IN THE SUPREME COURT
STATE OF SOUTH DAKOTA
* * * *

Gerald Pesall, Appellant

v.

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

No. 27324
* * * *

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

THE HON. SCOTT P. MYREN, CIRCUIT COURT JUDGE, PRESIDING
* * * *

APPELLANT'S REPLY BRIEF
* * * *

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PRELIMINARY STATEMENT

To avoid repetition, the following Reply Brief will limit discussion only to those issues raised or addressed by the Appellees which require correction or clarification. For all other issues, Gerald Pesall relies on his original Appellant's Brief. References to the record in this Reply Brief will follow the same convention used in Gerald Pesall's original Appellant's Brief. Because the briefs submitted by the Appellees are nearly identical, for brevity most references to the arguments raised in these briefs will be designated simply "Applicants' Brief" followed by the appropriate page number. Where they differ, references to the Public Utilities Commission's Brief will be separately designated "Commission's Brief."

JURISDICTIONAL STATEMENT, STATEMENT OF THE CASE AND STATEMENT OF FACTS

Gerald Pesall relies on the Jurisdictional Statement and Statement of the Case and Statement of Facts set out in his original Appellant's Brief, dated March 2nd, 2015.

STATEMENT OF LEGAL ISSUES

I. Did the South Dakota Public Utilities Commission improperly delegate its authority to a private party?

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

Case Law:

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

Statutes:

S.D.C.L. 49-41B-24
S.D.C.L. 49-41B-22.1

II. Did the South Dakota Public Utilities Commission exceed the twelve-month limit set out in S.D.C.L. 49-41B-24?

The Circuit Court held that the Commission did not exceed the twelve-month limit.

Statutes:

S.D.C.L. 49-41B-24

ARGUMENT

The applicants propose to construct a power line across three counties in South Dakota, using a variety of independent contractors to do the actual construction. (TR, pp. 176-177.) Those contractors will have to follow a number of rules during the construction phase in order to prevent the spread of soybean cyst nematode from field-to-field.

The foundational question remains: Who writes these rules, and how can they be enforced? Specifically, what must the Applicants, or their contractors, do with the thirty cubic feet of soil they plan to remove at the base of each tower? How must they clean their equipment between fields, and what must they do with the water afterwards? What weather conditions are most appropriate for construction activities?

Through Finding of Fact 47 of the Commission's Final Decision and Order, and paragraph 17 of the Applicants' Amended Settlement Stipulation, the Commission entrusted the responsibility to write these rules to the Applicants. Although the Commission reserved an option to "assess" the results, the Applicants' rules go into effect by default. Elected officials and affected citizens are left out of the rule-making process. This is an improper delegation of government authority to a private party, and it violates the statutory requirement that the Commission issue a complete decision within twelve months.

I. The South Dakota Public Utilities Commission improperly delegated its authority to a private party.

Before addressing the Applicants' and Commission's arguments, it is necessary to update the Court on *Association of American Railroads v. United States Department of Transportation*, 721 F3d 666 (D.C.Cir. 2013), which was cited in Gerald Pesall's original Appellant's Brief. As noted in the Applicants' brief, this decision was overturned by the Supreme Court of the United States (seven days after Pesall's brief was filed). It is important to note that the decision was reversed on the unrelated ground that AMTRAK was not a private entity for purposes of the delegation doctrine. *Dep't of Transp. v. Assoc. of Am. R.R.,* No. 13-1080, 575 U.S. ___, (2015). The High Court did not reverse any of the Appeals Court's reasoning regarding the delegation doctrine itself. To the contrary, the concurrences from Justices Alito and Thomas make it clear that the federal Appeals Court's rejection of the delegation of authority to private actors was sound. *Id,* at 16-27.

Turning to the arguments raised by the Applicants and the Commission, at the outset they seem to argue that the volume of the record and number of provisions incorporated in the Final Decision and Order somehow indicates that the Order is an exercise of regulatory authority and not a delegation. (Applicants Brief, pp. 7-8.) This is a non-sequitur, however, because neither the volume of the record nor the number of paragraphs in an order has any real impact on the legal validity of that order. The Findings of Fact, Conclusions of Law, and Decision and Order Denying Permit in the

MANDAN case, for example, had 222 separately numbered paragraphs in 102 pages, and this was still held to contain an unlawful delegation of authority. *In the Matter of the Application of Nebraska Power Dist.*, 354 N.W.2d 713 (S.D. 1984), commonly referred to as the "MANDAN" case.

