

November 12, 2009

The Public Service Commission convened in the Commission Hearing Room, State Capitol, Bismarck, North Dakota, on November 12, 2009, 10:00 a.m. Present were Commissioners Cramer, Clark and Kalk.

Minutes

Mr. Clark: I move the minutes of October 28, 2009 be approved.

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Bills

Mr. Clark: I move the following bills, as reviewed by the Commission, be approved and paid:

Hewlett-Packard Company	1,321.00
Spherion Corporation	592.00
ND Newspaper Association	785.70
Dakota Sound Systems, Inc.	2,100.00
Leo D. Praus	174.13
Wayne Grangaard	513.31
Phyllis G. Richter	824.43
JP Robbins	720.68
Patrick Fahn	7.50
Timothy Erdmann	624.36
Tim Oswald	1,184.00
Raymond Kelsch	631.78
Bruce Beechie	124.93
Guy Welch	15.00
Stephan A. Schroeder	443.79
Bruce Johnson	97.73
William E. Dodd	90.00
Mark Knell	579.66
Dean K. Moos	1,028.78
Dakota Sound Systems, Inc.	2,250.00
ND State Board of Law Examiners	780.00
AVI Systems, inc.	4,885.00
Executive Air Taxi Corporation	2,077.33
Illona Jeffcoat-Sacco	2,015.67
Presort Plus	26.25
DOT	12,387.35
ITD – 10/09 phone	1,532.63
OMB – 10-09 postage	778.77
ITD – 10/09 microfilm	299.65
ITD – 10/09 dp	4,323.91
ND Geological Survey	1,492.78
HRMS – training	105.00
OMB – 10/09 supplies	208.10

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Blaster Re-Certification
Approval

Mr. Clark: I move the Commission approve blaster re-certification for the following applicants:

No.	Applicant	Affiliation	Certificate No.
1.	Brenden Brinkman	Falkirk Mine	06-04-282 R(1)
2.	Wayne Hoger	Beulah Mine	03-11-266 R(2)
3.	Rachel Hushka	Beulah Mine	03-11-265 R(2)

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Case No. RC-09-543
Reclamation
Rulemaking

Mr. Clark: I move the Commission submit the mining and reclamation rule changes proposed in Case No. RC-09-543 and the 2009 reclamation law change to the Office of Surface Mining as State Program Amendment XXXVIII.

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Case No. AM-09-582
AML Maintenance
2009 Construction
Project

Mr. Clark: I move the Commission close-out Contract No. AM-582-09 with Fugro Horizon, Inc. for completion of aerial photography and topographic mapping at the Buechler/Velva Abandoned Mine Lands site in Ward County.

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-09-703
MGI Grain Processing, LLC
Roving Grain Buyer –
East Grand Forks, MN
License Application

Mr. Clark: I move the Commission approve the roving grain buyer license application in Case No. GE-09-703 for MGI Grain Processing, LLC, East Grand Forks, Minnesota.

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-09-704
Koppinger Trucking LLC
Roving Grain Buyer - Dickinson, ND
Discontinue Business

Mr. Clark: I move the Commission issue an order in Case No. GE-09-704 cancelling roving grain buyer license number 3060 issued to Koppinger Trucking, LLC and ordering that all North Dakota roving grain buyer activities be discontinued effective November 5, 2009.

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Case No. AU-09-706
Eddie Haynes
Auctioneer License
Revocation

Mr. Clark: I move the Commission issue an order in Case No. AU-09-706 revoking auctioneer license number 802 issued to Eddie Haynes of Yukon, Oklahoma effective November 1, 2009, for failing to maintain an adequate bond filing.

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-09-230
Otter Tail Corporation
Sewer Lift Station - Bottineau, ND
Public Convenience & Necessity

Mr. Clark: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Otter Tail Power Company, formerly known as Otter Tail Corporation, to extend electric service to the City of Bottineau's Sewer Lift Station at a location in Bottineau County, North Dakota, Case No. PU-09-230.

Mr. Kalk: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-09-608
Montana-Dakota Utilities Co.,
a Division of MDU
EOG Resources Oil Well - Ross, ND
Public Convenience & Necessity

Mr. Clark: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Montana-Dakota Utilities Co., a Division of MDU Resources, Inc., to extend electric service to EOG Resources Oil Well Ross 10-18H at a location in Mountrail County, North Dakota, Case No. PU-09-608.

Mr. Kalk: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-09-618
Otter Tail Corporation
Chad Weckerly - Hurdsfield, ND
Public Convenience & Necessity

Mr. Clark: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Otter Tail Power Company, formerly known as Otter Tail Corporation, to extend electric service to Chad Weckerly at a location in Wells County, North Dakota, Case No. PU-09-618.

Mr. Kalk: I second the motion.
Roll Call: All voting "Aye."

Case No. RC-09-316
Falkirk Mining Company
Notice of Violation No. 0903
Violation

Mr. Cramer: I move the Commission adopt the Findings of Fact, Conclusions of Law and Order vacating Notice of Violation 0903 in all respects, Case No. RC-09-316.

