STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
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COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

NEBRASKA PUBLIC POWER DISTRICT,

Appellant,

-vs-

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA, and CHARLOTTE FISCHER, KEN STOFFERAHN, and JEFF SOLEM, CONSTITUTING THE MEMBERS OF SAID COMMISSION,

Appellees.

MEMORANDUM DECISION

CIV. 82-34

Nebraska Public Power District (NPPD) filed its application for a permit to construct the proposed Mandan trans-state transmission facility on January 14, 1981. The South Dakota Public Utilities Commission (PUC) conducted public input and evidentiary hearings and in its decision and order dated January 14, 1982 denied NPPD's permit request.[1] The PUC found that, subject to specified terms and conditions of the PUC Order, NPPD had satisfactorily met its burden of proof under SDCL 49-41B-22(1), (2), (3), and (4). PUC Order, FF #5-8, p. 6. As to the remaining burden of proof under SDCL 49-41B-22(5), however, the PUC found NPPD had

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[1] In the Matter of the Application of Nebraska Public Power District for a Permit to Construct and Operate the Proposed Mandan 500 KV Transmission Facility, Docket No. F-3371, Findings of Fact, Conclusions of Law, and Decision and Order Denying Permit (PUC Order).

failed to prove that the proposed Mandan facility would be "consistent with the public convenience and necessity in any area or areas which will receive electrical service either direct or indirect, from the facility, regardless of the state or states in which such area or areas are located." PUC Order, FF #9, pp. 6-7; #222, p.77.

The administrative record here is voluminous, containing over 5200 pages of transcript and nearly 200 exhibits. Briefs submitted by counsel amounted to over 430 pages of argument and authority. Having considered the administrative record and all of the records and files herein, including oral argument of counsel at the hearing on June 15, 1982, the following is this Court's memorandum decision.

I.

RETROACTIVITY OF SDCL 49-41B-22(5)

On March 7, 1981, approximately seven weeks after NPPD filed its application to construct the proposed Mandan facility, the South Dakota Legislature enacted House Bill No. 1226, as amended. Since there was no emergency clause, that bill became effective on July 1, 1981. Section 3 thereof added a fifth subsection to SDCL 49-41B-22 which thereafter read in pertinent part as follows:

> The applicant has the burden of proof to establish that:
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> . . .
>
> (5) That the proposed trans-state transmission facility will be consistent with the public convenience and necessity in any

> area or areas which will receive electrical service, either direct or indirect, from the facility, regardless of the state or states in which such area or areas are located.

NPPD argues that SDCL 49-41B-22(5) is not applicable to the January 14, 1982 Mandan permit application and thus it is not required to satisfy the "public convenience and necessity" burden of proof. It thus contends that the PUC erroneously determined that SDCL 49-41B-22(5) is applicable to NPPD's pending application. PUC Order, Reserved Rulings, pp. 78-85. In particular, NPPD submits that the PUC's retroactive application of SDCL 49-41B-22(5) contravenes SDCL 2-14-21. That statute provides:

> No part of the code of laws enacted by §2-16-13 shall be construed as retroactive unless such intention plainly appears.

In support of this contention, NPPD points to the initial language in House Bill No. 1226, Section 4, which stated:

> That chapter 49-41B be amended by adding thereto a new section to read as follows: No pending permit application or future permit may be issued by the commission without full compliance with this chapter (emphasis added).

NPPD stresses that the above-quoted original language of House Bill No. 1226, Section 4 would have made SDCL 49-41B-22(5) expressly applicable to any permit applications pending at the time of its enactment, i.e., the January 14, 1981 Mandan facility application. NPPD argues that the South Dakota Legislature

specifically intended that the "public convenience and necessity" burden of proof should not apply to the Mandan application because the Legislature deleted Section 4 from House Bill No. 1226. Under this theory, NPPD asserts first, that it filed the Mandan permit application on January 14, 1981, well before the July 1, 1981 effective date of SDCL 49-41B-22(5); and second, that SDCL 2-14-21 precludes retroactive application of the "public convenience and necessity" burden of proof to its pending application.

On the other hand, the PUC in its decision and order determined that SDCL 49-41B-22(5) applied retroactively to NPPD's permit application. PUC Order, Reserved Rulings, pp. 79-85. It ruled that SDCL 49-41B-22(5) is "procedural," and not a "substantive," amendment. Id. at 80-84. The PUC Order relies upon SDCL 2-14-24 as authority for the retroactive application of SDCL 49-41B-22(5). SDCL 2-14-24 states that:

> No action or proceeding, civil or criminal, commenced before the code of laws enacted by §2-16-13 took effect and no right accrued are affected by its provisions, but the proceedings thereunder must conform to the requirements of such code as far as applicable (emphasis supplied).

