

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF
MONTANA-DAKOTA UTILITIES CO. AND
OTTER TAIL POWER COMPANY FOR A
PERMIT TO CONSTRUCT THE BIG STONE
TO SOUTH ELLENDALE 345KV
TRANSMISSION LINE

GERALD PESALL'S POST-HEARING
REBUTTAL BRIEF

EL13-028

The following rebuttal brief is submitted on behalf of Gerald Pesall pursuant to the Commission's Prehearing Conference Order, and is limited to the arguments and facts alleged by the Applicants through their Initial Post-Hearing Brief, Proposed Findings of Fact and Conclusions of Law, and Proposed Order Granting Permit to Construct Facilities. As in the initial brief, references to the evidentiary hearing transcript will be designated "TR" followed by the appropriate page and/or line number. References to exhibits will be designated by number and page. References to the Applicants' Initial Post-Hearing Brief, Proposed Findings of Fact and Conclusions of Law, and Proposed Order will be designated as "Applicant's Brief," "Proposed Findings," and "Proposed Order" respectively.

I. STATEMENT OF THE CASE AND FACTS

A complete statement regarding the status of the case, jurisdiction, and the facts and evidence presented are set forth in Gerald Pesall's Post-Hearing Initial Brief, pp. 1-8. Except as clarified or expanded-upon below, Gerald Pesall relies on the materials presented in his initial brief.

II. ARGUMENT

Gerald Pesall filed his initial post-hearing brief on July 18, 2014. Shortly thereafter, Applicants submitted their Initial Post-Hearing Brief, Proposed Findings of Fact and Conclusions of Law, and a Proposed Order Granting Permit to Construct Facilities. This brief will address these in turn.

1. Applicants Initial Post-Hearing Brief

Applicants Brief accurately quotes the elements of proof set forth in S.D.C.L. 49-41B-22.

Thereafter, the Applicant's brief incorporates their proposed Findings of Fact and Conclusions of Law, by reference, in lieu of making an actual argument within the brief. Issues with those proposed findings and conclusions are dealt with below.

Finally, Applicants Brief makes a short argument regarding testimony from Mr. Pesall and his motivations in this case. Applicant's claim regarding Mr. Pesall is, in effect, an ad hominem attack against Mr. Pesall himself. It is neither relevant to the case at hand, nor supported by the record.

Applicants claim that Mr. Pesall does not object to the issuance of the permit, only the route. Applicants Brief, p. 2. Although Mr. Pesall did state that he would not be affected as much if the project were routed elsewhere, he has clearly and repeatedly stated his objection to the issuance of the permit. Direct Testimony of Gerald Pesall, p. 8, (Stating that he “absolutely” opposed the issuance of a permit by the Commission,); TR, p. 280 (Reaffirming his pre-filed direct testimony); TR, p. 286, (Stating again that he did not think the permit should be granted.) During cross examination, Mr. Pesall acknowledged that he would not oppose the project, “as much,” if it did not cross his land, TR, p. 289, but he went on to state, “. . . this project will take more from agriculture and the state of South Dakota than it will return.” TR, p. 290.

This, together with the evidence and argument Mr. Pesall presented to-date makes it clear that he opposes the issuance of the permit, not just the proposed route. Applicant's argument as to Mr. Pesall's motivation or “true objection,” Applicant's Brief, p. 2, is simply an appeal “. . . to personal prejudices rather than to reason; attacking an opponent's character rather than the opponent's assertions,” Black's Law Dictionary (7th Ed. 1999), defining “ad hominem.”

It is also irrelevant. “Relevant Evidence' means any evidence having a tendency to make the

existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” S.D.C.L. 19-12-1. Of course Mr. Pesall's interest is stronger because the proposed facility would cross his land. But, his subjective motivation in participating in these proceedings is irrelevant because it has no impact on the facts. It does not change the actual harms the proposed line would cause to the environment or to inhabitants of the siting area.

Ultimately, there are unique agricultural, economic, and environmental issues present in the counties through which the proposed line would cross. It is not merely the proposed route, but also the nature of the towers, and the equipment used to erect and maintain them that creates these issues. Mr. Pesall is not urging the Commission to order changes to the route. The burden of selecting a workable route is on the Applicants, not the Commission. Mr. Pesall is asking the Commission to deny the permit because the Application is incomplete, and because the Applicants have not shown that the proposed line, as a whole, would meet the requirements of S.D.C.L. 49-41B-22.

