

FAX COVER SHEET

RECEIVED

FAX TO:

William W. Binck
Public Service Commission
328-2410

MAY 09 2008

PUBLIC SERVICE COMMISSION

MESSAGE: Order Denying Intervention

Minnkota Power Cooperative, Inc.
Pillsbury-Fargo 230 kV Transmission Line Siting Application
Case No. PU-08-48

FAX FROM:

Allen C. Hoberg
Office of Administrative Hearings
1707 North 9th Street
Bismarck, ND 58501-1882
Telephone Number: (701) 328-3260
Fax Number: (701) 328-3254

NUMBER OF PAGES SENT INCLUDING COVER SHEET: 5

DATE SENT: May 9, 2008

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL:

Liz
(701) 328-3260

29 **PU-08-48** Filed: 5/9/2005 Pages: 5
Order Denying Intervention

ALJ
Allen Hoberg, OAH

The information contained in this facsimile message may be privileged and confidential. It is intended only for the use of the individual or entity to whom it is sent. If you are not the intended recipient of this facsimile message and have received this transmittal by mistake, please do not distribute or copy the communication. Instead, we would appreciate it if you would notify the Office of Administrative Hearings immediately by telephone. Thank you for your cooperation.

RECEIVED

MAY 09 2008

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

PUBLIC SERVICE COMMISSION

**Minnkota Power Cooperative, Inc.
Pillsbury-Fargo 230 kV Transmission Line
Siting Application**

**Case No. PU-08-48
OAH File No. 20080082**

ORDER DENYING INTERVENTION**May 9, 2008**

On March 18, 2008, Otter Tail Power Company ("Otter Tail") and planned joint partner Minnkota Power Cooperative, Inc. ("Minnkota") filed a joint application for a waiver of procedure and time schedules, and consolidated application for a certificate of corridor compatibility and a route permit ("Application") authorizing construction of an electric transmission line located in Cass, Barnes, and possibly Steele Counties of North Dakota, Case No. PU-08-48. On April 17, 2008, Minnkota, with the concurrence of Otter Tail, filed an Amendment to the Application. (The Application with the Amendment will continue to be referred to as the "Application.") On April 9, 2008, RES America, Inc. ("RES America") and PEAK Wind Development LLC ("PEAK Wind") filed a petition to intervene. *See* April 23, 2008, Order Denying Intervention for additional detail on the application, the amendment, and the initial petition to intervene of RES America and PEAK Wind; *see also* Minnkota's April 18, 2008, objection, its "Motion to Dismiss Petition for Intervention . . . or in the Alternative, Motion for Expedited Hearing and Request for Expedited Prehearing Conference." The Commission denied the initial petition to intervene.

On May 5, 2008, RES America, PEAK Wind, and Burchill Farms Incorporated ("Burchill Farms") (together referred to as the "Petitioners") filed a "Petition . . . to Intervene and Requests for Shortened Notice and Response Periods, Expedited Consideration, and Expedited Discovery." On May 8, 2008, Minnkota filed another objection to this second petition to intervene. The hearing officer has considered those filings and believes the Petitioners do not have a sufficient legal interest to require intervention in this adjudicative proceeding and neither do the interests of justice require intervention, even on a limited basis. However, the Commission's rules do allow the Petitioners to individually or collectively present evidence at the hearing as a protestant of the Application, at which time they may present relevant testimony or other evidence.

N.D.C.C. § 28-32-28 states, in part, as follows:

28-32-28. Intervention. An administrative agency may grant intervention in an adjudicative proceeding to promote the interests of justice if intervention will not impair the orderly and prompt conduct of the proceeding and if the petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges,

immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of statute or rule. The agency may impose conditions and limitations upon intervention. . . .

N.D. Admin. Code § 69-02-02-05 states, in part, as follows:

69-02-02-05. Intervention. Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding. The commission may impose conditions and limitations on an intervention to promote the interests of justice.

4. **Effect.** Admission as an intervenor shall not be construed as recognition by the commission that such intervenor might be aggrieved by an order of the commission in such proceeding.

See Shark v. US WEST, 545 N.W.2d 194 (N.D. 1996).

N.D.C.C. chapter 49-22 is the Energy Conversion and Transmission Facility Siting Act. It requires hearings on applications such as Minnkota's Application in this proceeding. *See* N.D.C.C. § 49-22-13. N.D.C.C. § 49-22-13 states, in part, as follows:

49-22-13. Public hearings - Notice.

1. . . . At the public hearing, any person may present testimony or evidence relating to the information provided in the application, the criteria developed pursuant to section 49-22-05.1, and the factors to be considered pursuant to section 49-22-09.

N.D. Admin. Code § 69-02-01-07 allows for several types of "**Parties**" in Commission proceedings, including an "**Applicant**," an "**Intervenor**," and a "**Protestant**." N.D. Admin. Code § 69-02-01-07(2), (5), and (6). (Emphasis in original.) An Intervenor is someone or some entity accorded special party status. N.D. Admin. Code § 69-02-01-07(5); *see* N.D. Admin. Code § 69-02-02-05. Generally, an intervenor is an interested party who actively and openly participates in the control and conduct of the proceeding, *i.e.*, by offering evidence, questioning witnesses, and making closing argument, although even an intervenor's participation can be limited and conditioned. *See* N.D. Admin. Code § 69-02-02-05.