In response thereto, NPPD argues that the "public convenience and necessity" burden of proof of SDCL 49-41B-22(5) is substantive, and not procedural, in nature. NPPD's briefs suggest that irrespective of whether the "public convenience and necessity" burden of proof is characterized as a substantive or a procedural amendment, SDCL 49-41B-22(5) is inapplicable to NPPD's application in the absence of express retroactive language.

This court holds that SDCL 49-41B-22(5) is not retroactive in effect and does not apply to the January 14, 1981 Mandan permit application. In the initial version of House Bill No. 1226, Section 4, the Legislature placed express language in the bill that would have made SDCL 49-41B-22(5) apply retroactively to the January 14, 1981 Mandan application. Thereafter, the Legislature took the initiative to amend House Bill No. 1226 and to thereby delete Section 4. H.J. 750 at lines 16-17, (1981). The introduction of the original House Bill No. 1226, the elimination of the retroactive language of Section 4 via a subsequent amendment, and the final enactment of House Bill No. 1226 into law, were, at each stage, the affirmative acts of the Legislature. Presumably, the Legislature fully considered the language of Section 4 as well as the positions advocated by proponents and opponents of that particular legislation. It also had the language of Section 4 before it during the entire course of legislative action on this bill. The only plausible conclusion is that the Legislature intentionally deleted Section 4 from House Bill No. 1226 so that pending permit applicants, including NPPD, would not have to satisfy the new amendment to SDCL 49-41B-22. Had it intended otherwise, the Legislature simply would not have deleted the then-existing retroactive language that appeared in the text of the original bill.

Moreover, even though the Legislature amended House Bill No. 1226, it placed retroactive language in selected provisions of SDCL Chapter 49-41B, the South Dakota Energy Facility Permit Act. See, e.g., 1981 SD Sess. Laws. Ch.344 (SDCL 49-41B-12).

SDCL 49-41B-22, as amended, however, does not contain retroactive language. Certainly, if the Legislature would have desired to make SDCL 49-41B-22(5) applicable to the pending Mandan permit proceedings, it would have so stated in that statute. This Court cannot disturb this legislative mandate when the Legislature has taken the initiative to strike the very language that would have made SDCL 49-41B-22(5) retroactive in application.

Notwithstanding the legislative action on House Bill No. 1226, SDCL 2-14-21 compels this Court to rule that SDCL 49-41B-22(5) does not apply retroactively to the pending Mandan permit application because "(no) such intention plainly appears" in that statute or any other provision of the South Dakota Energy Facility Permit Act. The South Dakota Supreme Court has consistently held that statutes are presumed to have prospective application and may be construed as retroactive only when such intention plainly appears. See, e.g., In the Matter of State Sales and Use Tax Liability of Montgomery Ward Co., this Court's Memorandum Decision, June 25, 1982; State ex rel. van Emmerick v. Janklow, 304 NW2d 700 (SD 1981); Johnson v. Kusel, 298 NW2d 91 (SD 1980); In re Scott's Estate, 133 NW2d 1 (SD 1965); and American Inv. Co. v. Thayer, 63 NW2d 233 (SD 1895).

Likewise, the North Dakota Supreme Court has held that its Legislature must expressly authorize retroactive application of a statute, whether it is procedural or substantive, in order for the statute to apply retroactively. Reiling v. Bhattacharyya, 276 NW2d 237, 240-41 (ND 1980); Matter of the Estate of Nelson,

281 NW2d 245, 252 (N.D. 1979)[2] The Minnesota Supreme Court has also ruled that its statutory counterpart to SDCL 2-14-21[3] applies to all statutes, irrespective of whether they are substantive or procedural. No Power Line v. Minnesota Environmental Quality Board, 262 NW2d 312, 321 (Minn. 1977); Cooper v. Watson, 187 NW2d 689, 693 (Minn. 1971).

This holding, however, does not erode this Court's conviction that the "public convenience and necessity" burden of proof in SDCL 49-41B-22(5) is substantive, and not procedural, in nature. SDCL 49-41B-22(5), as amended, would force NPPD to satisfy an additional burden of proof that became effective subsequent to the filing of the pending Mandan permit application. Because this burden of proof impairs NPPD's substantive rights, SDCL 49-41B-22(5) does not apply retroactively. Tremps v. Ascot Oils, Inc., 561 F2d 41, 45 (7th Cir. 1977).

