

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
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

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APPEAL FROM THE PUBLIC UTILITIES COMMISSION
IN DOCKET NUMBER EL13-028
PIERRE, SOUTH DAKOTA.

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CIV14-53 (18civ14000053)

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BRIEF OF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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N. Bob Pesall, Attorney for the Appellant
PO Box 23
Flandreau, SD 57422
bob@pesall.com

Randall Schuring (Pro Se)
Vice President, Schuring Farms, Inc.
507 S. Second St.
Andover, SD 57422
schuringrl@hotmail.com

Thomas Welk, Attorney for Appellees
Mr. Jason R. Sutton, Attorney for Appellees
Montana Dakota Utilities and Otter Tail
Power
P.O. Box 5015
Sioux Falls, SD 571175015
tjwelk@bgpw.com
jrsutton@bgpw.com

Bradley R. Morehouse (Pro Se)
14026 416th Ave.
Andover, SD 57422
mhouse@nvc.net

John J. Smith, Attorney for Appellee
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
John.Smith3@state.sd.us

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PRELIMINARY STATEMENT

The South Dakota Public Utilities Commission (“Commission” or “PUC”), an agency of the State of South Dakota established pursuant to SDCL 49-1-8, files this brief pursuant to SDCL 1-26-33.2 through 1-26-33.4 in opposition to the Notice of Appeal and Appellant’s Brief filed by Appellant Gerald Pesall (“Appellant” or “Mr. Pesall”) on September 15, 2014, and November 4, 2014, respectively, and in support of the Final Decision and Order; Notice of Entry in Commission Docket EL13-028 (“Decision”) in which the Commission issued a permit to Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., a Delaware corporation (MDU), and Otter Tail Power Company, a Minnesota corporation (Otter Tail), (jointly, “Applicants”), for construction of the Big Stone South to Ellendale transmission line project (“Project”).

STATEMENT OF FACTS

On August 23, 2013, Applicants filed an energy facility permit application with the Commission (“Application”). The Application requested that the PUC issue a permit for the construction of the Project, a 345-kilovolt (kV) transmission line from Ellendale, North Dakota to Big Stone City, South Dakota, with approximately 150 to 160 miles of the line located in South Dakota. The line will cross the South Dakota and North Dakota border in Brown County, South Dakota and extend south and east through Brown, Day, and Grant counties to the Big Stone South Substation in Grant County, South Dakota, near Big Stone City. The Project will cross the farm of Mr. Pesall located in Day County, South Dakota. The Commission held three public input hearings on the Application in the Project area on October 17, 2013, and May 20, 2014, in accordance with SDCL 49-41B-15 and an evidentiary hearing on June 10 and 11, 2014. After briefing from the parties and oral argument, the Commission voted unanimously to approve the Amended Settlement Stipulation between Applicants and the Commission’s staff as the basis

for its decision subject to the addition of additional provisions regarding the soybean cyst nematode mitigation measures and grant an energy facility permit to Applicants for construction of the Project. On August 22, 2014, the Commission issued the Decision. A detailed recitation of the procedural and evidentiary facts in this case is set forth in the Procedural History and Findings of Fact in the Decision.

ARGUMENT AND AUTHORITIES

A. STANDARDS OF REVIEW

The standard of review of an agency's decision is governed by SDCL 1-26-36 which provides:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

The Supreme Court set forth the judicial standards for review of decisions of the Commission under SDCL 1-26-36 in *In the Matter of Otter Tail Power Company on Behalf of Big Stone II co-Owners for an Energy Conversion Facility Permit for the Construction of the Big Stone II Project*, 2008 SD 5, ¶ 26, 744 N.W.2d 594 (2008) ("*Big Stone II*");

Our review of the PUC's decision granting the Applicant's request for a permit to construct Big Stone II is controlled by SDCL 1-26-36. See *Tebben v. Gil Haugen Const., Inc.*, 2007 SD 18, ¶ 15, 729 N.W.2d 166, 171 (quoting *Wells v. Howe Heating & Plumbing, Inc.*, 2004 SD 37, ¶ 9, 677 N.W.2d 586, 590 (quoting SDCL 1-26-36)). The PUC's findings of fact are reviewed under the clearly erroneous standard, while its conclusions of law are reviewed de novo. See *id.* "A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *Id.* (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29).

The Supreme Court has further stated, "SDCL ch. 49-34A evidences a legislative intent for PUC to have broad inherent authority in matters involving utilities in this state." *In the Matter of Northern States Power Co.*, 489 N.W.2d 365, 370. (S.D. 1992).