2. Applicants Proposed Findings of Fact and Conclusions of Law

Some of the Applicants' Proposed Findings of Fact and Conclusions of Law relate to uncontested issues. However, there are a number of proposed findings of fact which are either incorrect or based upon inferences which are not supported by the record. Likewise, there are a number of proposed conclusions of law which are either unsupported by the law or not supported by the facts. Mr. Pesall opposes the Applicants' Proposed Findings of Fact and Conclusions of Law as a whole. For purposes of this brief though, only the most problematic are addressed below.

a. Proposed Findings of Fact

With respect to proposed findings 11-12, it may be accurate that the Applicants rejected Mr. Pesall's proposed reroute because a larger number of landowners objected to the change, however

minimizing the total number of land owners involved does not appear to be one of the route selection criteria identified by the Applicants. Further, the Applicants fail to point to anything in the record to support a finding that the project “will not impede Pesall's farming practices because of the open spaces and Pesall's ability to farm around the two structures on his property.” The record contains clear testimony to the contrary. Direct Testimony of Gerald Pesall, p. 2.

With respect to proposed finding 18, Applicants contend that Mr. Schuring “does not object to the issuance of the permit.” Mr. Schuring's actual statement was, “I don't think there's any reason for stopping it because I don't think that will happen.” TR, p. 318. The reasonable inference from this testimony is that Mr. Schuring does oppose the project, but does not believe it can be stopped.

With respect to proposed findings 27-32, Applicants contend that the project will be used by members of the public in South Dakota. This is not supported by the evidence. The Applicants admit that they cannot demonstrate which members of the public, if any, would benefit from the project in South Dakota, North Dakota, or Minnesota. Exhibit 4, pp. 4, 6, and 8. Applicants further contend that the project will benefit wind development in South Dakota. This is not supported by the evidence either. In fact, Applicants admitted that no wind generation facilities are expected to make use of the proposed line. TR, p. 42-43. Finally, Applicants proposed findings suggest that MISO approved this particular project. This is not supported by the evidence either. MISO only identified the connection between Ellendale and Big Stone City as one of 17 points where a 345 kV connection would be of value. MISO did not design the proposed line or select the proposed route. TR, p. 43.

With respect to proposed findings 34-36, Applicants estimates regarding tax benefits from the project are flawed because they fail to account for decreased property values on adjoining lands which would occur if the line were constructed. The evidence shows that adjoining property values, and thus

the taxes based upon them, would decrease if the line were built. Exhibit 101, p. 2; TR, pp. 325-326.

With respect to proposed finding 71, Applicants contend that they have furnished all required information. This is simply false. Applicants have not furnished all information required by either the applicable statutes or the applicable Commission Regulations. The Application specifically fails to provide estimated consumer demand information as required by S.D.C.L. 49-41B-11(9). It fails to address reduction of eminent domain use as required by A.R.S.D. 20:10:22:12(3). And, it fails to address plans for decommissioning the facility as required by A.R.S.D. 20:10:22:33. All of these failings are addressed in detail in Gerald Pesall's Initial Post-Hearing Brief, pp. 9-10.

With respect to proposed findings 72-77 these appear to be legal conclusions rather than factual findings. Whether factual or legal they are conclusory in nature and not supported by specific citations to the law or to any specific testimony in the record.

With respect to proposed finding 81, as noted at length above, Applicants contend that Mr. Pesall objects only to the placement of the lines on his property. This is not supported by the record. Direct Testimony of Gerald Pesall, p. 8; TR, pp. 280, 286, 290.

With respect to proposed finding 82-88, and 91, Applicants contend that construction activities “will not increase the spread of SCN compared to existing farming practices and other methods of spreading SCN.” This is false. Dr. Tylka specifically testified that construction activities required to erect the proposed line were more likely to spread SCN than ordinary farming activities. Direct Testimony of Gregory Tylka pp. 3-4.

In addition, the Applicants contend that the fields which already have SCN are not at risk for spreading SCN through construction activities. This is false as well. The presence of SCN can be localized within a field. TR, p. 268. “SCN usually takes years to spread throughout a field” Direct

Testimony of Gregory Tylka, p. 3. And, construction equipment like that required to erect the proposed line can cause SCN to spread more rapidly. Id.