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[2]NDCC 1-02-10 states that "(n)o part of this code is retroactive unless it is expressly declared to be so." In connection therewith, NDCC 1-02-18 provides that "(n)o action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this code as far as applicable." Although SDCL 2-14-21 uses the words "plainly appears" rather than the words "expressly declared" in NDCC 1-02-10, this Court is convinced that the above-cited cases provide a sound statutory construction of SDCL 2-14-21,-24. This is particularly apposite to the instant case because the Legislature deleted Section 4 from House Bill No. 1226 and did not otherwise specify that SDCL 49-41B-22(5) should apply to pending permit applications under SDCL Chapter 49-41B.

[3]Minn. Stat. §645.21 provides that: "(n)o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."

In Tremps, plaintiff brought a suit for damages under the Indiana Securities Law where defendant did not register the securities in Indiana prior to the offer and sale. After the securities sale in question took place, an amendment to an Indiana statute conditioned liability on the fact that the injured party must plead and prove he "did not knowingly participate in the violation or . . . did not have, at the time of the transaction, knowledge of the violation . . . ."[4] In holding that the statute affected a substantive right and could not be applied retroactively to the plaintiff's case, the court stated:

> It is a well-established rule that "absent a contrary legislative intent statutes should be given prospective effect only." (citation omitted)
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> . . .
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> . . . (T)he change cited by the appellants limits the substantive right of a securities buyer to recover from a seller who has failed to register them. Under the terms of the unamended statute, the buyer could recover irrespective of whether he knew the securities were unregistered or not. Because (the purchaser) had that right as of the time he purchased the unregistered securities and because the amendment did not expressly take it away, it was unnecessary for the plaintiff to be plead or prove (the purchaser's) lack of knowledge. (emphasis added) Id.

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[4] Ind. Ann. Stat. §25-873(a).

This Court is not unmindful of the fact that in Tremps the additional burden of proof affected a private cause of action, while in this case, the "public convenience and necessity" burden of proof, SDCL 49-41B-22(5), affects NPPD's ability to obtain a trans-state transmission facility permit. However, SDCL 49-41B-22(5) has forced NPPD to prepare and present exhaustive testimony and exhibits to justify its request for a permit. Even a cursory examination of the voluminous record below shows the scope and breadth of the substantive burden imposed upon NPPD by SDCL 49-41B-22(5). Without satisfying this burden, NPPD would be denied the requested permit, as it was here. This Court can hardly envision a requirement that could impair NPPD's substantive rights to the extent that SDCL 49-41B-22(5) has here.

In light of the above holding, this Court need not address the issue of whether SDCL 49-41B-22(5) violates the Commerce Clause of the United States Constitution. Similarly, this Court's holding renders moot the issue of whether the PUC erred when it excluded the testimony of four NPPD witnesses proferred as "rebuttal evidence". Under the scope of review conferred upon this Court by SDCL 1-26-36, the PUC's decision to retroactively apply SDCL 49-41B-22(5) violated statutory provisions, was affected by other error of law, and must be reversed.

II.

PUC ORDER TERMS AND CONDITIONS

H-FRAME TOWER STRUCTURE REQUIREMENT

The PUC ordered NPPD to utilize two-legged or H-frame steel

pole structures along the entire length of the South Dakota route, with the stated exception that NPPD use single shaft steel pole structures in the Gavins Point Dam Area.[5] PUC Order, FF#24, p. 11; #69-72, pp. 26-27. According to NPPD, the PUC Order primarily focused on three justifications for selection of the H-frame towers over NPPD's proposed reduced leg-spread lattice towers; namely, the minimization of (1) farming inconvenience, (2) visual impacts, and (3) the amount of land taken out of crop production. PUC Order, FF #23, 24, p. 11; #71,72, p. 27.

NPPD does not dispute the PUC's finding that reduced leg-spread lattice towers remove more acres from crop production than H-frame towers, PUC Order, FF #23, p. 11. Despite testimony from PUC Staff witnesses that H-frame towers, when compared to reduced leg-spread lattice towers, will enable farmers to cultivate more land beneath and within the vicinity of the transmission towers, NPPD insists that the record, when viewed in its entirety, does not show that H-frame towers will provide a "significant benefit" over lattice towers. NPPD presented evidence that 46% of the South Dakota land the proposed Mandan line would cross is rangeland. Based on this, NPPD urges that its proposed lattice

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[5]NPPD does not challenge the PUC finding here to the extent that NPPD's proposed Mandan project must utilize singe pole structures in the Gavins Point Dam Area.

tower structures will not pose a farming inconvenience threat to such lands. Additionally, NPPD stresses that both H-frame and lattice tower structures will necessarily create some weed control problems, and that affected landowners will be fully compensated for weed control costs via NPPD's easement payments.

