

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
2 COUNTY OF DAY) FIFTH JUDICIAL CIRCUIT
* * * * * * * * * * * * * * * *
3)
GERALD PESALL,) CIV. 14-53
4)
Appellant,)
5) ORAL ARGUMENT HEARING
VS.) ADMINISTRATIVE APPEAL
6)
MONTANA DAKOTA UTILITIES, OTTER)
7 TAIL POWER, SCHURING FARMS, INC.,)
BRADLEY MOREHOUSE, AND THE)
8 SOUTH DAKOTA PUBLIC UTILITIES)
COMMISSION,)
9)
APPELLEES.)
10)
* * * * * * * * * * * * * * * *
11
DATE & TIME: December 23, 2014
12 2:00 p.m.
13
BEFORE: THE HONORABLE SCOTT P. MYREN
14 CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota 57401
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LOCATION: Brown County Circuit Courtroom
16 Brown County Courthouse
Aberdeen, South Dakota 57401
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APPEARANCES:

FOR APPELLANT:

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FOR APPELLEES MONTANA DAKOTA UTILITIES AND
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FOR APPELLEES SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION:

JOHN J. SMITH, ESQ.
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1 THE COURT: We're on the record.

2 This is the time and place set for a hearing in an
3 appeal. It's an administrative appeal from the Public
4 Utilities Commission. The Day County file, civil file
5 14-53. It's *Gerald Pesall, appellant, v. Montana Dakota*
6 *Utilities, Otter Tail Power, Schuring Farms, Inc., Bradley*
7 *Morehouse, and the South Dakota Public Utilities Commission.*

8 We have the hearing today scheduled for oral argument on
9 the administrative appeal, and the hearing was supposed to
10 take place in Webster at the courthouse today. We've had a
11 pretty significant snowstorm that blew in through
12 northeastern South Dakota, and all of the parties have
13 agreed that we were going to conduct this oral argument over
14 the telephone today.

15 And so I provided -- actually, mister, I think it was
16 Mr. Sutton on behalf of MDU and Otter Tail had arranged the
17 telephone conference, and I thank him for doing that.

18 And I did provide the conference -- the call number to
19 the clerk of courts in Webster with instructions that if
20 anyone appeared at the Webster courthouse, because there may
21 have been some other spectators or other interested parties,
22 and I instructed her that she would call into this number
23 and make this call available to them. No one has called in
24 from the courthouse, so I'm assuming from that that no one
25 has appeared at the courthouse.

1 I will go around the phone and identify the folks that I
2 know are representing various parties on the record. And
3 then if they want to identify other people, they're welcome
4 to do so.

5 Representing MDU and the Otter Tail Power Company is
6 Tom Welk, and he's accompanied by Jason Sutton.

7 Mr. Welk, can you hear me?

8 MR. WELK: Yes, I can, Your Honor.

9 THE COURT: Anything additional that you'd like to do as
10 far as introduction?

11 MR. WELK: No, Your Honor. As said, we do have other
12 company representatives, but they will not be identified as
13 the Court indicated off the record that they would be
14 considered spectators. So with the Court's guidance on
15 that, we have nobody else to be identified at this time,
16 Your Honor.

17 THE COURT: And then representing Gerald Pesall is
18 Attorney Bob Pesall.

19 Mr. Pesall, can you hear me?

20 MR. PESALL: I can, Your Honor.

21 THE COURT: Were there any other identifications you
22 wanted to make on the record today?

23 MR. PESALL: No. Thank you.

24 THE COURT: And then representing the Public Utilities
25 Commission, on the telephone is John Smith.

1 Mr. Smith, can you hear me?

2 MR. SMITH: I can, Your Honor.

3 THE COURT: And did you want to make other
4 identifications on the record?

5 MR. SMITH: Well, I'm John Smith, commission counsel for
6 the South Dakota Public Utilities Commission representing
7 the South Dakota Public Utilities Commission this docket.
8 With me in the room today, and we're on speaker phone, is
9 Commissioner Chris Nelson. And that's it.

10 THE COURT: Thank you. And I'll just make sure on the
11 telephone line, was there any other party or any other
12 person that wished to appear before the Court on this
13 matter? If so, just speak up.

14 There are no other appearances being noted on the
15 record.

16 And there is a voluminous record here. I've had the
17 opportunity to review the entire record. And paying
18 particular attention, of course, to the evidentiary hearing
19 and the exhibits that were presented there. And I've also
20 received various briefings from all the parties, which I've
21 had a chance to review.

22 So with the understanding that I've been through all of
23 that material, I will let each of the counsel make their
24 argument. And then as I, I think I explained earlier, I
25 will go back around one additional time for each of the

1 parties to give me a brief rebuttal, if necessary.

2 And with that, I will start with Mr. Pesall.

3 MR. PESALL: Thank you, Your Honor.

4 As the Court noted, my name is Bob Pesall. I'm a lawyer
5 down in Flandreau, South Dakota. I've been practicing down
6 here for about eight years, and before that I was in
7 North Dakota.

8 My client is Gerald Pesall, who, just to clarify, is, in
9 fact, my uncle on my father's side. And he is raising a
10 series of six issues on this appeal which relate to the
11 application made by Montana Dakota Utilities and Otter Tail
12 Power for a permit to construct this
13 Big Stone-to-south-of-Ellendale line.

14 The issues themselves as they've developed through the
15 briefing process really kind of fall into three categories,
16 and I think it's actually best to go through them in reverse
17 order.

18 Issues 5 and 6 deal with the soybean cyst nematode
19 mitigation clause which was included in the decision and
20 order after a motion by Commissioner Nelson.

21 Issues 3 and 4 together relate to burden of proof issues
22 and the concerns that Mr. Pesall has about whether that was
23 applied correctly.

24 Issues 1 and 2 deal with certain findings of fact and
25 the admission of some evidence to which Mr. Pesall takes

1 issue.

2 Looking first at the soybean cyst nematode mitigation
3 clause. This is included in the order on, I think it's
4 page 15. It's also referenced under I think finding of fact
5 number 47. And what that clause does is it requires the
6 applicants to consult with an expert in taking soil samples
7 and then requires them to developing a mitigation plan that
8 they would then follow to reduce the spread of the soybean
9 cyst nematode, this little microscopic or almost microscopic
10 worm that has caused so much consternation in this case.

11 The way that the commission has written that, however,
12 gives us a great deal of concern. We don't think it's a
13 lawful way to approach the problem either because the
14 provision effectively delegates from the commission to the
15 third-party applicants as a private party the authority to
16 draft their own permit conditions. Or in the alternative,
17 it's reserving to the commission the right to impose permit
18 conditions after the one-year deadline has lapsed.

19 Now, in the briefing I made a mistake. I had missed the
20 repeal of one of the statutes that relates to delegation. I
21 have since located the pocket parts that were missing. But
22 our position remains that the delegation of commission
23 authority is still unlawful even though the statute which
24 made it a criminal act has been repealed.

25 And there are a number of bases we have for that. They

1 exist in the legislative history; they exist in the nature
2 of the statutes surrounding the requirements to the PUC to
3 conduct its proceedings open and before the public; and also
4 in, well, really the only case that's available on point,
5 which is the application of the *Nebraska Power District*
6 case, or commonly referred to as the *Mandan* case.

