STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF BURLEIGH — SOUTHWEST JUDICIAL DISTRICT

RES Americas, Inc. PEAKWIND Development LLC, and Burchill Farms Incorporated ,
Appellants,

vs.

Public Service Commission and Minnkota Power Cooperative, Inc.,
Appellees.

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF MORTON)

MELISSA K SCHNEIDER, being first duly sworn, on oath, deposes and says: That she is a citizen of the United States, over the age of eighteen and not a party to the above-entitled action.

That on the 15 day of August, 2008, this affiant deposited in the United States Post Office at Mandan, North Dakota, a true and correct copy of the following document(s) in the above captioned action:

Brief of Appellants RES Americas, PEAK Wind, and Burchill Farms

That a copy of the above document(s) was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

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Melissa K Schneider
MELISSA K SCHNEIDER

Subscribed and sworn to before me this 15 day of August, 2008.

Lori Spencer
Notary Public, State of North Dakota

(SEAL)
LORI SPENCER
Notary Public
State of North Dakota
My Commission Expires April 18, 2012

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

RES Americas Inc., PEAK Wind Development LLC, and Burchill Farms Incorporated,	)	Civil No. 08-08-1474
Appellants,	)	BRIEF OF APPELLANTS RES AMERICAS, PEAK WIND AND BURCHILL FARMS
vs.	)	
Public Service Commission and Minnkota Power Cooperative, Inc.,	)	
Appellees.	)	

TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION AND MINNKOTA POWER COOPERATIVES, INC.

RES Americas Inc., PEAK Wind Development LLC, and Burchill Farms Incorporated ("Appellants") appeal from an agency determination of the North Dakota Public Service Commission ("Commission") denying intervention in an application for certificate of corridor, compatibility, and route permit (Application) filed by Minnkota Power Cooperative, Inc.

SUMMARY OF CASE

1. On February 5, 2008, Otter Tail Power Company and Minnkota Power Cooperative, Inc. filed a Letter of Intent to file an Application for the proposed construction of a high voltage transmission facility from Luverne to Maple River, North Dakota and for a waiver of the requirement that the Letter of Intent be filed one year before the filing of an Application (Document 1).

2. On February 13, 2008, the Commission shortened the one year waiting period between filing a Letter of Intent from the one year required in 69-06-03-01 N.D. Admin. Rules to one day (Document 7).

3. 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 ("Proposed Transmission Line"), Case No. PU-08-48. (Document 8)

4. On April 9, 2008, RES Americas Inc. ("RES Americas") and PEAK Wind Development LLC ("PEAK Wind") filed a petition to intervene. (Document 14)

5. On April 14, 2008, the Commission requested that the Office of Administrative Hearing appoint an Administrative Law Judge to act as a procedural hearing officer only, ("no recommended decision"). This request listed Otter Tail, Minnkota and Appellants RES Americas and PEAK Wind as parties. Administrative law judge Allen C. Hoberg was designated procedural hearing officer in this case. (Document 11 & 12)

6. On April 17, 2008, Minnkota, with the concurrence of Otter Tail, filed an Amendment to the Application purportedly removing Otter Tail as an owner of the project.

7. On April 18, Minnkota filed an objection to Appellants' petition to intervene. (Document 19)

8. On April 21, 2008, the Commission filed a Notice of Filing and Notice of Hearing Scheduling. In this Notice, the Commission determined that Minnkota's amended Application

was complete on the condition that a map showing proposed final transmission line structure location is filing on or before May 15, 2008. The Commission scheduled a public hearing for May 22, 2008 at 10:00 AM in Casselton, North Dakota. (Document 18)

9. On April 23, 2008, the Commission denied the Appellants' initial petition to intervene. (Document 21)

10. On May 5, 2008, in response to Minnkota's April 17 Amendment, RES Americas, PEAK Wind, and Burchill Farms Incorporated ("Burchill Farms") Appellants filed a "Petition... to Intervene and Request for Shortened Notice and Response Periods, Expedited Consideration, and Expedited Discovery" (the "Petition to Intervene"). (Document 26)