The PUC further found that H-frame towers, when compared to NPPD's proposed lattice towers, will more satisfactorily mitigate visual impacts when viewed at distances of less than one mile. It found, however, that visual complexity differences between H-frame and lattice towers disappear at distances of "a little over 1 mile." PUC Order, FF#71, p. 27.

Here, NPPD challenges the validity of the response analysis study relied upon by the PUC Staff. Based on that study, PUC Staff witness Mr. Burggraf concluded that H-frame towers "are visually more acceptable in exposed locations." Specifically, NPPD takes exception to the study because the subjects surveyed were not afforded the opportunity to view photographs of the transmission towers "taken at a distance" from the transmission line. This, when considered along with other PUC findings,[6] so reasons NPPD, in fact proves that H-frame towers create greater

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[6] See, e.g., PUC Order, FF#71, p. 27: "At distances greater than 1 mile, steel pole structures, being large in diameter, may become more prominent than lattice structures."

visual impacts than lattice towers at viewing distances of more than one mile. NPPD also submits that the proposed Mandan line will not, as presently devised, cross near or through any towns or other significant population concentrations. In sum, NPPD again contends that the H-frame tower requirement is unwarranted, this time because the evidence purportedly fails to prove that H-frame towers will cause a significantly greater visual impact.

In contrast, the PUC Staff draws an entirely different inference from the response analysis study and the testimony of Mr. Burggraf. It stresses that a majority of people in the study who viewed different transmission tower designs preferred pole structures (i.e., H-frame towers) over lattice towers. Notwithstanding NPPD's attack on the PUC findings, the PUC Staff points to weaknesses within NPPD's case. The PUC Staff notes that nowhere in the record below did NPPD seek to establish that it had shown comparative photographs of transmission towers to those persons whom had attended NPPD's public information hearings. The PUC Staff notes that NPPD failed to ascertain the aesthetic tower preferences of landowners and of the affected public within the vicinity of the proposed Mandan line. Consequently, the PUC Staff intimates that NPPD has effectively foregone the opportunity to provide the most pertinent testimony on aesthetic tower preferences, and that the response analysis study and Mr. Burggraf's testimony fully support the PUC finding here.

NPPD mounts its primary assault upon the H-frame tower requirement because NPPD would have to spend approximately

$13 million more over the cost of its proposed reduced leg-spread lattice tower in order to save an additional 2.0 to 19.3 acres of South Dakota cropland. PUC Order, FF # 24, 25, p. 11. NPPD's attack here, of course, is premised on the assumption that the additional cost of H-frame towers is grossly disproportionate to the number of cropland acres saved by this measure.

Under the scope of review conferred upon this Court by SDCL 1-26-36, the question is not whether this Court would have reached the same result as the PUC. Rather, the crucial question is whether, in light of the "great weight" accorded to the PUC's decision, it withstands the review criteria of SDCL 1-26-36.

Based on the entire evidence in the record, it is this Court's opinion that an additional cost of approximately $13 million for the H-frame towers does not, under these circumstances, impose an undue financial burden upon NPPD. Particularly, there is substantial evidence in support of the PUC's findings that H-frame towers, as compared to NPPD's reduced leg-spread lattice towers, will minimize farming inconvenience, visual impacts, and the number of cropland acres removed from production. In the absence of reversible error here, the PUC Order is affirmed in these respects.

TOPSOIL REMOVAL AND STOCKPILING REQUIREMENT

The PUC further ordered NPPD to remove, stockpile, and later replace topsoil along the 30-foot construction path within the Mandan facility right-of-way. Under this requirement,

affected landowners will receive written notice of specific landowner options for topsoil separation and stockpiling. If they desire, landowners may require that NPPD employ other enumerated topsoil preservation procedures on their land. If, however, a landowner does not respond within ten days after he has been presented the option form, the PUC topsoil removal and stockpiling requirement will become effective automatically. PUC Order, FF#27, 29, pp. 13-14.

Throughout the evidentiary hearing and in its briefs before this Court, NPPD has proceeded on the theory that subsoiler usage, followed by intensive soil tillage, would alleviate any soil compaction resulting from construction of the proposed Mandan line. According to NPPD, this would fully mitigate those soil compaction threats to future soil productivity cited by the Environmental Impact Statement. Not only will the PUC requirement create a potential added expense of approximately $4 million, so argues NPPD, but the record in fact warrants the conclusion that the topsoil removal and stockpiling provision will have detrimental, not beneficial, effects on the affected lands.