7 Our position is that even though that statute was
8 repealed, in the words of Rolayne Wiest in testifying on the
9 appeal, it doesn't mean that the commission would then be
10 able to delegate its powers in violation of its statutory
11 authority. And these are her exact words: "What would
12 happen is that if someone had a claim that the commission
13 had delegated its power, the Court could still find there
14 was an impermissible delegation." So even though they don't
15 necessarily risk a Class II misdemeanor or jail time for
16 delegating their authority, the commission still doesn't
17 have the ability to do that unless there is an expressed
18 statutory authorization.

19 I guess in the interest of full disclosure in the
20 amusingness of living in South Dakota, Rolayne Wiest is
21 apparently also my first cousin once removed on my mother's
22 side.

23 Beyond that you've got the case law. The only really
24 applicable case is this *Mandan* case. It's cited by both
25 sides in the briefs. What you had there was a situation

1 where the commission had authorized landowners to determine,
2 based on a specific set of options, what would be done with
3 topsoil where it is removed during the construction of power
4 line towers. The Supreme Court of South Dakota ruled that
5 that was impermissible. And it based that ruling not so
6 much on the repeal statute which criminalized the
7 delegation, but rather on SDCL 49-41B-24 noting that that's
8 the statute that says only the PUC can impose terms and
9 conditions.

10 And, anyway, I go into this in the rebuttal brief fairly
11 extensively, so I'll be brief. We think there is some solid
12 public policy reasons for keeping that law in place and
13 honestly believe that, given the opportunity, the
14 South Dakota Supreme Court would reach the same position in
15 this case, which is that the delegation is improper because
16 there isn't any statutory authority to transfer the ability
17 to write permit conditions to a private party, and because
18 that would intrude upon the public's right to participate in
19 the proceedings whether it was interveners or in the nature
20 of public testimony.

21 It would also create an inherent conflict of interest
22 between the applicants in this case and the farmers in this
23 case because they have diametrically opposed interests as
24 far as how much money ought to be spent in mitigating the
25 soybean cyst nematode issue.

1 Ultimately, the question from a farmer's perspective
2 like Gerald Pesall comes down to, what are you going to do
3 with 30 cubic yards of potentially contaminated soil?

4 Now, the other side of the mitigation clause is that if
5 it isn't a delegation, then what the commission has
6 effectively done is to reserve for itself the ability to
7 write permit conditions after the fact. It's not a
8 delegation. They've still got the authority to review it
9 under some of the conditions in there, and we think that
10 that directly violates the statutory requirement that the
11 decision be complete within the one-year time limit.

12 Turning to issues 3 and 4, these are burden of proof
13 issues. The essential contention that we're making on the
14 burden of proof issues is that it was not correctly applied
15 by the Public Utilities Commission. And this is evidenced
16 in part by some of the arguments that were placed in the
17 commission's own brief.

18 The statute requires that the applicants bear the burden
19 of proving by a preponderance of the evidence all of the
20 different elements of 49-41B-22. And what the commission
21 appears to have done in this case is to say rather than
22 proving by a preponderance of all the evidence, the standard
23 that we're going to hold the applicants to is merely to make
24 a prima facie case, and then turn to the interveners and
25 say, all right, interveners, now you prove by a

1 preponderance of the evidence that we shouldn't grant the
2 permit. And that's, that's essentially a misapplication of
3 the way the statute is constructed.

4 Finally, we've got issues 1 and 2. Issue 1 is primarily
5 factual issues. And what that can be boiled down to is
6 there are a number of findings of fact, and they're all
7 articulated in the statement of issues and in the briefs,
8 that state no evidence was offered when, in fact, evidence
9 was offered. Or in the alternative, they find that there is
10 no evidence presented on an issue; and so, therefore, the
11 issue is essentially a, well, nonissue, for lack of being
12 able to come up with a better term here on the spot.

13 Finally, you've got issue 2. Issue 2 deals with the
14 MISO studies. The MISO studies were objected to at the, at
15 the hearing. And initially the applicants raised an
16 objection as to whether the issue was properly preserved for
17 appeal. So I should deal with that first.

18 Neither the words foundation nor hearsay were actually
19 articulated at the hearing, but our position is that it's
20 clear from the context that those are the two issues that
21 were raised as far as Gerald Pesall's objection to the
22 admissibility of those studies. In the context, we were
23 challenging the history of the document, whether it was
24 certified, where it was obtained from; but also, I think the
25 actual language was, just because something is downloaded

1 off the internet doesn't mean it's reliable. That clearly
2 sounds in hearsay more so than foundation. These weren't
3 statements offered by the engineer who was giving the
4 testimony; they were statements offered by a third party.
5 So we think that the objection itself is adequately
6 preserved.

7 Now, beyond that, our position is that there is a fairly
8 clear and well-established law for the admission of
9 documents in the way the PUC attempted to do in this case.
10 Following the objection and in the order, the commission
11 determined that these were documents of a nature reasonably
12 relied on by people in the industry; and so, therefore,
13 could be admissible without following the rules of evidence.

14 What they failed to do was to consider the other part of
15 the test, which is whether or not they are amenable to proof
16 under the actual rules of evidence. There was no testimony
17 there as to whether or not any actual custodian of the
18 documents could testify or whether the individuals who
19 prepared those actual studies could testify. It wasn't
20 Mr. Weiers, the engineer who actually prepared the studies;
21 although, he may have participated in submitting the
22 information. Those studies are not his words.

23 Finally, both sides raised the possibility that the
24 commission might have taken judicial notice of the contents
25 of the studies. And there are two problems with that.

1 First of all, the commission cites a Federal Energy
2 Regulatory Commission proceeding as the foundation for
3 taking judicial notice of the studies. The concern we have
4 there is that the order they cite, which is attached to
5 their brief, I think it's in appendix two, is dated several
6 months before the last MISO study was, was introduced -- or
7 was prepared, excuse me. So it's a bit difficult to say
8 that this Federal Energy Regulatory Commission order somehow
9 validated a document that had not yet been prepared.

10 Beyond that, there is an inherent problem with the
11 approach of taking judicial notice at this point in the
12 game, which is that during the commission hearings the
13 commission did not do so. Mr. Pesall, if faced with a
14 situation where the commission intended to take judicial
15 notice of some record or other, has to be afforded the
16 opportunity during those proceedings to test the
17 appropriateness of that, and he was not given the
18 opportunity to do so. The commission should at this point,
19 at least, be bound by the rulings that they made at the
20 hearing, and this Court should proceed accordingly in
21 overturning those.

22 That essentially covers Mr. Pesall's position.
23 Obviously, I'm available for any questions that the Court
24 may have.

25 THE COURT: Addressing the MISO study, it was Mr. Weiers

1 who was testifying at the time that they offered the MISO
2 studies into evidence; correct?

3 MR. PESALL: Yes, it was.

4 THE COURT: And he was an engineer, and he was
5 essentially testifying as an expert. Wouldn't you agree?

6 MR. PESALL: I don't know that he was testifying as an
7 expert. He was an employee of one of the power companies.
8 I don't necessarily agree that his capacity was to provide
9 an expert opinion so much as to testify as to the nature of
10 the project as he understood it.