11 On May 8, 2008, Minnkota filed another objection to this second petition to intervene. (Document 27)

12. On May 9, 2008, without granting Appellants an opportunity to respond to Minnkota's objection to their Intervention and without the opportunity for a hearing, the procedural hearing officer issued an Order Denying Appellants Second Intervention. (Document 30) The hearing officer found that Appellants 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. The denial of Appellant Intervention was based on the rationale that to grant the intervention would unduly broaden the issues or unduly delay the proceeding. The hearing officer found that the Commission's rules allow the Appellants 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.

13. On June 9, 2008, Appellants filed a Notice of Appeal from the May 9, 2008 Order denying their second Intervention

1. Appellants Have Standing to Appeal Denial of Intervention

The Order Denying Appellants Intervention in the above action is an appealable Order under N.D.C.C. § 49-22-19 and N.D.C.C. § 28-32-42.

Appellants were not allowed to be parties to the action. The only review available to the Appellants is appeal from the Order Denying Intervention which is a final Order as to Appellants affecting their substantial rights.

In Application of Bank of Rhame, 231 N.W.2d 801, 808 (N.D.1975), this court articulated a three-part test for determining whether or not a person has standing to appeal from a decision of an administrative agency:

> "[A]ny person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a 'party' to any proceedings for the purposes of taking an appeal from the decision."

See also *Matter of Persons,* 311 N.W.2d 919 (N.D.1981); *O'Connor v. Northern States Power Co.,* 308 N.W.2d 365 (N.D.1981); *Reliance Ins. Co. v. Public Serv. Com'n,* 250 N.W.2d 918 (N.D.1977); *Citizens State Bank of Neche v. Bank of Hamilton,* 238 N.W.2d 655 (N.D.1976); *Bank of Hamilton v. State Banking Bd.,* 236 N.W.2d 921 (N.D.1975).

Appellants easily fulfill the requirements for standing. First, Appellants are directly interested in the proceedings before the Commission. Appellants are planning to construct a wind-powered electric generation facility on property directly adjacent to the proposed Minnkota-Otter Tail transmission line. Appellants have a significant legal and financial interest in the proposed line and are entitled to be a part of the administrative approval process with

respect to the line. Appellants timely sought intervention on two separate occasions. Even after Denial of Intervention, Appellants participated at the public hearing as a protestor.

The final requirement for standing-that is the party be factually aggrieved by the decision. In *Associated General Contractors v. Local No. 580,* 278 N.W.2d 393, 397 (N.D.1979), this court stated that a party lacks standing if he has only "a nominal, formal, or technical interest in the action." See also *Froling v. Farrar,* 77 N.D. 639, 44 N.W.2d 763 (1950). A party thus may be interested in an action but fail to be factually aggrieved. A party must be injured in some manner. *Bernhardt v. Rummel,* 319 N.W.2d 159 (N.D.1982). Thus a party is factually aggrieved if a decision has enlarged or diminished that party's interest.

In the present case, Appellants contend that the Administrative Law Judge's denial of intervention prevented Appellants from receiving due process in the proceeding. Appellants sought intervention in this proceeding under NDCC 28-32-28, which authorizes an administrative agency to grant intervention to one who demonstrates that its "legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding."

In *Shark v. U.S. West Communications, Inc.*, 545 N.W.2d 194, (N.D., 1996) the North Dakota Supreme Court ruled: "Any party to any proceeding heard by an administrative agency ... may appeal from the order...." NDCC 28-32-15(1). Under NDCC 28-32-14(1), only a party "who is aggrieved by the final order of the agency ... may file a petition for reconsideration with the agency." But the limits of judicial power to review agency and executive action are marked by several doctrinal boundaries, including the concept of standing.