To illustrate, NPPD's brief suggests that the PUC findings here lack factual support, particularly in view of the testimony of PUC Staff witnesses Burggraf and Fly. At one point in his testimony, Dr. Fly stated that many affected lands within the Mandan right-of-way could be adequately protected by other measures less extensive than topsoil removal and stockpiling. Mr. Burggraf presented, and the PUC received, photographs of a tower foundation construction in New York and a water pipeline in the Yankton, South

Dakota area. As to these, NPPD asserts that the photographs lack relevance to the Mandan project and depict atypically bad construction practices.

In comparison, NPPD relies on the testimony of Dr. Luebs. Succinctly stated, Dr. Luebs concluded that topsoil removal and stockpiling does not alleviate soil compaction but in fact creates a new host of problems. Among the most serious problems cited by Dr. Luebs were permanent topsoil damage from the unavoidable mingling of topsoil and subsoil, erosion of stockpiled topsoil, compaction of exposed subsoils, subsoil damage from poor drainage in trenched areas, and greater possibilities for reduced crop yields. NPPD further urges this Court to reverse the PUC Order here because it enables affected landowners to invoke other specified alternative conservation procedures for use on their land in lieu of the topsoil removal and stockpiling requirement and thus constitutes an unlawful delegation of statutory authority in violation of SDCL 49-1-17.

Undoubtedly, the topsoil removal and stockpiling requirement imposes a significant financial burden upon NPPD. Again, however, it is this Court's opinion that the PUC Order here is supported by substantial evidence and must be accorded "great weight" under the criteria of SDCL 1-26-36.

Despite objections voiced by NPPD against the photographic evidence presented by Mr. Burggraf, his testimony clearly pointed out the nature and magnitude of the soil compaction problems posed by the Mandan project. Similarly, he provided an articulate description of the many construction activities that would cause

soil compaction - the usage of different types of construction equipment and their effects on wet and dry soils, tensioner compaction, and dynamic compaction. In addition, Dr. Fly's testimony established that soil compaction, whether it occurs on croplands or rangelands, impairs the normal restoration and growth of plantlife on compacted soils for many years. NPPD's fears that the present requirement will cause permanent subsoil compaction are dispelled by a proviso in the PUC Order that requires tillage of exposed subsoil to a depth of 20 inches prior to replacement of the stockpiled topsoil. PUC Order, FF#27, p. 13.

If, as NPPD claims, certain lands within the path of the Mandan right-of-way can be adequately protected by measures less extensive than topsoil removal and stockpiling, affected landowners can, if they wish, exercise their options and designate the use of a specified alternative procedure for topsoil preservation on their lands. Even assuming that an affected landowner takes no action within the 10-day period, the PUC Order ensures that lands within the Mandan right-of-way will receive adequate protection from soil compaction. The PUC requirement here enables each affected landowner - who must bear the direct burden of construction activities on his land - to take measures that will most fully protect his land. For these reasons, the PUC's findings on this issue are affirmed.

PRESENTATION OF SUMMARY OF APPLICABLE LAWS AND RULES TO PUC AND CONTRACTORS

The PUC ordered NPPD to compile, update, and summarize those South Dakota laws and rules applicable to the proposed Mandan

facility and to provide summaries thereof to the PUC prior to awarding any construction contracts. NPPD must also provide a summary of all applicable laws and rules to each contractor hired to work on the South Dakota portion of the project. PUC Order, FF #14, p. 8. Additionally, NPPD is directed to produce and deliver to the PUC copies of all governmental permits requisite to construction of the proposed Mandan facility. Id., FF #15, p. 8.

The PUC has premised these requirements upon the statutory language of SDCL 49-41B-22(1) which in pertinent part reads:

> The applicant has the burden of proof to establish that:
> (1) The proposed facility will comply with all applicable laws and rules . . .

The PUC requirements here misinterpret SDCL 49-41B-22(1) and bear no relationship to NPPD's burden of proving that the proposed Mandan line will comply with all applicable laws and rules. Therefore, the PUC action here was arbitrary, capricious, and a clearly unwarranted exercise of discretion.