11 THE COURT: Mr. Smith, your argument.

12 MR. SMITH: Thank you, Your Honor.

13 First of all, I'd like to just state that, you know, the
14 commission over the last few years, we've had some pretty
15 significant experience with citing dockets. Almost all the
16 citing dockets in history have occurred since I joined the
17 commission staff in 2002. And can I tell you this: The
18 commission really takes its role in investigation, decision
19 and enforcement of citing applications seriously to ensure
20 to the best of their ability that the project will not
21 result in serious harm to landowners across, by, or near the
22 project.

23 In each of these, the commission has imposed a
24 significant number of conditions on the project as is
25 authorized by 49-41B-24. These conditions are always

1 forward looking. They're always forward looking, as
2 conditions pretty much are inherently that way, requiring
3 the project to take certain actions, including reporting
4 back to the commission with respect to certain types of
5 conditions and refraining from taking certain actions during
6 the construction/operation of the project.

7 Compliance with conditions is monitored by the
8 commission, and when necessary, action is taken to obtain
9 compliance where necessary. In so doing, the commission
10 isn't, quote, delegating its responsibilities under chapter
11 49-41B. The fact is that it's the applicant that has the
12 responsibility of proceeding with planning and development
13 of the project, not the commission. The commission oversees
14 the process. The commission does not submit the application
15 or prepare the vast preponderance of the documents in a
16 case.

17 And in condition 17 of the amended settlement
18 stipulation, the commission didn't not delegate its
19 responsibilities, nor in the paragraph in the decision by
20 requiring applicants to conduct a detailed survey of the
21 route after permit issuance and then formulate a detailed
22 mitigation plan for soybean nematode control, cyst nematode
23 and risk minimization.

24 As a practical matter, the commission felt this had to
25 be done following issuance of the permit so applicants have

1 access to the land and the ability to take action, to take
2 surveys of the property, to conduct the SCN survey. Now,
3 they probably have access to some parcels of land, but here
4 where we're talking an extremely detailed survey. It's our
5 opinion that they, that needs to be done when they have the
6 ability to access that land, bore holes, and all of that.

7 And again, after the survey results and mitigation plan
8 are done, they're required to be submitted to the commission
9 for its review and action if the commission deems it
10 warranted. And that could be saying, nope, it's not good
11 enough. And honestly, Mr. Pesall will have the right to
12 appear and be, be heard with respect to that and tell us why
13 it's not, it's not acceptable to him.

14 Because this condition occurs in the future does not
15 mean that the permit hasn't been issued within the one-year
16 period allowed for decision, but only that the condition
17 will be carried out by applicants following permit issuance
18 when it's allowable for them to enter on easement properties
19 and carry out the survey sampling.

20 THE COURT: Mr. Smith?

21 MR. SMITH: Yes, sir.

22 THE COURT: Can you -- this is Judge Myren. Can you
23 give me any example of where the commission has previously
24 granted a permit and then had some sort of process
25 afterwards establishing conditions that have to be met like

1 you're describing here that have also been upheld by the
2 courts?

3 MR. SMITH: You know, I think, I'm 99 percent sure we
4 have. And right off the top of my head, nothing is coming
5 to mind. But it's very frequently that we require
6 conditions that do require reporting back to the condition
7 -- commission. And yes, we have, in fact, taken action in
8 response to such reporting in the past. We have done so.

9 And part of the reason is because so much of this,
10 Your Honor, in the practical sense really can't, it can't be
11 done really until permit issuance. A lot of things can't be
12 accomplished until after permit issuance. And, you know,
13 we, we take a, we take a very serious role in project
14 monitoring as it goes along. And the commission does take
15 subsequent decisions, yes, concerning permit conditions.

16 Yeah. Like, for example, Keystone, it files --
17 Commissioner Nelson just pointed out to me, and he's right,
18 the Keystone projects, for example, are required to file
19 quarterly reports, which then, depending on what's in there,
20 can lead to additional commission action following,
21 following decisions.

22 THE COURT: Have those been reviewed and approved by a
23 court?

24 MR. SMITH: I don't think we've ever had one challenged
25 to wind up in court, no. I -- ordinarily, projects are

1 pretty -- nobody ended up appealing either of the Keystone
2 cases, for example. And, and so it's just basically us and
3 Keystone are the only, quote, party-parties to the cases at
4 this point. And generally the projects that I've seen, I
5 mean, they really try to be diligent in, in doing an
6 excellent job of holding to and carrying out the permit
7 conditions. At least that's what we've seen.

8 Anyway, that's the deal -- oh, pardon me?

9 THE COURT: Any further argument?

10 MR. SMITH: Yeah. I was just, this is going to be very
11 brief. But again, on the MISO studies, and again, you saw
12 in there the, I submitted the FERC order. And yes, this
13 particular document was created after. But it's, it's the
14 other document in the appendix submitted with my brief, our
15 brief, that is why. Because what that was was a compliance
16 filing under the FERC order which was required to be done in
17 the following year. And that was, that was Otter Tail's
18 first compliance filing, or the party's first compliance
19 filing under the MTEP MVP order. Okay? That was a
20 compliance filing. FERC had the right following the filing
21 of that document to reject it or require modification to it,
22 and it did not do so. And it's a document that's a public
23 record document as part of a, as part of the overall FERC
24 proceeding. Again, it's a compliance filing under that
25 order, and it's part of the official record at FERC.

1 And I guess it's just our feeling -- it was my feeling
2 at hearing that, I mean, we have been actively involved,
3 Your Honor, the commission has, in that whole planning
4 process that constitute those four MISO documents in
5 Exhibit B to the application. I mean, we, the commission,
6 were actually part of that whole process that led to that.
7 We have a person who participates in about every one of
8 those proceedings. His name is Greg Rislove (phonetic).
9 And we do it via an organization called the Organization of
10 MISO States. And we are a very active participant in that
11 process.

12 So, I mean, honest to gosh, I mean, I have been aware of
13 and bored through all those exhibits, some of them years
14 ago. All of those are present in our own records. You
15 know, I, I am fully aware of them. I know they're official
16 records at FERC. And so I, I admitted them because I felt
17 that they were -- plus we had Mr. Weiers in attendance, who
18 was a, who was a witness who, an expert who was an active
19 participant in the entire process from beginning, from the
20 very beginning. As were we. We were, too, from the very
21 beginning, from way back in the early 2000s.

22 And so at least from our standpoint, these are documents
23 where, I mean, the fact is we just know that they're, that,
24 what they are. And we know they're the real thing. And
25 there was a, an attendee and a participant there to

1 cross-examination with respect to the substance of what's in
2 there. And that's, that was the rationale there is that
3 they're official documents, they're officially on file with
4 a federal government agency, they're available to everybody
5 in the public, and they're readily verifiable. It's easy to
6 verify whether they, whether the document in the application
7 is real or whether they doctored it.

8 And lastly, just a little bit on farming practices, EMF
9 and all of that.

10 One last thing on, on the Exhibit B. I'm just going to
11 throw this out because I think it's accurate. If the Court
12 were to rule that I erroneously admitted that into, into the
13 record, there is other evidence in the record that, in my
14 opinion, is sufficient to, to support the findings anyway.
15 And that would be the testimony of Mr. Weiers and other
16 documents in the file. And I -- at least looking over the
17 findings today in preparation, I, it appeared to me there
18 was other evidence in the record really to support just all
19 of those, all of those, all of those documents.