The Applicants and Commission go on to argue that the holding in the MANDAN case should not be applied in the present case. (Applicants' Brief, p. 9.) In making this argument, they misread the MANDAN decision in two ways.

First, they contend that the MANDAN decision "rests upon SDCL 49-1-17" which criminalized the delegation of authority by the Commission, because this statute was repealed in 2009. (Applicants' Brief, 9.) This argument is flawed because the non-delegation rule is constitutional, not statutory in nature. *Mistretta v. United States*, 488 U.S. 361 (1989); *Boever v. South Dakota Bd. of Accountancy*, 1997 SD 34, 561 N.W.2d 309. And, although the Court referenced S.D.C.L. 49-1-17 in its decision, it relied expressly on SDCL 49-41B-24 when it stated, "S.D.C.L. 49-41B-24 dictates that the PUC is the only body which can impose terms and conditions." *In the Matter of the Application of Nebraska Power Dist.*, 354 N.W.2d at 719. S.D.C.L. 49-41B-24 is still the law.

Second, the Applicants and Commission contend that in the MANDAN case the landowners were given "carte-blanche authority to devise conditions regarding topsoil preservation." (Applicants' Brief, 10.) This argument misreads the Commission's original Order in the MANDAN case by taking a single sentence out of context.

Paragraph 29 of original Order in the MANDAN case did say landowners would have "an opportunity to specify other specific procedures he wished to have employed on his particular land," but this argument ignores the preceding sentence, which states that those "specific procedures" had to be selected from a list of specific options on "a form approved by the South Dakota Public Utilities Commission." It also ignores the following sentence, which stated, "In the event that a landowner did not respond within ten (10) days after presentation of the option form, the procedures outlined in Findings of Fact 27 and 28, above, would automatically go into effect." (See Applt-App. p. 111.) In short, there was no carte-blanche authority given to landowners in the MANDAN case. There was only a list of options determined in advance by the Commission. Giving the landowners the authority to decide what to do with topsoil in the MANDAN case was an improper delegation. Likewise here, giving the Applicants the authority to decide what to do with the topsoil is an improper delegation.

Next, the Applicants and Commission argue that the Court should disregard the due process and separation of powers concerns that arise when an unlawful delegation takes place because, they contend, these were not raised as separate issues during proceedings before the Commission or Circuit Court. (Applicants' Brief, p. 11.) This argument is misplaced. The due process and separation of powers concerns are not separate legal issues being raised on appeal. The issue here has always been the improper delegation of authority by the Commission to the Applicants. The delegation issue was expressly raised both during the Commission hearings, (August 6, 2014 Transcript, p.

45,) and before the Circuit Court, (Oral Argument Hearing Transcript, December 23, 2014, pp. 32-33.)

Due process and separation of powers concerns are discussed here, together with open government concerns, and conflict of interest concerns, as some of the many reasons why the rule against delegation exists and should be enforced in this case. Indeed, any reference to delegation in this context incorporates separation of powers by definition. The "Delegation Doctrine" is generally defined as "The principle (based on the separation of powers concept) limiting Congress's ability transfer its legislative power to another governmental branch." Black's Law Dictionary, 7th Ed. 1999. And, the Supreme Court of the United States relied on due process concerns as a reason to enforce the non-delegation rule in *Carter v Carter Coal Co.*, 298 U.S. 238, 311, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

Finally, without citing authority, the Applicants and the Commission restate their contention that the Applicants are not exercising any regulatory authority, and thus, no delegation occurred. In this, the Applicants and the Commission seem to misunderstand the definition of of the word. "Delegation" is generally defined as, "the act of entrusting another with authority or empowering another to act as an agent or representative." Black's Law Dictionary, 7th Ed. 1999. The Commission made it clear that this "entrusting" was exactly what it intended to do when it observed,

> "And the last thing I would say is, is there a leap of trust in all of this? Absolutely. There is a burden, I believe, on MDU and Otter Tail to make this thing work.
>
> There's only so much we can put in writing. And I think we've accomplished

> what we need to do in writing, but there is also the trust that we're placing in the two companies to make sure that you make this work for the landowners that are going to be your partners for perpetuity."