The Applicants' burden of proof is set forth in SDCL 49-41B-22:

The applicant has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

In addition to the standards for review set forth above, the Supreme Court has stated the following with respect to the Commission's decision-making regarding matters before it under SDCL Chapter 49-41B, particularly 49-41B-22:

While global warming and CO2 emissions are considered harmful by the scientific community, what will pose a threat of *serious* injury to the environment under SDCL 49-41B-22 is a judgment call initially vested with the PUC by the Legislature. Nothing in SDCL Chapter 49-41B so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment. Rather, it is a question of the acceptability of a possible threat. *Big Stone II*, ¶ 35.

B. DISCUSSION OF ISSUES ASSERTED BY APPELLANT

Issue 1.a) Whether the Decision's Findings of Fact 14 through 21 and 23 dealing with need for and benefits of the Project were clearly erroneous and not supported by the evidence presented.

With respect to Appellant's assertions in Issues 1.a), 1.b), 1.c), and 1.d) that certain of the Decision's Findings of Fact are clearly erroneous, the Commission basically stands by its Findings of Fact and offers such Findings of Fact and the record citations in them as its primary argument in support of such findings and in opposition to Appellant's arguments that such findings fall within the clearly erroneous standard.

Appellant's first point of contention is that the Decision should be reversed because the Commission found that Applicants had presented credible evidence of need for and benefits of the Project. The Commission would first point out that the criteria set forth in SDCL 49-41B-22 for approval of a project do not include a burden of proof of need for the project as stated in Finding of Fact 56. That said, Applicants presented evidence of the reason for the Project as an integral component of a Midwest regional grid improvement plan known as the Midwest Independent Transmission System Operator MISO Transmission Expansion Plan ("MTEP") multi-value project portfolio ("MVPs") consisting of seventeen transmission projects designed to reduce or eliminate power flow constraints to enable the delivery of energy from least cost generation resources to load, increase reliability, and enable the delivery of wind energy from the very highly productive wind areas in the Dakotas to load centers in the more populous eastern portion of the Midwest. Other benefits of the Project include strengthening the power delivery system in the area, reducing the risk of outages, and increasing system reliability.

Extensive studies were performed by MISO to evaluate the benefits of candidate transmission projects, which study process was approved by the Federal Energy Regulatory Commission

("FERC") in its *Order Conditionally Accepting Tariff Revisions*, 133 FERC ¶ 61,221, (2010) and *Order Denying in Part and Granting in Part Rehearing, Conditionally Accepting Compliance Filing, and Directing Further Compliance Filings*, 137 FERC ¶ 61,074 (2011) ("MVP Orders"). See Appendix for the order on rehearing and MISO's initial compliance filing under the MVP Orders which includes Exhibit 1, B.1. The MVP Orders were upheld by the 7th Circuit Court of Appeals in *Illinois Commerce Commission, et al. v. Federal Energy Regulatory Commission*, 721 F.3d 764 (7th Cir. 2013), *cert. den.* February 24, 2014. In its first compliance filing at FERC under the MVP Orders on March 27, 2012, MISO included as Tab A the Multi Value Project Portfolio Results and Analyses January 10, 2012, which was filed with the Application to the Commission as Appendix B, B.1, and introduced and received into evidence at the evidentiary hearing before the Commission as part of Exhibit 1 over Mr. Pesall's objection. TR 107-109. Based on the record citations referenced by the Commission in the Decision and Exhibit 14, the pre-filed testimony of Jason Weirers, an Otter Tail employee involved in the MISO evaluation of the MVP projects from the beginning of the process, the evidence in the record substantiates the Commission's findings regarding need for and benefits to be gained by the Project. The evidence also does not support Mr. Pesall's assertion about no evidence of benefit to South Dakota electric utilities and customers. Mr. Weirers, an Otter Tail expert in the field testified to the contrary. TR 133-139.

Issue 1.b) Whether the Decision's Findings of Fact 28 through 30 dealing with the impacts of the project and the adequacy of the Applicants' proposed mitigation efforts were clearly erroneous and not supported by the evidence presented.

This is purely a factual issue, and Findings of Fact 28 through 30 speak for themselves. As set forth above, the Supreme Court has recognized that no project subject to SDCL Chapter 49-41B can be expected to be constructed without any potential impact. "Rather, it is a question of the acceptability of a possible threat." *Big Stone II*, ¶ 35. As set forth in the Findings of Fact, in the

Commission's judgment, Applicants' proposed mitigation plans, in combination with the conditions set forth in the Amended Settlement Stipulation between Applicants and the Commission's staff ("Staff") and which was approved by the Commission and incorporated by reference in the Decision, meet that standard. As to Appellant's point about the soybean cyst nematode ("SCN"), this was an issue brought to Applicant's attention by Mr. Pesall following his intervention in Docket EL13-028, and Applicants, in response, presented an SCN mitigation plan. Ex 23. The Commission added additional, more specific detail to the mitigation plan as set forth in Finding of Fact 47 and the ordering clause of the Decision. This mitigation issue is dealt with separately in the Decision in Findings of Fact 38 through 50.