20 And lastly, just a little bit about the issues, the
21 other issues. And again, we're talking like farming
22 practices, electromagnetic field effects, that kind of
23 thing, and to some extent land valuation, I guess.

24 On land valuation, not much to say. It's just that we
25 felt there just really wasn't any, I don't know, hard

1 evidence about effects on land valuation, you know. It,
2 there were just, the opinions --

3 THE COURT: Let me interrupt you for a minute.
4 Mr. Smith, I'm not interested in hearing why you, or why the
5 commission made the decision except to the extent that
6 you're arguing the legal issues.

7 MR. SMITH: Okay.

8 THE COURT: You can't extend the decision beyond what
9 was in the findings of fact and conclusions. Your
10 explanations here are of no value to the Court.

11 MR. SMITH: Okay. Sorry about that.

12 You know, I guess my feeling on the, on the issues with,
13 with, with the farming practice effects, again, the presence
14 of EMF, and to, maybe to a lesser extent, you know,
15 valuation, I mean, valuation, it just didn't feel like there
16 was record evidence to support that. At least no hard
17 evidence.

18 With respect to farming practices and EMF, I mean, the
19 fact of the matter is the applicants in argue, as you see in
20 the findings of fact, et cetera, and decision, took
21 significant mitigative measures to minimize the effect on
22 agricultural land. Those included unusually high tower
23 height, very long wire spans, the use of monopoles instead
24 of other more intrusive pole structures.

25 And I think it gets down to this really: Is 49-41B-22

1 meant to prohibit the construction of an electric line? Is
2 that its intent? No, we don't think so. We don't think
3 that's a reasonable interpretation of that statute.

4 That said, there is no such thing as -- you can't build
5 a power line without that pole being stuck in the ground
6 somewhere. So there is at least going to have to be some
7 minimal effect. There has got to be some minimal effect on
8 farming practices. And we think with the decisions that, or
9 that the mitigative measures that the applicants took, that
10 those are reduced to the level where they're not serious
11 effects. Will there be some small effect? Yes, but, but
12 not serious.

13 With respect to EMF, every electric transmission line
14 has an electric field around it. It's not -- you can't
15 build an electric line without an electric field on it. So
16 to hold that the presence of an electric field and the
17 possibility for some minor electromagnetic field effects is
18 a serious environmental or health concern essentially means
19 that the statute bans the building of a transmission line in
20 South Dakota. And we don't think that's what the
21 legislature intended in that statute.

22 And with that, let me see here. On burden of proof, I,
23 I, I disagree, I guess, with Mr. Pesall on that. We were
24 not in any way implying in the order that, that the, that
25 the intervener has the burden of proof. But as Mr. Pesall

1 himself said, it's the totality of the evidence. And when
2 we talked about at some point when, when the one side has
3 produced a significant amount of evidence, there is some,
4 some -- it's not maybe a burden of proof in the technical
5 sense, but there is some necessity for the other party to
6 produce evidence that contradicts or disproves what the
7 party with the burden of proof has already submitted. And
8 that's all that was intended to do.

9 And I think that's it for, for my argument unless you
10 have something else to ask me or Commissioner Nelson here.

11 THE COURT: Mr. Welk, your argument.

12 MR. WELK: Thank you, Your Honor, and counsel. And
13 thank you to both the Court and counsel for accommodating in
14 light of the weather everybody's attendance by phone.

15 Your Honor, there has been extensive briefing in this
16 case by all parties, extensive citation to the record. The
17 Court has read the record and has read the briefs. I'm not
18 going to try to repeat what Mr. Smith said. So if I do so,
19 it will be unintentional.

20 I believe that, you know, from the top of the mountain,
21 so to speak, we start in looking at this procedure that the
22 South Dakota Legislature in 49-41B, and that's a capital B,
23 dash 1, has specifically recognized the need for energy
24 development and prohibited energy development without a
25 permit granted by the South Dakota Public Utilities

1 Commission. In addition, as Mr. Smith indicated, 49-41B,
2 the commission can impose terms, conditions, and
3 modifications on such permit.

4 The legislature has specifically recognized the PUC as
5 having an expertise in this matter. The Court is required
6 to give deference to an administrative agency on issues
7 regarding factual findings. And I think, essentially,
8 Your Honor, that this is a scope of review case for this
9 Court's review under 1-26-36 and to determine whether the
10 requirements of 49-41B-22 have been satisfied.

11 The law is settled in South Dakota that the Court as
12 sitting as an appellate court of the PUC record does not
13 reweigh the evidence, does not determine credibility of
14 witnesses, does not substitute its judgment as to matters
15 relating to facts. The Court is required to defer to the
16 expertise of the commission regarding matters within its
17 expertise, and the appellant must demonstrate that there
18 have been prejudice based upon six errors in 1-26-36.

19 In addition, the Court looks at the totality of the
20 evidence and not an isolated finding of fact or conclusion
21 of law in its review as an appellate court.

22 The two key cases that I think that the Court needs to
23 rely on for its decision are the *Big Stone II* case and the
24 *Dorsey & Whitney* case. Both -- I was involved in both of
25 those cases, Mr. Smith was involved in the *Big Stone* case,

1 and they involved scope of review issues. The MISO study
2 issue is a decision under 1-26-19. But we believe that all
3 those, the cases and the statutes support the commission's
4 determination.

5 I believe that essentially Mr. Pesall's admission in the
6 redirect examination that's cited in our brief is the reason
7 we're here today. And in answering Mr. Bob Pesall's
8 question, his uncle very candidly stated that he is opposed
9 not to the project, but for the project being on his land.
10 And, in fact, he said if they would just move the project
11 off his land, he'd go away. And that was a question asked
12 by Mr. Bob Pesall, not even a question that I or Mr. Smith
13 asked.

14 And the problem and concern of Mr. Pesall on routing
15 cannot be addressed by the commission. The commission is
16 specifically precluded by the legislature from having any
17 authority to route a transmission facility. And that
18 prohibition is found in 49-41B-36. So the principal
19 objection by Mr. Pesall, frankly, can't be addressed because
20 the legislature didn't authorize the commission to do so.

21 The commission has amassed a record of over 8,000 pages,
22 as the Court has indicated. There was significant
23 prehearing discovery by both the staff and Mr. Pesall.
24 There was a contested case hearing for over two days.
25 Briefs that were submitted. Findings of fact. The

1 commission has read a very detailed decision including
2 amending the stipulation that we made with the staff to
3 provide extensive terms and conditions, those of which
4 directly address the SCN issue and many other issues that
5 are not before the Court.

6 And in response to, in further support of Mr. Smith, it
7 would be nonsensical for the commission not to impose
8 conditions on permits and then be able to walk away after
9 the decision was then rendered within 12 months. The
10 commission has a duty to monitor the permits, as Mr. Smith
11 indicated. They are living, breathing, and a need to
12 monitor applicants and all permittees under the commission.
13 So these are usual matters. And they, the monitoring
14 becomes the subject of compliance reviews. If they wanted
15 to revoke or amend the permit, the commission has the
16 ability to do that.