(August 13, 2014 Hearing, p. 24.)

II. The South Dakota Public Utilities Commission exceeded the twelve-month limit set out in S.D.C.L. 49-41B-24.

As to this second issue, the Applicants and the Commission seem to argue that under S.D.C.L. 49-41B-24 the Commission is free to craft whatever conditions it likes within a permit order, even conditions reserving the right to modify the permit after it is issued, as long as they are written down within twelve months. (Applicants' Brief, 12.) As with their interpretation of paragraph 29 of the original MANDAN order above, the Applicants and the Commission reach this conclusion by taking a single portion of the rule and applying it without context.

S.D.C.L. 49-41B-24 contains one sentence. It begins with the twelve-month requirement, and then goes on to discuss the "complete" findings and conditions that must be made within that time frame. At no point does the statute empower the Commission to reserve the authority to change permit conditions after that twelve-month time frame has lapsed. Indeed, if the Commission could revise permit orders after-the-fact, simply by reserving that authority within its original decision, this would render the twelve-month limitation meaningless. "A fundamental rule of statutory construction is that whenever possible, effect must be given to all provisions within a statute." *State v. Hirsch*, 309 N.W.2d 832, 834 (S.D. 1981) citing *State v. Heisinger*, 252 N.W.2d 899

(S.D.1977).

Finally the Commission, separately from the Applicants, also argues that it has included "forward looking" conditions in permit orders for many years. (Commission's Brief, 17-18.) This appears to be more of a policy argument than a legal one. The Commission does not cite any specific provisions in other permits as having been tested in light of the twelve-month statutory limit, or any other legal authority in support of this argument. But, the Commission contends, it needs the flexibility to do this in order to regulate modern utility projects.

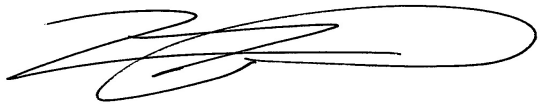
Even if the Commission had included similar conditions in other permits, this fact alone would not support an argument that doing so is lawful in this case. After all, "a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom." Thomas Paine, Common Sense 3 (Palladium Press Special Ed. 2000) (1776). Ultimately, if the Commission requires the authority to alter existing permit orders or revise conditions during construction of a utility project, that authority should come from the legislature rather than the Courts. "Courts are not at liberty to legislate under the guise of exercising their powers of statutory construction." *Wiseman v .Wiseman*, 2015 S.D. 23, ¶11, citing *McFarland v. Keenan*, 77 S.D. 39, 47, 84 N.W.2d 884, 888 (1957)

CONCLUSION

In this case, the Commission improperly delegated its regulatory authority to the Applicants when it entrusted them with the power to write their own rules. The Commission reserved the right to assess the appropriateness of those rules after the fact, but in so doing violated the statutory twelve month decisional deadline. The Commission should have followed the statutory process in S.D.C.L. 49-41B-22.1, denied the permit on specific grounds, and allowed the Applicants to re-apply.

This Court should, therefore, reverse the Circuit Court's decision as to the issues on appeal, vacate the Commission's Final Decision and Order, and remand the matter with instructions that the permit be denied.

Respectfully submitted this 24th day of April, 2015



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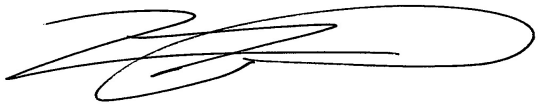
CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66, the undersigned attorney certifies that the foregoing brief complies with the statutory font, character, and volume limitations, containing 2798 words and 18048 characters in less than 14 pages.

Dated this 24th Day of April, 2015



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The undersigned attorney hereby certifies that true and correct copies of the foregoing **Appellant's Reply Brief** were served upon the following individuals by electronic mail this 24th Day of April, 2015:

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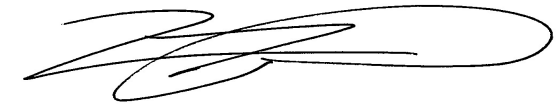

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