Issue 1.c) Whether the Decision's Findings of Fact 33 through 57 dealing with Gerald Pesall's objections to the project, including the impact on property values, the impact on farming activities, and the spread of soybean cyst nematode (SCN) were clearly erroneous and not supported by the evidence presented.

As with the previous issue, this is a factual issue and boils down to the question of whether the Commission's judgment concerning the adequacy of Applicants' mitigation and construction management plans, in combination with the conditions set forth in the Amended Settlement Stipulation and incorporated by reference in and supplemented by the Decision, was supported by the evidence and not clearly erroneous. As far as the potential SCN risk, the Commission required a detailed SCN survey followed by the development of a detailed mitigation plan tailored to address what is revealed by the survey results for submittal to the Commission. Finding of Fact 47. Despite the fact that Mr. Pesall had SCN soil sampling performed on his property, Mr. Pesall provided no evidence as to whether his property is currently infected with SCN and has not provided any such information to the Commission following hearing. TR 282; 303; 363-364.

As to the effect on property values, the only evidence presented by Appellant to support this claim were the personal opinions regarding the effect on his property valuation expressed by Mr. Pesall. The only other evidence in the record regarding effects on agricultural property values were simply the statements of concern by Mr. Schuring and Mr. Morehouse. There was no testimony or documentary evidence presented by anyone in the agricultural land appraisal or real estate sales business or any statistical evidence concerning previously constructed transmission lines.

As far as effects on farming practices, the Commission found that Applicants' measures to minimize such effects went as far as could be practicably achieved with a transmission facility and would result in an acceptable level of impact on farming practices and were reasonable. These included use of monopole structures, using long wire spans, appropriately ground any structures susceptible to induced current or static voltage, and mitigate any interference with unlicensed agricultural navigation equipment. Ex 1; Ex 301A. For the Commission to find that any impact whatsoever of a transmission line on farming practices renders a transmission line not permissible would essentially mean that SDCL Chapter 49-41B prohibits the construction of a transmission line in South Dakota.

With respect to road damage, Conditions 7, 8, 10, 27, and 30 of the Amended Settlement Stipulation require Applicants to obtain permits from applicable governmental units having jurisdiction, mitigate dust and other road issues, restore all roads to preconstruction condition, use appropriate signage, furnish a \$300,000 bond to comply with SDCL 49-41B-38 and ensure complete road restoration, and provide a post-construction report to the Commission on road restoration completion status and issues. Ex 301A.

Findings of Fact 28 through 30 are not internally inconsistent and must be read in the context of the Decision as a whole, including the conditions imposed by adoption of the Amended Settlement Stipulation as modified by the Decision.

Issue 1.d) Whether the Decision's Findings of Fact 71 through 81 dealing with satisfaction of the statutory requirements for the issuance of a transmission facility permit subject to the conditions set forth in the Decision were clearly erroneous and not supported by the evidence presented.

As to Appellant's assertion that the Commission's acknowledgement of the conditions in its prior transmission permitting orders in Finding of Fact 71 constitutes reversible error, the Commission would argue that it can take judicial notice of its own prior decisions. *Nelson v. WEB Water Development Ass'n, Inc.*, 507 N.W.2d 691 (1993); *Jenner v. Dooley*, 1999 SD 20, 590 N.W.2d 463 (1999); *Matter of S.S.*, 334 N.W.2d 59 (1983). The Commission would further argue that the Commission can take judicial notice of its own operations, including of complaints received regarding the construction of transmission projects pursuant to orders issued by the Commission. In any event, such a finding does not rise to the level of reversible error in the context of the Decision as a whole.

Issue 2. Whether the Commission improperly admitted the MISO Studies into evidence as set forth in Conclusion of Law 14.

