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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE FILING BY)	EL01-027
OTTER TAIL CORPORATION REGARDING)	
ITS NOTIFICATION OF INTENT TO)	BRIEF IN SUPPORT OF
APPLY FOR A PERMIT FOR AN ENERGY)	MOTION TO RECONSIDER
CONVERSION FACILITY)	ORDER OF DECEMBER 5, 2001

The Public Utilities Commission of the State of South Dakota has considered a filing by Otter Tail Corporation regarding its intent to apply for a permit for an energy conversion facility pursuant to SDCL 49-41B. In concert with that chapter, the Public Utilities Commission is required to designate the area affected by the proposed energy conversion facility.

The Commission met November 27, 2001, and discussed the designation of the affected area and the local review committee. The Commission determined that the affected area shall consist of all land area within a 10 mile radius of the proposed site for the facility including parts of Minnesota. The Commission also designated the local review committee, consisting of approximately 15 individuals including a number of Minnesotans, including the Mayors of the cities of Odessa and Ortonville, the chairpersons of the Board of County Commissioners for Big Stone and Lac Qui Parle Counties and the chairpersons of the Clinton-Graceville-Beardsley and Ortonville School Boards.

Otter Tail Corporation has made a Motion asking the Public Utilities Commission to reconsider its Order designating affected area and local review committee, EL01-027, and files this brief in support of said Motion.

I. THE PUBLIC UTILITIES COMMISSION LACKS JURISDICTION TO NAME NON-RESIDENTS OF SOUTH DAKOTA TO A COMMITTEE UNDER ITS AUSPICES.

The South Dakota Public Utilities Commission is a creature of the Legislature of the State of South Dakota. SDCL 49-1. The Public Utilities Commissioners who are elected shall constitute a commission to be known and designated as the Public Utilities Commission of the

State of South Dakota. SDCL 49-1-8. It is a Class II Misdemeanor for the Public Utilities Commission to delegate any of the powers conferred upon it, or, the performance of the duties imposed upon it by law, to any other person except in cases where express authority has been given by statute. SDCL 49-1-17.

In the instant case the Public Utilities Commission has named a local review committee pursuant to Chapters 49-41B-6 and 49-41B-7. However, the Commission has seen fit to extend the radius of the affected area into Minnesota, a territory in which it lacks jurisdiction. In fact, it could be seen that a majority of the local review committee is comprised of residents of the State of Minnesota. See Order Designating Affected Area and Local Review Committee. EL01-027.

Otter Tail argues that this is an impermissible delegation of authority. Except to the extent that they are subject to the prohibitions of the Constitution, or that their action conflicts with the powers delegated to the national government or with congressional legislation enacted in the exercise of those powers, the governments of the states are sovereign within their territorial limits and have exclusive jurisdiction over persons and property located within those limits. However, no state can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. 72 AmJur 2nd § 4, see also, State v. Prosser 98 NW2d 329, (SD 1959). Thus, the jurisdiction of a state does not ordinarily extend beyond its boundaries, although it may sometimes do so in the case of concurrent jurisdiction over a boundary river. Id.

In the instant case, the Commission seeks to add to a committee, persons over which it has no jurisdiction, by virtue of the fact that they are, as individuals, public officers in various jurisdictions in which the South Dakota Public Utilities Commission has no authority to act. The Commission, because it has no authority in the State of Minnesota, appears to have no legal authority to put residents of that state on this committee.

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The Commission has created, as delegated by the Legislature, public offices for committee members. SDCL 49-41B-6,7. There appears to be no guidance in the South Dakota Code or cases respecting whether non-residents can hold such public offices. However, the Supreme Court of the State of Wisconsin has held that "it is a fundamental principle of our government that a person not an elector of the state is ineligible to hold a public office therein, although our constitution and statutes do not expressly so ordain." State v. Dammann 277 N.W. 278 (Wis. 1938), citing State v. Trumpf 50 Wis. 103, 108, 5 N.W. 876, 878, 6 N.W. 512; State ex rel Opp v. Smith 14 Wis. 497; State ex rel Schuet v. Murray, 28 Wis. 96, 9 Am Rep 489. Dammann revolved around the Wisconsin Development Authority, which was incorporated under the general incorporation laws of Wisconsin for the purpose of promoting and encouraging municipal and cooperative acquisition and operation of all forms of public utilities, and engaging in the utility business as a holding or as an operating company.