The record is replete with testimony wherein NPPD has committed itself to complying with all applicable laws and rules, both in statements of general commitment and in statements that address specific subjects of applicable laws. This Court agrees with NPPD's assertion that these terms and conditions would result in an enormous waste of time, money, and effort. Not only is NPPD forced to make speculative and abstract determinations as to what laws and rules may or may not be applicable to the proposed

Mandan facility at some future point in time, but these terms and conditions have no relevance to NPPD's burden of proof here. The testimony of NPPD witnesses, and not the mere compilation of applicable laws, rules, and governmental permits, is probative of NPPD's commitment to comply with all applicable laws and rules. Having met its burden of proof, this Court must hold in NPPD's favor and reverse the PUC Order in these respects.

PUC DELEGATION OF 24-HOUR STOP-WORK AUTHORITY TO INDEPENDENT INSPECTOR

The PUC Order authorizes an independent inspector to enforce the specific terms and conditions of construction imposed by the PUC. The PUC Order, FF #109, p. 38, in salient part, states that the PUC

> . . . deems it necessary to employ at least one independent state field inspector having environmental or engineering background and possessing 24-hour independent stop work authority to enforce any terms and conditions of the permit in accordance with SDCL 49-41B-33(2).

The PUC Staff relies upon SDCL 49-41B-33(2) and 49-1-8.2[7] in support of the PUC decision to confer 24-hour stop work authority via the employment or direction of an independent inspector by the PUC executive secretary. In pertinent part, SDCL 49-41B-33 reads as follows:

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[7]SDCL 49-1-8.2 in salient part provides: "The executive secretary shall carry out those functions that have been delegated to him by the commission or any of its members."

> A permit may be revoked or suspended by the Commission for:
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> (2) Failure to comply with the terms and conditions of the permit . . . (emphasis added).

There is nothing in SDCL Chapter 49-41B, however, that expressly empowers the PUC, let alone the PUC executive secretary, to delegate 24-hour stop work authority. SDCL 49-1-17 controls here and as quoted below states:

> It shall be unlawful for the public utilities commission to delegate any of the powers conferred upon it, or the performance of the duties imposed upon it by law, to any other person except in cases where express authority has been given by statute. (emphasis added).

Here, there is no express statutory authorization for the PUC delegation of 24-hour stop work authority to an independent inspector via the PUC executive secretary, or for that matter, to any other person or entity. Further, even if the PUC had possessed the statutory authority to delegate these powers, the delegation of authority here still would have been fatally defective for failure to articulate criteria to guide the independent field inspector in the exercise of his discretion. Otherwise, the PUC delegation would have been tantamount to a conferral of "blank check" powers upon the independent field inspector without guidance as to what particular infractions would constitute grounds for halting construction work.

Accordingly, the PUC Order must be reversed on this issue.

43-FOOT CONDUCTOR CLEARANCE REQUIREMENT FOR MAJOR ROAD CROSSINGS

The PUC found that an induced current level for no greater than 5.0 millamperes for vehicles in the vicinity of the proposed Mandan facility would adequately protect the general public health and safety.[8] PUC Order, FF #133, p. 45. The PUC further found that if a 65-foot tractor-trailer truck were operated perpendicular to the proposed Mandan line, a 40-foot conductor height would satisfy the 5.0 milliampere induced current level requirement. Id. FF #130, p.44. However, the PUC Order postulated that if a 65-foot tractor-trailer turned onto a "major road crossing"[9] in the vicinity of the line and was positioned parallel thereto, a conductor clearance of 43 feet would be needed to meet the 5.0 milliampere limit. Id.

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[8]The PUC adopted the 5.0 milliampere standard of the National Electrical Safety Code, Rule 232 B-1c.

[9]The PUC Order, FF#130, p. 44 defined "major road crossings" as roads with sufficient width or load limits to accomodate 65-foot tractor-trailer trucks.

Mr. Dietrich's testimony supports the PUC finding that a 43-foot conductor clearance is necessary to comport with a maximum 5.0 milliampere induced current level if a 65-foot tractor-trailer truck is positioned or operated parallel to the proposed Mandan line. More importantly, though, there is in fact no evidence in the record that shows any location along the proposed Mandan route where a 65-foot tractor-trailer truck could be positioned or operated parallel to the transmission line. Rather, Mr. Dietrich admitted in his testimony that his 43-foot conductor clearance recommendation is predicated on an "unlikely or worst case event." NPPD witness Mr. Flugum acknowledged that NPPD will reposition the Mandan transmission towers so as to achieve the requisite 5.0 milliampere safety level at any location along the proposed Mandan route where NPPD could reasonably contemplate that a 65-foot tractor-trailer truck could be positioned or operated parallel thereto. Therefore, the PUC's 43-foot conductor clearance requirement is clearly erroneous, arbitrary and capricious, an abuse of discretion, and must be reversed.