The Commission admitted the MISO MTEP documents set forth in Applicants' Exhibit 1, Appendix B into evidence at hearing over Appellant's objection. As set forth above, these documents found in Exhibit 1, Appendix B.1 were studies prepared by MISO as part of its transmission planning process for submittal and approval by FERC. As noted above, FERC's Order on Rehearing and MISO's compliance filing containing Exhibit 1, Appendix B.1 are set forth in the Appendix to this brief. These are public records of the Federal Energy Regulatory Commission and meet the standards for judicial notice under SDCL 1-26-19(3) and 19-10-2. Furthermore, a witness at the

hearing, Jason Weirers, was an Otter Tail employee and transmission expert who represented Otter Tail throughout the MISO MTEP process that resulted in the analysis documents set forth in Exhibit 1, Appendix B. Otter Tail is a member of MISO and the MISO Transmission Owners, which was an applicant party along with MISO to the FERC proceedings resulting in the MVP Orders. TR 108. Mr. Weirers was available for cross examination at the hearing concerning the documents in Exhibit 1, Appendix B and the process and analytical methods and assumptions that resulted in the documents in Exhibit 1, Appendix B. Lastly, the Commission itself participated in the MISO MTEP planning process that led to MVP Orders and the documents set forth in Exhibit 1, Appendix B through its membership in the Organization of MISO States (“OMS”) and OMS’s participation in the MTEP planning process.

Issue 3. Whether the Commission improperly applied the Applicants' burden of proof under SDCL 49-41B-22 as set forth in Conclusions of Law 15 and 16.

Based on the Findings of Fact made by the Commission in the Decision, the Commission did not error in concluding in Conclusions of Law 15 and 16 that Applicants had met their burden of proof under SDCL 49-41B-22.

Issue 4. Whether the Commission improperly placed a burden of proof upon Mr. Pesall as set out in Conclusion of Law 18.

In its assertion that the Commission wrongfully shifted the burden of proof under SDCL 49-41B-22, Appellant ignores the Findings of Fact and Conclusions of Law finding and concluding that Applicants had presented evidence that met their burden of proof under SDCL 49-41B-22. At such time as a *prima facie* showing had been made by Applicants as found to be the case by the Commission, Appellant then had the burden to refute that showing with sufficient evidence to overcome Applicants’ evidence that was sufficient to support the grant of permit for construction of the Project.

Issue 5. Whether the Commission improperly delegated its authority as prohibited by SDCL 49-1-17 when it ordered the Applicants to submit soybean cyst nematode (SCN) mitigation plans after the permit was issued.

SDCL 49-1-17 was repealed by the Legislature in 2009. 2009 Session Laws, Chapter 235, §1.

That said, there is no doubt that the Commission has an obligation to perform the duties entrusted to it by law. The Commission believes it has done so in this case. The provisions in the Decision requiring Applicants to perform detailed testing of soils for SCN and then prepare a detailed mitigation plan and submit it to the Commission are not a delegation of the Commission's authority but rather the imposition on Applicants of conditions deemed necessary by the Commission for issuance of the permit as provided in SDCL 49-41B-24. Although not overruled by subsequent Supreme Court decisions as of this time, at least explicitly, it is the belief of the Commission that the Supreme Court would not reach a similar ruling as it did in the Mandan Line Case at this time, with thirty years of administrative law experience now under the Court's belt. Every permit issued by the Commission in recent years contains conditions requiring the permittees to perform actions after permit issuance and affords landowners certain rights, such as the right to elect how they want soil handled, rocks disposed, restoration grass variety selection, etc. See e.g. Amended Final Decision and Order; Notice of Entry in Docket HP09-001, *In the Matter of the Application by TransCanada Keystone Pipeline, LP for a Permit under the South Dakota Energy Conversion and Transmission Facility Act to Construct the Keystone XL Project*, June 29, 2010 (available on the Commission web site at <http://www.puc.sd.gov/commission/orders/hydrocarbonpipeline/2010/hp09-001c.pdf>).

Issue 6. Whether the Public Utilities Commission improperly exceeded the twelve month limitation established by SDCL 49-41B-24 when it ordered the Applicants to comply with an SCN mitigation plan which would not be drafted until after the permit was issued.

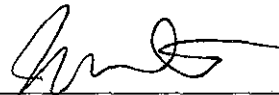
Applicants filed their application for an energy facility permit under SDCL Chapter 49-41B on August 23, 2013. The Commission issued the Decision on August 22, 2014. The Commission complied with the one year deadline requirement of SDCL 49-41B-24. The fact that conditions of permit adopted by the Decision require actions to be taken by Applicants following the issuance of the permit does not render the one year issuance deadline violated. If so, it's difficult to perceive how the Commission could ever meet that deadline. The Commission monitors compliance with permit conditions and sometimes takes subsequent actions regarding permits following commencement of construction in almost all siting dockets. It is simply a practical necessity given the need for enough flexibility to for applicants to adjust to conditions as they are encountered during the final planning and construction phase of the project.

CONCLUSION

For the reasons stated above, the Commission respectfully requests that the Court affirm its Final Decision and Order; Notice of Entry in Commission Docket EL13-028.

Dated this 4th day of December, 2014.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION



John J. Smith, Special Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Ph. (605) 773-3201
Fax (605) 773-3809
john.j.smith@state.sd.us