"Standing" is necessary for judicial review through appeal of an administrative order, this court held in *Application of Bank of Rhame,* 231 N.W.2d 801 (N.D.1975). In that case, the Bank

of Rhame challenged an appeal by First National Bank of Bowman, a competitor, from an order of the North Dakota Banking Board that allowed the Bank of Rhame to move to Bowman. This court had to decide "who are parties for purposes of seeking [judicial] review" of an administrative decision. *Id.* at 806.

Because the Administrative Agencies Practice Act, NDCC ch. 28-32, did not define "party" for any purpose, the Supreme Court surveyed the subject and reasoned:

> The question of who is a proper party should not be resolved on strict technical grounds which could result in the public being denied the opportunity to question the actions of the governing agency, body or board.... Any doubt on the question of standing involving a decision by an administrative body should be resolved in favor of permitting the exercise of the right of appeal by any person aggrieved in fact.

Bank of Rhame, 231 N.W.2d at 808 (footnote omitted). The court decided:

> [A]ny person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a "party" to any proceedings for the purposes of taking an appeal from the decision.

In the context of an appeal for judicial review of an agency decision, standing is an aspect of the basic constitutional concept that confines the exercise of judicial power to actual cases and controversies. *See* 2 Am.Jur.2d *Administrative Law* § 438 (1994); III Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 16.2 (1994); 5 Jacob A. Stein, Glenn A. Mitchell, Basil J. Mezines & Joan D. Mezines, *Administrative Law* § 50.01 (1995). "[T]he question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Association of Data Processing Serv. Orgs. v. Camp,* 397 U.S. 150, 151-52, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970) (quoting *Flast v. Cohen,* 392 U.S. 83, 99-100, 88 S.Ct. 1942,

1952, 20 L.Ed.2d 947 (1968)). 64 Am.Jur.2d *Public Utilities,* § 287 (1972) ("Persons entitled to review"), focuses the concept for regulation of public utilities: "Within the meaning of a statute authorizing a 'party aggrieved' by the order of public service commissioners to appeal to the courts, one is 'aggrieved' when his rights are injuriously affected by the unauthorized or irregular acts of the commissioners."

The over-arching concept of standing for justiciability has been explained by the Supreme Court in *State v. Carpenter*:

> The question of standing focuses upon whether the litigant is entitled to have the court decide the merits of the dispute. It is founded in concern about the proper-and properly limited-role of the courts in a democratic society. Without the limitation of the standing requirements, the courts would be called upon to decide purely abstract questions. As an aspect of justiciability, the standing requirement focuses upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to justify exercise of the court's remedial powers on his behalf. The inquiry is two-fold. First, the plaintiff must have suffered some threatened or actual injury resulting from the putatively illegal action. Secondly, the asserted harm must not be a generalized grievance shared by all or a large class of citizens; the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties.

301 N.W.2d 106, 107 (N.D.1980) (citations omitted); *see also Application of Otter Tail Power Co.,* 451 N.W.2d 95, 98 (N.D.1990) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 80, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595 (1978))

Decisions since *Bank of Rhame* have continued to employ its three-part analysis for who has standing to obtain judicial review of an agency decision: One who is factually aggrieved, directly interested, and participates. *See Bank of Hamilton v. State Banking Bd.,* 236 N.W.2d 921 (N.D.1975); *Citizens State Bank of Neche v. Bank of Hamilton,* 238 N.W.2d 655 (N.D.1976);

Reliance Ins. Co. v. Public Serv. Comm'n, 250 N.W.2d 918 (N.D.1977); *Associated Gen. Contractors v. Local No. 580,* 278 N.W.2d 393, 397 (N.D.1979) (party with only "a nominal, formal, or technical interest in the action" lacks standing); *O'Connor v. Northern States Power Co.,* 308 N.W.2d 365, 371 (N.D.1981) (ratepayers who did not participate in agency proceeding on rates of electric service could not challenge PSC order granting increase); *Matter of Persons,* 311 N.W.2d 919 (N.D.1981); *Bernhardt v. Rummel,* 319 N.W.2d 159 (N.D.1982)

2. Appellants Petition to Intervene Was Timely Made.

Section N.D.C.C. § 28-32-28. Intervention provides:

> 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. The agency shall give reasonable notice of the intervention to all parties. An administrative agency may adopt rules relating to intervention in an adjudicative proceeding.