In addition, the United States Supreme Court has held that "it is unconstitutional for a state to project its legislation into other states." Brown-Forman v. New York Liquor Authority 476 US 573, 90 L.Ed.2d 552, 106 S.Ct. 2080 (1986), quoting Baldwin v. G.A.F. Seelig, Inc., 294 US 511, 521; 55 S.Ct. 497, 499; 79 L.Ed. 1032, 1037 (1935), see also Casanova Beverage Company, Inc., v. Commission of Public Safety, 486 N.W.2d 448. (Minn. App. 1992). By virtue of naming portions of the State of Minnesota as the affected area, the Commission may be placed in the position of having to act on a committee request to take some mitigation or other action in Minnesota, which the Commission clearly lacks power to do.

II. IT IS A VIOLATION OF THE SOVEREIGNTY OF THE STATE OF SOUTH DAKOTA TO APPOINT NON-RESIDENTS TO CONTROL A LOCAL REVIEW COMMITTEE APPOINTED UNDER SDCL 49-41B.

In addition to the arguments above, it is noted that the makeup of the local review committee potentially contains a majority of persons who are residents of the State of Minnesota.

As argued above, the Otter Tail asserts that it is a violation of state sovereignty to include any non-residents on the local review committee. But it bears discussion that the committee makeup may contain a majority of non-residents.

While it would be hoped that the Committee could operate and make its recommendations and hold hearings by forming consensus, the potential exists for a power shift to persons who are not under the jurisdiction or authority of the South Dakota Public Utilities Commission, from whence these persons gained power. The Commission could be forced to consider recommendations weighted in favor of the Minnesota territory outside its jurisdiction and upon which it cannot lawfully act. Further, the Commission could be forced to review, revise or reject recommendations which did not meet the clear need of those persons who are subject its protection, namely residents of the State of South Dakota.

While the law requires that no persons other than South Dakotans be appointed to the local review committee, the practical considerations also point toward reconsideration and rejection of the current plan.

III. THE STATE OF MINNESOTA HAS NOT AND WOULD NOT GRANT SIMILAR CONSIDERATION TO SOUTH DAKOTANS SIMILAR PROJECTS.

The State of Minnesota appears to have a siting law different from that found in this state. The general law gives most responsibility to the officials who comprise the Minnesota Environmental Quality Board.

The Minnesota Environmental Quality Board may appoint one or more advisory task forces to assist it in carrying out its duties. Task forces appointed to evaluate sites or routes considered for designation shall be comprised of as many persons as may be designated by the Board, but at least one representative from each of the following: regional development commissions, counties and municipal corporations and one town board member from each

county in which a site or route is proposed to be located. No officer, agent, or employee of the utility shall serve on an advisory task force. Minn. Statutes 2001, 116C.59.

Thus, no similar consideration would be given to the residents of the State of South Dakota if, for example, Big Stone II were to be built in Ortonville. The Minnesota Siting law respects only the territory in the Minnesota county in which the facility is proposed.

The State of Minnesota does accept other public participation. The statute provides that the Board shall adopt broad spectrum citizen participation as a principle of operation. The form of public participation shall not be limited to public hearing and advisory task forces and shall be consistent with the Board's rules and guidelines as provided for in Section 116C.66. Minn. Statutes 2001, 116C.59(2).

The Commission should compare the Minnesota model to its Order. To construct non-residents as public officers where the state of their residence does not provide for reciprocal arrangements is improper and wrong.

IV. CONCLUSION.

For the reasons and upon the authority cited above, the Commission should reconsider its previous Order and enter a new order designating the affected area as a territory in South Dakota within a 10 mile radius of the proposed site and appointing a review committee from within that area.

Dated this 3rd day of January, 2002

MAY, ADAM, GERDES & THOMPSON LLP

BY: 

DAVID A. GERDES
BRETT M. KOENECKE
Attorneys for Otter Tail Corporation
503 S. Pierre Street
PO Box 160

Pierre, South Dakota 57501-0160
(605) 224-8803
(605) 224-6289 (FAX)

CERTIFICATE OF SERVICE

3 Brett M. Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the day of JANUARY, 2002, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

Karen Cremer
Staff Counsel
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501

Michelle Ferris
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501

Mark Rolfes
Otter Tail Power Company
PO Box 496
Fergus Falls, MN 56538-0496



Brett M. Koenecke