpiling of topsoil. *The landowner would be given an opportunity to specify other specific procedures he wished to have employed on his particular land in regard to topsoil preservation.* . . .

(Applt-App 111) (emphasis added). Because the landowners had unlimited authority to decide the procedures for topsoil prevent, this Court concluded that the Commission wrongfully delegated its authority to impose conditions to private landowners. *See In re Nebr. Pub. Power Dist.*, 354 N.W.2d at 719 (stating the Commission wrongfully delegated its authority because no statute indicates "landowners can dictate topsoil restoration conditions").

Unlike the MANDAN Case, no private party here was granted unfettered authority to decide the conditions imposed to prevent spread of SCN. Applicants proposed various mitigation techniques. (Ex. 23). As explained by Applicants at the

evidentiary hearing, Applicants cannot choose the specific technique to be used until after SCN testing is performed. (TR 34-36). Nevertheless, the Commission was apparently uncomfortable with this necessarily vague plan, and the Commission adopted Finding of Fact 47 which enables the Commission to oversee the SCN mitigation plan and modify mitigation techniques if inappropriate. (FOF 47). Thus, Pesall's argument that Applicants have the power to determine the conditions for issuance of the facility permit is simply incorrect.

For the first time on this appeal, Pesall argues that the Commission's actions are unconstitutional delegation of authority that violates Pesall's due process rights and conflicts with basic separation of powers requirements. (Pesall's Brief at pp.18-19). Pesall never raised these arguments to the Commission or on appeal to the Circuit Court. Pesall thus failed to preserve this argument for appeal. *See Casey Ranch Ltd. P'ship v. Casey*, 2009 SD 88, ¶ 19 n.6, 773 N.W.2d 816, 823 n.6 (stating the Court will not consider arguments first asserted on appeal).

Even if preserved, Pesall's constitutional arguments fail. Pesall cites two federal cases involving alleged unconstitutional delegation of authority which do not apply to this case. *See Association of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), *vacated on other grounds by Dep't of Transp. v. Assoc. of Am. R.R.*, 135 S. Ct. 1225 (2014); and *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). The cases cited by Pesall all involve an instance where a private actor is actually exercising regulatory authority over

other private actors. Unlike those cases, the Applicants are not exercising any regulatory authority, and no unconstitutional delegation of authority occurred.

In sum, the Commission did not wrongfully delegate its authority regarding the SCN Mitigation Plan. The Circuit Court thus properly affirmed the issuance of the permit.

II. The Commission Complied with SDCL 49-41B-24 When it Issued the Findings of Fact and Conclusions of Law within 12 Months of When Applicants Filed the Application.

Pesall argues that the Commission violated SDCL 49-41B-24, which states:

Within twelve months of receipt of the initial application for a permit for the construction . . . transmission lines of two hundred fifty kilovolts or more, . . . the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate.

SDCL 49-41B-24 (emphasis added).

Consistent with SDCL 49-41B-24, the Commission ruled on the Application for the facility permit within 12 months. Applicants filed the Application with the Commission on August 23, 2013. (AR 13-851). The Commission filed its Findings of Fact and Conclusions of Law along with the order granting the permit on August 22, 2013. (AR 8324-8341). Thus, the Commission issued its decision within one year.

Without citing any authority, Pesall argues that the one-year time limit prohibits the Commission from enforcing compliance with the conditions of the permit, including the SCN Mitigation Plan. The language of SDCL 49-41B-24 does not support that interpretation. Instead, the statute merely requires the Commission to rule on the Application within one year of filing. The plain language of SDCL 49-41B-24 also expressly authorizes the Commission can grant the permit “upon such terms, conditions

or modifications of the construction, operation, or maintenance as the commission deems appropriate.” As recognized by the Circuit Court, the ability for the Commission to mandate compliance with the condition of its permit during future construction, including the SCN Mitigation Plan, does not violate SDCL 49-41B-24. (December 23, 2014, Hearing Transcript at p.48).

CONCLUSION

Applicants respectfully request that the Court affirm the Circuit Court’s Findings of Fact and Conclusions of Law granting the facility permit.

Dated this 16th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents and Table of Authorities, and certificate of counsel, this brief contains 3,393 words as counted by Microsoft Word.

/s/ Jason R. Sutton
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CERTIFICATE OF SERVICE

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