N.D.C.C. § 28-32-28. The Commission, pursuant to N.D.C.C. § 28-32-28 has adopted rules relating to intervention in an adjudicative proceeding. These rules are set out in § 69-02-02-05:

> 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.
>
> 1. **Contents of petition to intervene.** A petition to intervene must be in writing and must set forth the grounds for intervention, the position and interest of the petitioner in the proceeding, what the petitioner would contribute to the hearing,

and whether the petitioner's position is in support of or in opposition to the relief sought.

2. **When filed.** A petition to intervene in any proceeding must be filed at least ten days prior to the hearing, but not after except for good cause shown.

3. **Number of copies.** The petitioner will serve a copy of the petition on each party to the proceeding and will file with the commission the original and seven copies.

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.

Appellants filed their Petition for Intervention on May 5, 2008, more than 10 days before the hearing. Appellants RES Americas and PEAK Wind had previously filed a Petition for Intervention on April 9, 2008, twelve days before the Commission filed its Notice of Hearing, and determined Minnkota's application was complete.

3. Appellants Have a Legal Interest That May Be Substantially Affected by the Proceeding.

PEAK Wind is a North Dakota limited liability company that is comprised of approximately eighty (80) citizens and landowners holding approximately 30,000 acres of land spanning 20 miles and including parcels in six townships in Barnes County, North Dakota. Many of the PEAK Wind members are customers of Minnkota. PEAK Wind, which was formed to develop renewable and ecologically-friendly wind energy, hired Jay Haley, President of EAPC Architect Engineers, Grand Forks, North Dakota to do a wind study concerning the feasibility of developing a wind farm on the land owned by PEAK Wind. The results of the study were very favorable.

RES America develops, constructs, owns, and operates wind farms throughout the United States. With corporate headquarters in Broomfield, CO and regional offices in Austin, TX, Portland, OR, and Minneapolis, MN, RES America employs more than 150 full time employees; it is one of the fastest growing wind energy development companies in the world. Over the last ten years, RES America has grown into one of the country's leading developers of wind generation projects, actively participated in the development of more than 12% of the installed wind power capacity in the United States. Specifically, RES America has developed or constructed more than 3,400 megawatts of wind energy in six different states and has more than 14,000 megawatts under development throughout the country. As a result, on a total megawatt basis, RES America constructed more wind projects in North America than anyone else except M.A. Mortenson Company.

RES America and PEAK Wind are jointly developing a wind generation project with a maximum generating capacity of 400 MW. The project will be located on property owned by PEAK Wind members adjacent to the Proposed Transmission Line.

Burchill Farms, a North Dakota Family Farm Corporation owned and operated by the Nyle Burchill Family, is one of the land owners and members of PEAK Wind. Burchill Farms is the owner of the following described property which is located within the corridor and on the proposed route of the Proposed Transmission Line:

Township 143N, Range 56W
Section 9: SE ¼, Ellsbury Township, Barnes County.

Each of the Appellants has a legal interest which may be substantially affected by Minnkota's April 17 Amended Application: PEAK Wind is comprised of North Dakota citizens and landowners, who (together with RES America, a leading wind developer) are developing an wind generation project near the Proposed Transmission Line. In fact, the Proposed Transmission Line would be located on the land owned by Burchill Farms.