17 And no permit could, of this extensive time and nature
18 could address all the issues without having some monitoring
19 authority to the commission. And I believe that's what the
20 commission has done and will require to, to make further
21 reports to the commission and address the SCN concerns that
22 were brought forth by Mr. Pesall.

23 Mr. Pesall may disagree with the decision, but the issue
24 before this Court is whether the record supports the PUC
25 decision, and we submit it does.

1 As the Court saw in the *Big Stone II* decision and when
2 the Supreme Court reviewed the record of the PUC, it dealt
3 with the CO₂ issue, the carbon dioxide issue. And the issue
4 involved whether it was a serious concern. That's the
5 operative adjective. And the Court was quick to jump and
6 say that, look, this is a detailed record; that, that they
7 needed to give deference. And similarly in this case, the
8 PUC did its job in conducting its extensive inquiry and also
9 its many public hearings.

10 And I will submit, I disagree with Mr. Pesall that this
11 is, that there is a mixed review in this case. The *Dorsey*
12 *Whitney* case I believe is clear where the Supreme Court said
13 if there are certain things that the agency must look at
14 that are statutory, and whether those statutory requirements
15 are met is essentially a factual inquiry. And I
16 respectfully submit, Your Honor, that it's a clearly
17 erroneous standard that you're looking at this. It's
18 whether the burden has been satisfied by the applicant to
19 meet the four requirements in 49-41B-22. And so it is a
20 clearly erroneous, not a de novo, review that you are faced
21 with.

22 As Mr. Pesall indicated, the applicants have raised the
23 issue of whether he's adequately preserved his objections in
24 this case. There was a PUC regulation that allowed findings
25 of fact to be submitted. Mr. Pesall did not do so. He did

1 file a brief. He objected to our findings. But we believe
2 since he did not submit findings he has waived those, and
3 it's simply, we're looking at the record to see if it
4 supports the conclusions of law entered by the commission,
5 which we claim that's been done.

6 And quickly looking at the issues that have been
7 directed by Mr. Pesall, I'm going to rely on what Mr. Smith
8 said regarding the conditions. I've already talked about
9 that.

10 The burden, I also agree with Mr. Smith, was not shifted
11 at any manner. It was merely, I believe that the, the
12 findings and conclusions said that the commission didn't
13 believe or find that, the evidence to be credible. It
14 didn't shift any burden. We were clearly held to the
15 burden. And the findings that, and conclusions that have
16 been entered as stated that we met our burden.

17 I also want to talk about the MISO records. First of
18 all, a point that really has not come out in the briefs is
19 that the essential data that Mr. Weiers talked about was in
20 his direct testimony along with the report. The direct
21 testimony was not objected to, and that went into evidence.

22 And to answer one of the Court's other inquiries,
23 Mr. Weiers was designated as an expert. He is entitled to
24 rely on evidence even if inadmissible in a civil trial. And
25 the Court -- or the PUC was aware of these records. 1-26-19

1 is relaxed than the civil rules of procedure. And the
2 commission is perfectly capable of determining whether it
3 ought to be admissible or not. And this is an issue that
4 comes between more to weight than admissibility, and the
5 commission obviously determined in its own decision the
6 reliability of the information.

7 Mr. Weiers participated in these studies and relied on
8 them, and as an expert can do so. And if you look, there
9 has been no objection that these documents were not
10 authentic, they were not true and correct copies. The
11 objection, even albeit, even it was not stated precisely,
12 had to do with where did the records come from? Had a
13 custodian been there? All the custodian would have been,
14 authenticate them, the documents. And there has been no
15 issue as to authentication or foundation because of the
16 people that testified.

17 So with those comments, Your Honor, I would respectfully
18 request that the Court affirm the findings and conclusions
19 and enter a judgment affirming the decision in total as
20 pursuant to 1-26-36. And I -- that concludes my remarks,
21 Your Honor.

22 THE COURT: Mr. Pesall, your rebuttal, if any.

23 MR. PESALL: Thank you, Your Honor. Can you hear me all
24 right?

25 THE COURT: I can.

1 MR. PESALL: Can you hear me now?

2 THE COURT: Yes, I can hear you.

3 MR. PESALL: All right. Thank you.

4 With respect to the comments that have been made by the
5 other parties, in the event that the Court were to find
6 Mr. Weiers was testifying as an expert rather than as an
7 employee of the applicants and an agent of the applicants,
8 he may be permitted to rely on the studies in forming his
9 own opinions, but I don't think he's permitted to simply
10 recite the contents of studies that he has read as evidence
11 in and of themselves.

12 Applicants note that the record is lengthy. We're of
13 the opinion the length of the record really doesn't prove
14 anything one way or the other.

15 The applicants challenge Mr. Pesall's motives: His
16 comment about how he would go away if the line did not cross
17 his land. Number one, I don't think his motives in bringing
18 this action are necessarily relevant to the legal arguments
19 that he is raising.

20 In any event, we're not asking this appellate court to
21 reroute the line. And as a practical matter, if the line
22 didn't cross his land, he wouldn't be at risk for the
23 transmission of soybean cyst nematode or the other liability
24 issues that having this line across his land would create.

25 The Public Utilities Commission through Mr. Smith has

1 noted that they have imposed conditions in many other cases
2 that required action by the applicants after the permit was
3 issued. I don't know that he has identified anywhere
4 they're specifically directed to write up new conditions of
5 the permit that they will follow. He doesn't cite any cases
6 where the delegation of authority has been challenged. And
7 in any event, in none of those cases was Mr. Pesall a party.
8 So I don't know that it's appropriate to say that Mr. Pesall
9 is somehow bound by the decisions in those cases.

10 You know, if we want to trace our history back to a
11 philosophical argument, I think it was Thomas Paine that
12 said, "A long history of not thinking something wrong gives
13 it the superficial appearance of being right." Just because
14 they've done it in other cases and nobody complained about
15 it doesn't mean it's legal.

16 As to the fundamental purpose of 49-41B-22, I think the
17 commission is correct that the purpose of that statute is
18 not to prohibit the construction of power lines, but rather
19 to protect citizens in the environment from the construction
20 of power lines where it would unduly interfere with their
21 lives or damage the environment. And I think that's really
22 quite clear.

23 As to the MISO studies, again, our position is that
24 nobody who is present in this case was a party to that
25 Federal Energy Regulatory Commission proceeding cited

1 repeatedly by the commission. So to assume that the MISO
2 studies which were submitted as a result of the FERC order
3 are somehow inherently admissible in this case would be akin
4 to saying that because an affidavit was filed in a divorce
5 case in Clay County, the contents of that affidavit are
6 admissible in a criminal case in Day County. It just does
7 not follow.

8 Finally, with respect to the soybean cyst nematode
9 mitigation clause, first of all, we do want to thank the
10 commission for at least taking the issue seriously and
11 trying to craft a remedy. The problem is the law itself is
12 not a living, breathing document that changes with the
13 times. If it would be too difficult for them to craft
14 conditions that can be subject to the public review and
15 participation requirements established in the statute, what
16 needs to change is not our interpretation of the law but
17 rather the administrative rules or indeed the statutes that
18 govern this. If times have changed and then we need updated
19 rules, well, then it really ought to be the legislative
20 bodies that address that.