Mr. Kalk: I second the motion.
Motion to accept substituted motion.
Roll Call: Mr. Cramer votes "Aye".
Mr. Clark votes "Nay".
Mr. Kalk votes "Aye".

Substitute Motion:

Mr. Clark: I move the Commission adopt the Findings of Fact, Conclusions of Law and Order affirming Notice of Violation 0903 and reducing the proposed penalty to \$0, Case No. RC-09-316.

Mr. Cramer: I second the motion.
Roll Call: Mr. Cramer votes "Nay".
Mr. Clark votes "Aye".
Mr. Kalk votes "Nay".

Commissioner Cramer Concurring
Opinion

I believe the evidence supports a conclusion good cause exists to vacate NOV 0903.

The checks and balances of a three member commission which both oversees the division charged with enforcing reclamation laws and hears appeals by affected parties implies more discretion for the elected PSC than for the bureaucracy.

“Good cause” is not defined in code and lacks clear definition even in law dictionaries. It is a term intended to provide discretion to decision makers as they consider all of the evidence and testimony and is dependent on the circumstances of a particular situation and each individual case.

The circumstances in this case which support a “good cause” finding are several; The mistake which led to the violation was self-discovered, self-reported and self-remediated. The mistake was discovered within hours of scrapers entering the affected area and reported the same day to Reclamation inspectors and administration. The mistake occurred because the affected area was one of two similar in nature. The other had received the permit revision allowing topsoil removal to begin while approval of the permit for the affected area was only pending. As it turned out, approval of the revision was imminent as less than one month later the PSC granted the revision.

While considering whether “good cause” exists to vacate the NOV, I contemplated whether there is “insufficient cause” for issuing the NOV in the first place. I have no quarrel with members of the Reclamation staff issuing the NOV as they simply carried out their duties as prescribed in code and by policy.

By choosing to carry out *the letter of the law*, however, I believe we would be violating the *spirit of the law*. While the various state and federal laws and rules with all of their penalties and consequences are designed to keep industry in check, good reclamation requires a commitment by all stakeholders to environmental protection. If self-reporting an honest and de minimis violation results in penal action by the PSC, we risk compromising the open and transparent relationship between regulators and industry that protects our citizens and land so well.

Commissioner Clark Dissenting
Opinion

There is little disagreement about the facts of this case. By just about any standard, Falkirk's violation was a minor one, but nonetheless it clearly was a violation. The staff contends it was a violation. The facts support the fact it was a violation. The company even admits it was a violation.

What Falkirk asks the Commission to do in this case is to use our discretion under the rules to say that because this was a minor violation, quickly caught and quickly mitigated, good cause exists to declare there was no violation at all. I do not read the term "good cause" as used in our rules that broadly.

In my opinion, good cause for vacating an order may exist when there are things like uncontrollable circumstances, acts of god, a grey area in the interpretation of the rules, or other outside events that might make for a technical violation of the rule, but one in which no reasonable person could suggest it was within the control of the mining company to prevent it.

But that is not the case here. It was miscommunication within the company that caused the violation. It was not gross negligence and it was not malicious, but it was a clear violation caused by a misunderstanding between the company's field operators and their supervisors.

Rather than having the Commission endorse the standard that a "violation is not a violation when we think it is minor," I would offer that the proper place to adjust for matters like seriousness and company remediation is in the penalty phase of the Commission's decision making process. This is why I have proposed an order to affirm the violation, yet would forbear from levying a fine, given the nature of the infraction and the good faith measures taken by the company to self-report and mitigate it. Therefore, I respectfully dissent.

Case No. PU-09-692
Basin Electric Power Coop/
PrairieWinds ND1 Inc.
Transfer of Site Certificate
Siting Application

Mr. Clark: I move the Commission issue a Notice of Opportunity for Hearing in the joint application of Basin Electric Power Cooperative, Inc, and PrairieWinds ND1, Inc. to transfer Certificate of Site Compatibility for Energy Conversion Facility No. 14 from Basin Electric Power Cooperative, Inc. to PrairieWinds ND1, Inc., Case No. PU-09-692.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. GE-09-705
Koppinger Trucking, LLC
Grain Warehouse - Dickinson, ND
License Application

Mr. Clark: I move the Commission issue an order in Case No. GE-09-705 granting the request of Koppinger Trucking, LLC to operate a 72,000-bushel grain warehouse at Dickinson, North Dakota, effective November 5, 2009.

Mr. Kalk: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-09-697
Montana-Dakota Utilities Co.,
a Division of MDU
Optional Time of Day Services
Tariff

Mr. Kalk: I move the Commission approve tariff revisions filed by Montana-Dakota Utilities Co. to accommodate the extension of Daylight Savings Time under Section 110 of the federal Energy Policy Act of 2005, Case No. PU-09-697.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-09-629
2009 - 2012 ARRA Grant
Application

Mr. Cramer: I move the Commission submit a request to the Emergency Commission to increase federal spending authority by \$766,350 in order to expend federal grant funds awarded to the Commission through the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

ATTEST

THE COMMISSION ADJOURNED AT 11:21 A.M.

Executive Secretary

KEVIN CRAMER, CHAIRMAN