Peak Wind is comprised of North Dakota citizens. Peak Wind is comprised of North Dakota landowners. Peak Wind and RES are developing a wind project that is located adjacent to the Proposed Transmission Line. The Proposed Transmission Line would be located on and cut across property owned by Burchill Farms. As a result, the Proposed Transmission Line will impact the welfare of the Petitioners.

The State's official policy to ensure that the proposed transmission facilities are "located, constructed, and operated" to produce minimal adverse effects on the welfare of the environment and its citizens. Minnkota acknowledges that multiple wind farms are being developed in and around the area of the proposed transmission route. It does not appear that the Minnkota Transmission Line (which would be capable of transmitting 400 MW or less) will be built large enough to accommodate the wind project being constructed by PEAK Wind and RES America, much less all the wind projects in the area. As such, additional transmission lines will need to be constructed to accommodate other wind projects. Accordingly, contrary to the declared policy of the state, granting the authorizations requested by Minnkota's April 17 Amended Application would not result in routing transmission facilities in an orderly manner, but rather would create a hodge-podge of multiple high voltage transmission lines criss-crossing farm land (some of which

are owned by the Petitioners). Multiple transmission lines will have multiple impacts on the environment.

The Legislature requires the Commission to explore how the Proposed Transmission Line would impact the reliability and integrity of the interstate transmission grid. Minnkota has provided no evidence concerning the Proposed Transmission Line's impact on either (i) reliability in and around North Dakota or (ii) the integrity of the interstate transmission grid. As North Dakota customers and ratepayers, these are significant issues for the Petitioners.

Granting Minnkota's requested authorization will likely result in irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated. Once the siting is authorized for the Proposed Transmission Line, it can be constructed. Certain wind generators directly connected to the Proposed Transmission line will likely benefit, while other projects (such as that being developed by PEAK Wind and RES America) may be harmed, possibly fatally. Notwithstanding the above, integration of the wind energy into the interstate transmission grid (which is comprised in part by Minnkota's facilities) and the impact on the local balancing authority (Otter Tail) may well require different uses of existing dispatchable generation resources or even the construction of additional generation resources. Minnkota's Amended Application is silent on these issues. As customers of Minnkota, the members of PEAK Wind and Burchill Farms have a significant interest in Minnkota's Proposed Transmission Line.

Minnkota's Proposed Transmission Line will likely result in some generation projects becoming "winners" and others "losers." More specifically, the construction and operation of the

Proposed Transmission Line and the resulting power flows may adversely impact adjacent balancing authority areas or impede the development of other electric generation projects in the region. It is unclear how much power to be transmitted over the Proposed Transmission Line is needed or will be utilized by Minnkota to satisfy its own customers' needs, how much of the power will ultimately be transmitted out of Minnkota's service territory, how much will be needed to satisfy Otter Tail load in and out of North Dakota. However, in a document prepared on behalf of Minnkota – the Maple River Wind Generation System Impact Study, dated May 10, 2008, and posted on Minnkota's internet web site – establishes that FPL Energy (a generator developing facilities connected to the Proposed Transmission Line) will transmit 60 MW of energy to the Midwest ISO over the line. The Appellants request that this court take judicial notice of this study.

Minnkota has acknowledged that other wind projects are being developed in the area of its Proposed Transmission Line. Specifically, PEAK Wind and RES America (not to mention other wind developers) have existing plans in the vicinity of the proposed site, corridor, or route.

The Minnkota Transmission Line would not only originate approximately 500 yards away from the PEAK Wind property in Barnes County on which PEAK Wind and RES America will develop a wind generation projection, but also be located in part on land owned by Burchill Farms. RES America, PEAK Wind, and Burchill Farms have a significant financial interest as well as a legal interest which may be substantially affected by the siting of the Proposed Transmission Line.