21 Right now the *Mandan* case is still good law. The *Mandan*
22 case said you cannot delegate to farmers the opportunity to
23 choose from a list of specified options for how to handle
24 topsoil when a power line is constructed. That's little or
25 no factual difference from what we're dealing with in this

1 case where the commission is delegating to the applicants
2 the decision on what to do with 30 cubic yards of
3 potentially contaminated soil at the base of each one of
4 these towers.

5 Our position is the appropriate remedy is that since
6 there wasn't a good plan in place when the issue was duly
7 raised, the permit should be denied, the applicants are free
8 to reapply, and would only need to address the narrow issue
9 of the soybean cyst nematode worm on that application.
10 That's really what the appropriate remedy would be.

11 Beyond that, Your Honor, I think everything is fairly
12 well covered. The burden of proof as applied I think is
13 clear in this case that it was really put on the applicants
14 to prove that they shouldn't build the line, and that's
15 incorrect. The evidence of that is really, shoots through
16 the decision from, from beginning to end.

17 Obviously, I would answer any additional questions the
18 Court had.

19 THE COURT: Mr. Smith, any rebuttal?

20 MR. SMITH: Just, just one extremely short thing here.
21 Just on the soybean cyst nematode condition in the, in the
22 order. Just to point out, and I think everybody is aware of
23 this anyway, though, but at the time that is submitted to
24 the commission, assuming the Court upholds our decision
25 there, Mr. Pesall will have the right to appear as a, as a

1 party and present whatever he wants to in opposition to it
2 or in changing it or whatever he thinks, whatever he thinks,
3 whatever they feel is appropriate. It's going to be a
4 public file, and it's a public document that either the
5 commission itself or Mr. Pesall or anybody else can
6 challenge after it's done. That's it.

7 THE COURT: Mr. Welk, your rebuttal.

8 MR. WELK: Very short, Your Honor.

9 As I started out with my remarks, the appellant is
10 required to show a prejudice as to what this decision has
11 done to prejudice his rights based upon the findings of the
12 decision. I don't believe he's demonstrated any prejudice.
13 I believe that what the commission has done has been fully
14 detailed for the Court to review.

15 I do disagree with Mr. Pesall, his comment about
16 Mr. Weiers being an expert. It doesn't make any difference
17 whether you're an employee or not. It's the knowledge of
18 the witness that determines the ability to be an expert.
19 And what he relied on can be admitted or not admitted, and
20 it can be subject to cross-examination. And there wasn't
21 much done on that. So again, I think it's not an issue of
22 admissibility but weight to be given to the evidence by the
23 commission.

24 I also think that I've covered all the other arguments,
25 Your Honor, and it would be just wasting the Court's time to

1 go back over those because they've been covered in either my
2 initial remarks or in the briefs. So that would conclude
3 the remarks, Your Honor.

4 THE COURT: Each of the parties has made their various
5 arguments to the Court. I've had a chance to review the
6 record, and I've had a chance to review the written
7 arguments of the parties.

8 I intend to make a decision, but first I want to check
9 with the court reporter to see if she needs a break or if
10 she's read to proceed. Kristi?

11 COURT REPORTER: Go ahead, Your Honor.

12 THE COURT: This will be the decision of the Court. I'm
13 going to, I'll ramble a little bit here, but hopefully I'll
14 be able to bring it all together so that you're sufficiently
15 clear about the Court's ruling and the reasons for the
16 ruling.

17 First I'll start out with my understanding of my role in
18 this particular process. This is an appeal from the
19 decision of the Public Utilities Commission. The Public
20 Utilities Commission in this particular process is a
21 quasi-judicial body. And my job is to review the process
22 that they employed and the decision that they made.

23 To the extent that they have made findings of facts, I
24 will be applying the clearly erroneous standard. If I find
25 that any of their factual findings were not supported by the

1 evidence, that there is no way that someone could have made
2 that factual finding, that would be a clearly erroneous
3 finding, and then I could reverse that finding or reject it.

4 To the extent that they have applied the law, it's my
5 understanding that my role here is to see if they have
6 accurately applied the law. I don't believe that I am bound
7 by their determination of the law. It's my -- I can
8 determine the law just as well.

9 I do recognize that the Public Utilities Commission is a
10 specialized agency that has some expertise in dealing with
11 these sort of things. Presumably they have dealt with --
12 and I can tell from the testimony that they've dealt with
13 the transmission line issue a number of times in the past.
14 This is the first appeal that I have addressed as a circuit
15 court judge where we're dealing with it. So I mention that
16 because I want the record to reflect that I am giving them
17 the deference that I believe they're entitled to receive as
18 that specialized administrative agency.

19 I want to talk briefly about the process because I have
20 a couple of concerns about it that I just want to put on the
21 record because it's important about how I'm, what I'm
22 considering when I make my decision.

23 In the past, in my years before I became a circuit judge
24 and a magistrate judge, I was an administrative law judge.
25 In all three of those roles I've never had the opportunity

1 to appear before an appellate body reviewing one of my
2 decisions and try to convince them that my decision was
3 right. The reason that we don't do that is because the
4 decision that is being reviewed is the decision that the
5 Court entered at the time that it made that decision.

6 So in this circumstance, the decision of the PUC is
7 the -- the decision they made that day, while each of the
8 commissioners gave some brief general remarks, there is no
9 written decision in the sense that a court would normally
10 do, but then the PUC's formalized decision comes in the form
11 of its findings of fact and conclusions of law.

12 So here is the awkward part that I'm commenting about,
13 is that Mr. Smith was the hearing officer that conducted the
14 hearing on behalf of the PUC. And then I gather from his
15 remarks at the adjunct hearing that took place after the
16 initial evidentiary hearing, he was also the person as
17 general counsel for the PUC who was drafting the findings of
18 fact, conclusions of law, and order. I may or may not be
19 exactly right about that, but that's the impression that I
20 have.

21 And then here today he's arguing on behalf of PUC, and
22 in his argument he's trying to tell me why the PUC made
23 certain decisions. Now, the awkward part about that is if
24 we had an attorney who was simply arguing it, they could
25 probably make an argument like that and try to infer what he

1 thought the argument was, but that wasn't what I was getting
2 today. What I'm getting today on the record is we made this
3 decision and we did this, and he's explaining why he made
4 various decisions.

5 So I comment on that only -- I recognize it happens and
6 everything. All I'm commenting on it is to mention that
7 what I'm doing in my review is reviewing the decision that
8 the PUC made and not the decision that the general counsel
9 may have made or the reasoning that the general counsel had
10 for doing it. It's what the PUC said in their written
11 findings of fact and conclusions of law that control here,
12 not their explanations through general counsel afterwards.

13 So here is -- I'm going to go into a little bit of
14 detail on some of these things. I probably don't need to,
15 but I'm going to so that you're all aware that I have
16 actually considered these things. The fact that I don't
17 mention every single issue that has been addressed by the
18 parties in their briefing doesn't mean that I haven't
19 considered it; it just means that I'm trying to cover, to
20 give you sufficient specificity so you know that I'm aware
21 of all of the issues, but not specifically addressing every
22 single tiny one.