The hearing officer can find no statutory or regulatory right of the Petitioners to intervene in this matter. It appears, then, that a decision on a grant of intervention must consider whether the Petitioners have a legal interest that arises to a substantial interest to the extent that, in the interests of justice, intervention should be granted. But, also, the hearing officer must consider whether a grant of intervention would unduly broaden the issues or delay the proceeding. In other words, even if there is a legal interest that arises to a substantial interest that should be recognized that would otherwise allow for intervention, granting intervention could unduly broaden the issues and, in this proceeding, it could easily delay the proceedings. *See Shark v. Northern States Power Co.*, 477 N.W.2d 251 (N.D. 1991), where after a grant of intervention, refusing to allow the intervenor time to prepare was grounds for a reversal and a remand to the agency.

The Petitioners continue to raise issues that are not relevant to this proceeding, e.g., the issue regarding the ten-year plan. But, more importantly, although Petitioners state that their intervention will not delay the proceeding, in their initial petition the Petitioners asked for 60 days for discovery, and in this petition the Petitioners ask the hearing officer to schedule a conference to provide for a discovery schedule. At a conference, once intervention is granted, the Petitioners could ask for expedited discovery or they could again request a longer discovery period. Timing, with any kind of discovery, considering a hearing scheduled for May 22, is problematic.

RES America has less of an interest in this matter than either Burchill Farms or PEAK Wind. But, the hearing officer does not believe that any of the three Petitioners have legal rights, duties, privileges, immunities, or other legal interests that may be substantially affected by the Application, such that they should be granted intervention.

RES America is a Colorado corporation that, as far as can be determined from the pleadings to date, is jointly with PEAK Wind only in the process of developing a wind generation project to be located on property owned by PEAK Wind members. RES America's interests appear to be no more than any other utility with plans still in the developmental stages. To the extent it may have interests, its interests can likely be adequately addressed as a protestant without being granted intervention. *See* N.D.C.C. § 49-22-13(1); N.D. Admin. Code § 69-02-01-07.

Burchill Farms, in its petition, said that it owns property located within the corridor and on the proposed route of Minnkota's proposed transmission line. But, Minnkota says otherwise and provided documentation to show that in its objection. Minnkota says that it will present a "minimally changed route for the PSC's consideration at the public hearing on May 22, 2008," because it "was unable to negotiate an option . . . with Burchill Farms." Minnkota's May 8, 2008, objection at 3. Minnkota has entered into an option, dated April 30, 2008, with a landowner "that owns the land across the road from Burchill Farms . . . the south side of the road . . . as opposed to the north side of the road in the Burchill Farms property." *Id.* Burchill Farms is one of the landowner members of PEAK Wind. Apparently, this new landowner is not a member of PEAK Wind. PEAK Wind is a North Dakota limited liability company with landowner members in Barnes County. Many of PEAK Wind's members are customers of Minnkota. To the extent Burchill Farms and PEAK Wind may have interests in this proceeding,

their interests, too, can likely be adequately addressed as a protestant without being granted intervention.

To the extent they may have a legal interest, the legal interests of the Petitioners must be founded in N.D.C.C. chapter 49-22 and N.D. Admin. Code Article 69-06. *See especially* N.D.C.C. § 49-22-09 and N.D. Admin. Code § 69-06-08-02. But, the Petitioners say that they "are not generally opposed to the construction of transmission lines [in the area]," and it is still clear that their principal concern is whether, upon interconnection, the proposed transmission line will be constructed with sufficient capacity for the energy generated from the area including the wind generation project being developed by PEAK Wind and RES America. Petitioners' May 5, 2008, petition at 13. Primarily, this petition for intervention, too, appears to present another version of the principal concern in the initial petition. Petitioners do note that additional construction of transmission lines, if necessary, will cause unnecessary environmental impact, and that is a valid concern for the Commission in this proceeding. Most of the rest of the Petitioners' argument in their May 5 petition deals with arguments for denying the Application not with the right to intervene.

In other words, although Burchill Farms and PEAK Wind originally did have land affected by the Application and, arguably, a legal interest in this proceeding, that was not present in their initial petition, it was no longer the situation as of April 30, 2008, before the Petitioners filed their petition to intervene.

The Petitioners do not have a substantial legal interest that requires intervention. Moreover, if intervention is granted, the Petitioners appear to want to broaden the issues and there is a real possibility of delay. Regarding the Petitioners' principal concern, the Commission has already ruled denying intervention. This second attempt at intervention should also be denied. The Petitioners' interests can be addressed as protestants.

The petition for intervention and the remaining associated requests are **denied**.

North Dakota Public Service Commission


Allen C. Hoberg
Administrative Law Judge
Hearing Officer