GROUNDING REQUIREMENT FOR INSTALLED IRRIGATION SYSTEMS

NPPD does not challenge the PUC Order insofar as it directs NPPD to "work with landowners to make appropriate design modification of installed irrigation systems . . . ." However, NPPD objects to a further term and condition of the PUC Order that

directs NPPD "to provide proper grounding for installed irrigation systems." PUC Order, FF #132, p.45.

According to the record, NPPD remains voluntarily committed to evaluating each irrigation system near the proposed Mandan line and making recommendation to landowners on grounding, on necessary adjustments to the irrigation systems, and on proper safety precautions. The evidence in the record, according to NPPD, does not support the PUC's finding that NPPD, as compared to landowners, must provide proper grounding here to adequately protect the public health, safety, and welfare. Consequently, NPPD urges this Court to rephrase and clarify the language of the PUC finding, particularly in view of language in the PUC Brief, pp. 67-68, that NPPD must merely "'work with the landowners to' provide for the proper grounding of installed irrigation systems."

This Court agrees with NPPD and must hold that the PUC Order grounding requirement is clearly erroneous, arbitrary and capricious, and an unwarranted exercise of discretion. Under these circumstances, NPPD and/or the PUC cannot ground landowners' irrigation systems; neither can the PUC or NPPD require landowners to ground their private property, i.e., irrigation systems, according to PUC dictates. For these reasons, this matter is remanded to the PUC with the direction that it modify the final clause of PUC Order, FF #132, p. 45, to be consistent with this decision.

III.

PUC AUTHORITY TO GRANT GENERAL VARIANCE

The PUC denied NPPD's request for a general variance by the following excerpt from its decision and order:

> The South Dakota Public Utilities Commission has no authority to grant the requested general variance of 120 feet on either side of the proposed centerline. The grant of such a variance would violate the Commission's route specific requirements, would deny parties to the proceeding an opportunity to meaningfully assess the proposed route, and would place the Commission in the potential dilemma of granting a permit that was not route specific in violation of its rules and precedents, or, in the alternative, would force the Commission to effectively route within the variance, in violation of SDCL 49-41B-36. PUC Order, CL #4, p.99.

In NPPD's view, the PUC Order misinterprets SDCL 49-41B-36,[10] particularly when SDCL 49-41B-11(2) requires permit applicants to provide an adequate "description of the nature and location of the facility." NPPD justifies its general variance request for two reasons. First, NPPD argues that the general variance would be used only if unforeseen construction problems were encountered or if reasonable landowner requests warrant relocation of transmission towers. Second, the relocation of transmission

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[10] SDCL 49-41B-36 provides: "This chapter shall not be construed as a delegation to the commission of the authority to route a transmission facility. . . ."

towers within 120 feet on either side of the Mandan centerline, does not, according to NPPD, enable either NPPD or the PUC to "reroute" a transmission facility. From an evidentiary standpoint, NPPD submits that the record fully supports NPPD's general variance request insofar as this has been endorsed in concept by landowners, NPPD's witnesses, and PUC Staff witness Bettman. PUC Order, FF #163, p. 60.

Clearly, SDCL 49-41B-36 and 49-41B-11(2) authorize the permit applicant, not the PUC, to designate the proposed transmission facility route.SDCL 49-41B-20 empowers the PUC to approve or disapprove the permit application, including the proposed route, and if disapproved, the applicant may revise the proposed transmission route and may seek approval thereof in a subsequent permit application. SDCL 49-41B-22.1,-22.2.

These statutes, therefore, necessarily lead to the conclusion that the permit applicant is expressly authorized to present and recommend the proposed transmission facility route. Admittedly, SDCL 49-41B-11(2) merely states that the permit applicant must describe "the nature and location of the facility." It is this Court's opinion, however, that a fair construction of SDCL 49-41B-11(2) necessarily leads to the conclusion that this statute implicitly authorizes a permit applicant to obtain, upon a proper evidentiary showing, a general variance from the centerline of a proposed transmission facility.

Moreover, the PUC's posture on this issue is clearly inconsistent with its decision and order in In re Northern States Power Co., Docket No. F-3343 (April 13, 1980). There, when confronted

with the very same issue, the PUC expressly approved the general variance concept. In that case, the PUC Order stated that the applicant could "request any reasonable variances or modifications it deems appropriate . . ." in its transmission facility permit application. Id. at pp. 2-3.

Accordingly, it is this Court's opinion that the PUC erred as a matter of law in concluding that it lacked the legal authority to grant the requested general variance, and therefore its decision must be reversed. On remand, the PUC shall grant NPPD the requested general variance if the evidence in the record warrants this finding.