23 The first things I'm going to address are the claims
24 that there are findings of fact that are clearly erroneous.
25 Those essentially break down into a couple different groups,

1 about four different groups of findings that Mr. Pesall has
2 contended were clearly erroneous.

3 The first group are findings number 14 and findings
4 number 21 through 23. Those are the findings that relate to
5 the PUC's determination that this project, that there is a
6 public need and a public benefit.

7 In finding 14 the PUC finds that the project "will be
8 used by area utilities to transport electric supply to and
9 from lower voltage transmission and distribution lines for
10 delivery to retail customers." As I explained, I've had a
11 chance to read through the entire record and, in particular,
12 the administrative hearing record, the evidentiary hearing.
13 The issue is whether there is evidence to support that
14 finding, not whether I would make the same finding. That's
15 not what clearly erroneous is. What clearly erroneous is
16 there is, is there is no way any fact finder could look at
17 the evidence in this record and come to that finding. And
18 clearly there is evidence that supports that finding, and a
19 fact finder could have made that decision. And so that
20 finding, those, number 14 was not clearly erroneous.

21 Similarly on 21 through 23, those are findings that
22 relate to tax revenue. Mr. Pesall claims that they're
23 clearly erroneous because he claims the commission didn't
24 take into account the economic burden imposed by the
25 project. In those findings the PUC finds that the project

1 will result in some revenue for the various communities
2 along the route of the path and that there is an economic
3 benefit as a result. And although they didn't specifically
4 lay out a balancing of the burdens, it's clear that the PUC
5 in its process determined that the net effect was an
6 economic benefit from the project. Their decision, that
7 factual finding is supported by evidence in the record.
8 It's not clearly erroneous.

9 The second group of findings is findings 28 through 30.
10 Those relate to the reasonableness of the applicant's
11 mitigation plan.

12 Number 28, the PUC found, "The applicants have developed
13 reasonable mitigation plans to mitigate any environmental
14 concerns arising from the construction or operation of the
15 project." For the same rationale that I explained before,
16 that is supported by evidence in the record.

17 On most factual findings in any record there are going
18 to be contradicting evidence, and the finder of fact is
19 going to weigh that evidence. And as long as it is possible
20 for a finder of fact to have weighed the evidence and come
21 to the factual finding that they did, it's not clearly
22 erroneous. That's the case with findings of fact both 28,
23 29 and 30.

24 29 and 30 were findings that, where the, where the PUC
25 said, "No evidence was introduced to demonstrate any effect

1 of the project on property values." I want to talk about
2 that because clearly that's not accurate in the truest sense
3 of the word because there was evidence that was presented.
4 Mr. Pesall and Mr. Schuring both testified that they thought
5 that having this, this line come across their land would
6 result in a reduction or a devaluation of their properties.

7 I think, at least my reading of the overall decision is
8 that the department -- or that the Public Utilities
9 Commission, what they meant in the finding when they said
10 there was no evidence is that they meant there was no
11 creditable evidence. There was no evidence upon which that
12 they chose to rely.

13 Now, here is my explanation for that. I do a lot of
14 findings of fact and conclusions. I'm a judge, and I don't
15 have any qualms about calling someone lacking in credibility
16 if that's my determination. Here what we have is three
17 commissioners that make a decision, and it's a rather
18 general decision when they actually issue, they approve the
19 permit. And then they rely upon their counsel to write up
20 these findings of fact, and it's their job to review them
21 before they get entered. But they're not judges in the same
22 sense that a law-trained person like myself is. And so they
23 don't have exactly the same artfulness probably with
24 language that we would come up with writing findings of fact
25 on such a regular basis like we do as judges and attorneys.

1 So it's my reading of that particular finding that what
2 they've done is they've determined that Mr. Pesall was not
3 creditable, but they -- that they did not believe that his
4 testimony was entitled to significant enough weight that it
5 outweighed the other evidence that they had. The reason
6 that I say that is if you read that finding, in the next
7 sentence they talk about the fact that it's speculative.

8 And here is where it becomes important. Mister, I think
9 it was Mr. Pesall, the attorney here today, argued that he
10 thinks that it's not relevant talking about the testimony
11 that Mr. Pesall, his client, had given where he said if this
12 wasn't coming across my land, I wouldn't be here. The
13 reason that it's important is because the Public Utilities
14 Commission and members have to weigh evidence. And when
15 they're weighing evidence, they have the ability to observe
16 witnesses testifying, they have the ability to determine
17 whether they're credible, and they have the ability to
18 determine whether they have the ability to observe and
19 recollect testimony.

20 And in the whole -- and I have the same impression from
21 having read through the entire record. In the whole I have
22 the, I am left with the impression that Mr. Pesall, the
23 client, was interested in keeping this project off of his
24 property regardless of what he had to say. I -- if I had
25 been the finder of fact, I probably would have disregarded

1 his testimony, also. That's what I conclude that the
2 department -- or the Public Utilities Commission did in
3 here, and that's what they were trying to explain. They
4 perhaps didn't do it as artfully as possible. So to the
5 extent that they said no evidence was introduced to
6 demonstrate any effect on the project -- of the project on
7 property value, I read that to mean no creditable evidence
8 was presented. And with that minor addition in the reading,
9 their finding is not clearly erroneous.

10 The other group that I'm going to address are findings
11 of fact 35 through 57. Those relate to the impact on
12 property values, farming activities, and the spread of SCN.

13 Mr. Pesall testified that having the project on his
14 property would impact his property values, would impact his
15 farming activity, and would impact the spread of SCN. And
16 for the exact same reasons I described at more length
17 before, it's clear to me that the Public Utilities
18 Commission essentially chose to disregard his testimony on
19 those. They found that he was not creditable; that they
20 would not, that his evidence was not sufficient; that his
21 testimony was not reliable enough that they, that they would
22 rely upon it in making a different decision.

23 Again, it's essentially the exact same analysis as I had
24 applied before. It's his under-no-circumstances attitude
25 that undermine his credibility and that make it possible for

1 the department to disregard his, his testimony or to find
2 that it is not entitled to sufficient weight that it
3 outweighed the other evidence that was on the record that
4 supported those findings. So those findings are not clearly
5 erroneous.

6 And then the last group was findings of fact 71 through
7 81, and I've reviewed the record. There is evidence
8 sufficient to support those. They're not clearly erroneous.

9 I'm going to talk about the admission of the MISO
10 studies. Again, the Public Utilities Commission is a
11 quasi-judicial body. There are some rules that -- the
12 administrative rights say that the rules of evidence are
13 somewhat relaxed in those proceedings. So they don't
14 necessarily apply the exact same rules that we do, and
15 they're not nearly as, or they don't have to be as precisely
16 applied as we would in a formal court proceeding. What's
17 important is whether they have provided such regularity in
18 their rulings and in their application of the law that the
19 evidence that comes before them is reliable.

20 The MISO studies were offered during the testimony of
21 Mr. Weiers. Mr. Weiers, it is true, was an employee of one
22 of the applicants, but he was identified as an expert
23 witness, and he's testifying as an expert witness. And
24 specifically what he's testifying about is how this project
25 is going to be built out, how it's going to be constructed.