Additionally, in enacting the North Dakota Energy Conversion and Transmission Siting Act (Siting Act), the Legislature requires that the Commission ensure that "sites and routes shall be chosen which minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion." N.D. Cent. Code § 49-22-02. In order to comply with the legislative mandate, the Commission must consider several statutory factors set forth in section 49-22-09 of the North Dakota Century Code, including:

> 7. The direct and indirect economic impacts of the proposed facility.
>
> 8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.
>
> * * *
>
> 11. Problems raised by federal agencies, other state agencies, and local entities.

As of May 9, 2008, the date that Appellant Burchill Farms' Petition to Intervene was denied, Minnkota had not even filed its Proposal of Final Transmission Line Structure Location. This was not filed until May 15, 2008. (Document 31)

The Commission failed to comply with the requirement of § 49-22-08(c). Minnkota argues that one of the "factors" to be considered by the Commission – "a statement explaining the need for the facility." N.D. Cent. Code § 49-22-08(c) is not a required factor for the Commission to consider. While Minnkota's May 8 Objection cited a North Dakota Supreme Court case for the proposition that the Commission need not comply with the statutory requirement.[1] However,

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[1] *Nebraska Public Power District for Certificate of Corridor Compatibility for a 500 KBAC Electric Transmission Facility Extending from the Canadian Border near Cavalier, ND to the South Dakota Border near Forman*, ND, 330 N.W.2d 143 (N.D. 1983). No where does this case indicate that the interested landowners were not granted

North Dakota Supreme Court never struck down the statute. The "factor" is still in the Century Code. Moreover, in a concurring opinion, Justice Vande Walle noted: "Perhaps if the need for the line in the jurisdiction to be served by it had been officially determined prior to the hearings before the PSC, the issue of whether or not the North Dakota PSC should consider need would not have been so sensitive."[2] Whether the Commission "should" or "must" consider the need for Minnkota's proposed transmission line is a legal issue that may prove to be of no small consequence.

4. Appellants Were Denied Due Process

By the Denial of Intervention, Appellants were denied to exercise their due process rights. "Due process requires a participant in an administrative proceeding be given notice of a general nature of the questions to be heard, **and an opportunity to prepare and be heard on those questions**." *Morrell v. North Dakota Department of Transportation*, 598 N.W.2d 111, 114 (ND 1999) (emphasis added) (citations omitted). Appellants sought to intervene in this proceeding and as such be afforded their rights to participate in a meaningful way at the hearing scheduled for May 22, 2008. Failure to grant the Appellants' request to intervene resulted in commission action in this procedure being viewed as a simple "rubber stamp" of Minnkota's amended application.

Pursuant to § 28-32-21 N.D.C.C. parties to an adjudication proceeding are afforded the opportunity to present evidence and to examine and cross examine witnesses as presented under § 28-32-24 and § 28-32-35 N.D.C.C. Appellants were not afforded the public rights to conduct

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intervention. In fact, quite to the contrary, the order reflects that the landowners were allowed to present expert testimony and participate fully at that hearing. *Id.* at 148.

[2] *Id.* at 150.

discovery or to examine or cross examine witnesses at the hearing. Appellants were not even given the opportunity to respond to Minnkota's objection to intervention or to have a hearing on the denial of intervention.

In Appellants initial request for Intervention, Appellants argued that a Certification of Public Convenience and Necessity was required because Otter Tail was a proposed owner of the transmission line. Afterwards, Otter Tail tacitly admitted the need for a certificate, when Minnkota filed an amendment indicating that Otter Tail is no longer an owner of the transmission line. Despite this assertion, however, Otter Tail is still constructing the transmission line and is an owner of 98 MW of electricity output from the transmission line and FPL Energy. FPL Energy is an owner of 60 MW of this transmission line for distribution on the MISO market.

It was error on the part of the Commission to deny Intervention to Appellants to permit Appellants look into the relationship and ownership of the proposed transmission line.