PUC AUTHORITY TO PREEMPT OR SUPERSEDE LOCAL LAND USE REGULATIONS

The PUC Order, CL #6, p. 100, provided the following rationale for the PUC decision not to preemptor supersede local land use regulations:

> The Commission declines to make a determination as to the effect of its decision on the Day, Hanson and Clark Counties "MANDAN" Ordinances (NPPD Exhibits 19A, 19B and 19C), on the grounds that such a legal determination is beyond the authority of this Commission. Application of City of Schuyler, 181 Neb. 704, 150 N.W. 2d 588 (1967). Likewise, the Commission declines to make a legal determination of the effect of its decision in preempting or superseding county or municipal rules, regulations, resolutions, or ordinances now existing or hereafter enacted that are inconsistent with the Commission's decision in this proceeding. (emphasis added).

NPPD challenges the PUC's legal conclusion and contends that the PUC has express statutory authority to preempt or supersede local land use regulations upon a proper finding that such regulations are "unreasonably restrictive." SDCL 49-41B-28.[11] In addition, NPPD points to the record testimony of NPPD witnesses and PUC Staff witness Mr. Burggraf in support of its position that the evidence clearly weighs in favor of PUC preemption and supersession of local land use regulations. NPPD further claims that the PUC has conceded the issue here, particularly because the PUC Brief, pp. 70-71, states that "the statute in question (SDCL 49-41B-28) is permissive and its application is within the discretion of the Commission."

This Court concludes that the word "may" in SDCL 49-41B-28 does not direct or mandate the PUC to preempt or supersede local land use regulations. Rather, the word "may" is permissive and empowers the PUC to exercise its discretion and decide whether or

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[11] SDCL 49-41B-28: "A permit for the construction of a transmission facility within a designated area may supersede or pre-empt any county or municipal land use, zoning, or building rules, regulations, or ordinances upon a finding by the commission that such rules, or regulation, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost, or economics, or needs of parties where located in or out of the county or municipality. Without such a finding by the commission, no route shall be designated which violates local land-use zoning, or building rules, or regulations, or ordinances." (emphasis added).

not it will preempt and supersede local land use regulations, assuming, of course, the PUC has found that the local land use regulations are "unreasonably restrictive."

Therefore, the PUC erred as a matter of law in concluding that it did not possess this statutory authority. Likewise, the PUC's refusal to exercise its statutory discretion was arbitrary and capricious and an abuse of discretion. Accordingly, the PUC Order here is reversed. On remand, the PUC shall exercise its statutory discretion under SDCL 49-41B-28 and shall decide, assuming it has made a proper finding, whether it will preempt or supersede the local land use regulations.

IV.

APPLICANT DEPOSIT UNDER SDCL 49-41B-12

NPPD also appeals from the decision of the PUC dated March 5, 1982, Order Denying Request for Refunds And Denying Application For Rehearing, wherein the PUC upheld its earlier Order For Further Deposit, dated December 28, 1981 and required NPPD to deposit an additional $55,963.50.

The central issue here is whether the term "construction costs" in SDCL 49-41B-12 necessarily includes finance and interest costs, land acquisition costs, administrative and general overhead costs, and engineering costs. While SDCL Chapter 49-41B does not define the term "construction costs" as used in SDCL 49-41-12, the term "construction" is defined in SDCL 49-41B-2(3):

> "Construction," any clearing of land, excavation, or other action that would affect the environment of the site for each land or rights of way upon or over which a facility may be constructed, but not including activities incident to preliminary engineering or environmental studies.

This Court is persuaded by NPPD's arguments that the phrase ". . . or other action that would affect the environment of the site . . ." in 49-41B-2(3) requires a narrow interpretation, particularly when that clause is preceded by the words "clearing of land" and "excavation" and is read in this context. It is this Court's opinion that the term "construction costs" in SDCL 49-41B-12 does not embrace finance and interest costs, land acquisition costs, administrative and general overhead costs, and preliminary engineering costs. Therefore, the PUC erred as a matter of law, acted in an arbitrary and capricious manner, and abused its discretion in requiring NPPD to deposit an additional $55,963.50. For these reasons, the PUC is directed to return this sum, plus interest at the judgment rate.

Counsel for NPPD is directed to prepare an order consistent with this opinion.

Dated this 30th day of September, 1982.

BY THE COURT:

Robert A. Miller
Presiding Circuit Judge

ATTEST:

Clerk of Courts

(SEAL)