1 And he's clearly providing the PUC with testimony in the
2 form of an expert. And in the process of his testimony he
3 explains that part of his knowledge as an expert comes from
4 participating in the creation of these MISO studies and that
5 the particular MISO studies that were ultimately admitted
6 into the record were utilized by him in formulating the
7 opinions that he's providing. That's perfectly appropriate.
8 There is no reason that he couldn't do that. If he had
9 appeared in my court and wanted to tell -- and one of the
10 parties offered documentation of this type that the expert
11 relied upon, it would be admissible into evidence. Now,
12 that wasn't the reason that was given at the time. It was a
13 little bit less precise from the department, from the PUC.

14 Here is my understanding of the law. The evidentiary
15 rulings of a judge, or in this case, a hearing officer, are
16 reviewed for essentially an abuse of discretion. If the
17 judge had, if the judge's decision was, in admitting the
18 evidence had some basis, there was some way that it could
19 have been correct, then the court should not throw that
20 ruling out. And it's my determination that the ruling was
21 ultimately correct; that the MISO studies were properly
22 admitted. It is clear that this quasi-judicial body, the
23 PUC, was quite familiar with those MISO studies, and it is
24 clear from the evidence in the record that they had
25 sufficient familiarity with them; that they were comfortable

1 with the genuineness, the authenticity of the documents.

2 There was an argument that in one of the conclusions of
3 law that the PUC shifted the burden to the, to the
4 objectors. That particular one, again, it's my ruling that
5 what that was was essentially an inartful conclusion. It
6 wasn't a shifting of the burden. What they were indicating
7 was that there was sufficient evidence in the record that
8 they believed established that particular point. And that
9 having established it they were, they were reviewing the
10 record to see if there was anything else that would
11 contradict that, and they were simply mentioning or noting
12 that there was nothing presented to contradict it.

13 I do the same thing in issuing my decisions. I will
14 frequently comment on the absence of contradictory evidence.
15 It doesn't mean you're shifting the burden. It's just a
16 comment on the nature of the evidence that you're
17 considering.

18 There are two additional arguments that I want to
19 address. The second-to-the-last is the argument that there
20 was an improper delegation of authority.

21 Mr. Pesall very properly raised this issue regarding
22 SCN, the soybean nematodes. And it's a good thing that he
23 did because it gave everyone an opportunity to learn about
24 it and gave the PUC an opportunity to address his concerns
25 regarding that.

1 This is a \$250 million project or something in that
2 neighborhood. It is literally impossible for the Public
3 Utilities Commission to create a permit that covers every
4 precise, tiny detail in the one year that they have within
5 which they have to issue that decision. There always are
6 going to be things that are open. What the Public Utilities
7 Commission has the authority to do, in my opinion, under the
8 law, is to set up requirements, things that the applicant
9 has to comply with and, if necessary, set up a process
10 making sure that they comply with that. That's what they
11 did with this, with the SCN study.

12 What they required the applicants to do is conduct a
13 detailed study of the properties involved, taking soil
14 samples from them on, sufficient to gather the information
15 about which properties were infected, the level of
16 infection, even within properties which portions might be
17 infected and which portions weren't, and then develop a
18 mitigation plan to make sure that parcels that were not
19 infected will not become infected, and that the infection on
20 any individual parcels won't be unnecessarily spread into
21 portions that weren't.

22 It's a completely reasonable thing that they've done.
23 It's not a delegation of authority. The PUC has kept the
24 power to, to follow up on that. They didn't specifically
25 say, applicants, you go out and do what you want. They

1 said, you need to address this problem. It's not possible
2 for us to do that right now because you have to conduct
3 these surveys, these soil surveys. And then based on what
4 you find, you'll have to develop a mitigation plan. It
5 seems completely appropriate to me, and it's not an illegal
6 delegation of their authority.

7 Then, then the last issue that I want to address is the,
8 which I think no one has essentially argued about today, but
9 it's in the briefing, so I'll address it, and that's the,
10 exceeding the 12-month limit. And essentially the argument
11 is that by leaving open the opportunity to address the SCN
12 soil survey at a later date that they've gone beyond the
13 survey and -- or gone beyond the period of time for the
14 granting of the permit.

15 The permit has been granted. The SCN study is a
16 condition to the permit. The fact that the PUC has retained
17 the ability to review that process and make sure that there
18 are no further, and that there are no impacts that are too
19 much for the project doesn't mean that they have exceeded
20 the 12-month limitation.

21 So for all the reasons that I've provided, it is my
22 finding that the, that the Public Utilities Commission did
23 not make any clearly erroneous findings. All of their
24 findings are adopted by the Court with the minor exception
25 of the addition of the word creditable on those findings

1 where they have found that there is no evidence as I
2 outlined in my decision where there was evidence. It just
3 wasn't that, it was that they weren't finding that it was
4 creditable. And then that they have accurately applied the
5 law. I see no problems with their application of the law to
6 the facts of this case. So I'll affirm their decision.

7 What I'm going to propose is I'm going to have --
8 Mr. Welk, I'm going to have, I'm going to propose having you
9 draft an order, the orders to follow up on this. If there
10 is, if it's ordinarily done in a different way, I would
11 entertain some suggestions about that.

12 Mr. Welk, would that work for you?

13 MR. WELK: Yes. It will be -- normally it's capped
14 under 1-26-36 as a judgment, Your Honor. And so with the
15 Court's ruling today, we'll make the modifications, and I'll
16 be glad to send that around to counsel before it's submitted
17 to you. If there is any -- and if we can't agree to the
18 form of the order, then we can compete, we can submit to the
19 Court competing orders, if that's acceptable to you.

20 THE COURT: It will work for me.

21 Mr. Pesall, does that process work for you?

22 MR. PESALL: I think that process is probably the most
23 reasonable way to approach it, Your Honor. Thank you.

24 THE COURT: Mr. Smith?

25 MR. SMITH: Yes, Your Honor. That's fine with me.

1 THE COURT: I'll go around one last time and make sure
2 that I've addressed everything. I don't want to miss
3 anything. If there is something else you want to have me
4 address today, this is your opportunity.

5 Mr. Pesall?

6 MR. PESALL: No, Your Honor. I think the Court
7 thoroughly covered all of the issues that we had raised on
8 appeal.

9 THE COURT: Mr. Welk?

10 MR. WELK: Nothing further, Your Honor.

11 THE COURT: And Mr. Smith?

12 MR. SMITH: Nothing further, Your Honor.

13 THE COURT: Then we're off the record.

14 (Whereupon, the proceedings adjourned at 3:13 p.m.)
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1 STATE OF SOUTH DAKOTA)
) SS CERTIFICATE
2 COUNTY OF BROWN)
3

4 THIS IS TO CERTIFY that I, Kristi A. Brandt, RPR,
5 Official Court Reporter for the Circuit Court, Fifth
6 Judicial Circuit, Brown County, South Dakota, took the
7 proceedings of the foregoing case, and the foregoing pages,
8 1-50 inclusive, are a true and correct transcript of my
9 stenotype notes.

10 Dated at Aberdeen, South Dakota, this 2nd day of
11 January, 2015.

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/s/ Kristi A. Brandt
Kristi A. Brandt, RPR
Official Court Reporter
My Commission Expires:
February 21, 2019

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