Finally, Applicants contend that their proposed mitigation plan will reasonably minimize the spread of SCN during the construction project. This is not supported by the record and was addressed at length in Gerald Pesall's Initial Post-Hearing Brief, pp. 13-14. In sum, the mitigation plan, exhibit 23, does not contain enough detail for the Commission or the parties to assess whether or not it would be effective. TR, p. 238.

With respect to proposed finding 94, Applicants contend that “whether the Project will decrease property values ... is speculative.” This contention is not supported by the record. The only credible testimony presented at the hearing on this subject came from Mr. Pesall and Mr. Schuring. Both indicated that the presence of the line would cause a decrease in their property values. Exhibit 101, p. 2; TR, pp. 325-326. It is well established that a property owner is competent to testify about the value of his property. *Sacramento Suburban Fruit Lands Co. v. Soderman*, 36 F.2d 934 (9th Cir. 1929); *Christopher Phelps & Associates, LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007); *Pfliger v. Peavey Co.*, 310 N.W.2d 742, 747-748 (N.D. 1981). Applicants cite no evidence to contradict that testimony. It being established that devaluation would take place, S.D.C.L. 49-41B-22(2) places the burden of proving that this devaluation would *not* pose a threat of serious injury to the economic condition of the inhabitants of the siting area on the Applicants, not the intervenors.

With respect to proposed finding 95, Applicants contend that the proposed line would not create health risks because it is designed to comply with industry safety standards. Applicants argument here is a non sequitur, and is unsupported by the record. It does not follow that, merely because a project complies with industry standards, it does not create *any* health risks. Rather, Applicants admitted that

the presence of the line could create health risks, particularly if one were to refuel equipment within 100 feet of the line, TR, p. 56, or in the event of a collision between farm equipment and transmission lines or towers TR, p. 51. While the severity of these risks is a contested issue, the record does not support a finding that the line “would not create health risks.”

With respect to proposed finding 97, Applicants rely on previously proposed findings 27 and 32. These are unsupported by the record, and are already addressed in detail above.

With respect to proposed findings 104-107, Applicants contend that Mr. Schuring does not object to the Project, only the location. As noted above, this contention is not supported by the evidence and relies on a misconstruction of his testimony. TR, p.318. Further, Applicants contend that Schuring's testimony regarding the valuation of his land is speculative. As noted above, a property owner like Schuring is generally competent to testify about the value of his own property, and there is no evidence in the record to the contrary.

With respect to proposed findings 108-110, these appear to be legal conclusions rather than factual findings. Whether factual or legal they are conclusory in nature and not supported by specific citations to the law or to any specific testimony in the record.

With respect to proposed finding 111, this proposed finding presents the same unsupported, non sequitur argument addressed above regarding proposed finding 95. Compliance with standards does mean that safety concerns do not exist.

With respect to proposed finding 112, Applicants contend that the project will “not prevent the orderly development of the region.” This proposed finding is of little value as it incorporates the wrong legal standard. S.D.C.L. 49-41B-22(4) prohibits facilities which would “unduly interfere” with orderly development, not just those that would “prevent” orderly development. Applicants further contentions

regarding the concerns of local government and the proposed line's impact on farming practices are unsupported by the record, as discussed at length above.

b. Proposed Conclusions of Law

With respect to proposed conclusion of law 14, Applicants restate the ruling made by the Commission after Mr. Pesall's objection to the admission of Exhibit 4 and Appendices B1 o B4 of the Application, (the MISO studies.) For purposes of this brief, Mr. Pesall stands by his objection.

With respect to proposed conclusions of law 15-19, as discussed at length above, and in Gerald Pesall's Initial Post-Hearing Brief, these conclusions are not supported by the facts or the applicable law.

III. CONCLUSION

The Commission should deny the permit because the Application is legally insufficient, and because the Applicants have not met their statutory burden of proof. The proposed line would not comply with all applicable laws. It would pose a threat of serious environmental and economic harm to the inhabitants of the siting area. This would result in substantial impairment to the health, safety and welfare of those inhabitants, and it would unduly interfere with the orderly development of the region.

Dated this 1st Day of August, 2014



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of **GERALD PESALL'S POST-HEARING REBUTTAL BRIEF** was served upon the following parties of record, electronically, this 1st Day of August, 2014:

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