Under Administrative Agencies Practice Act provision authorizing judicial reversal of agency decision if agency's rules or procedure have not afforded appellant a fair hearing, parties not afforded fair opportunity to prepare their cases are entitled to second chance.
NDCC 28-32-19, subd. 4. Flink v. North Dakota Workers Compensation Bureau, 1998, 574 N.W.2d 784, corrected on denial of rehearing. Administrative Law And Procedure 815

Appellants are persons who are directly interested in the proceeding and also may be factually aggrieved by the decisions of the agency. Appellants have attempted to participate in this proceeding before the agency, and as much will be considered a party for the purposes of appeal of any decision denying Intervention or of the final order of the Commission in the Action.

The question of who is a proper party should not be resolved on strict technical grounds which could result in the public being denied the opportunity to question the action of the governing agency. Any doubt on the question of standing involving a decision of an administrative body should be resolved in favor of permitting the right of appeal by any person aggrieved in fact. *Shark*, 545 NW2d at 195. The courts give RES Americas, PEAK Wind, and Burchill Farms the right to appeal, they should also have had the right to be heard in this action.

N.D. Admin. Code § 69-02-01-07 allows for several types of "**Parties**" in Commission proceedings, including an "**Applicant**," and "**Intervenor**," and a "**Protestant**" N.D. Admin. Code §69-02-01-07(2), (5), and (6). 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 §69-0202-05.

Although Appellants were permitted to participate in the hearing in the above case as Protestants and did so, they were not permitted to conduct discovery, to cross examine or call witnesses, or to prepare and file proposed finding of fact and conclusions of law or legal briefs on this action.

5. Finding That Appellants Do Not Have a Substantial Interest is Error

The PSC and hearing officer erred in finding that Appellants do not have a substantial legal interest that requires intervention.

The PSC and hearing officer erred in finding that granting of Appellants Intervention would unduly broaden the issues and would unduly delay the proceeding.

The Commission in its Notice of Hearing outlined the following issues to be considered in this proceeding:

A. Will the location, construction, and operation of the proposed electric transmission line produce minimal adverse effects on the environment, natural resources, and upon the welfare of the citizens of North Dakota?

B. Is the proposed electric transmission line compatible with the environmental preservation and the efficient use of resources?

C. Will the proposed electric transmission line corridor and route minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

D. Is it appropriate for the Commission to waive the procedures as requested in the application including the request for a single consolidated application for Corridor Certificate and Route Permit?

In addition to these issues, the following statutory factors in N.D.C.C. § 49-22-09 must be considered:

4. Adverse direct and indirect environmental effects which cannot be avoided should the proposed site or route be designated.

* * *

6. Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.

7. The direct and indirect economic impacts of the proposed facility.

8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.

* * *

11. Problems raised by federal agencies, other state agencies, and local entities.

The Appellants have existing plans to develop a wind project adjacent to the Proposed Transmission Line. The siting and operation of the Proposed Transmission Line will have both direct and indirect economic impacts on each of the Appellants. Furthermore, the Appellants include more than 80 citizens of North Dakota. They own farmland adjacent to the corridor in which Minnkota proposes to construct and operate a transmission line.

In fact, until a startling change first announced in its Objection to Appellants Intervention dated May 8, 2008, Minnkota had always proposed to construct the line through the land owned by Burchill Farms. Burchill Farms has been intimately involved in the process through which Minnkota seeks to construct its transmission line. As landowners, PEAK Wind and Burchill Farms have an interest in the orderly siting of construction lines which impact upon their property.

Minnkota has acknowledged that other wind projects, including that of Appellants, are being developed near the Proposed Transmission Line. Those projects will require construction of additional transmission lines in the same area, which could have adverse environmental effects.

As of May 9, 2008, the date of the hearing officer's Order denying intervention, the route for the proposed Minnkota transmission line as filed with the Commission crossed Appellant Burchill Farms property. Furthermore, Minnkota did not even file its Proposed Final

Transmission Line Structure Location until My 15, 2008. (Document 31) The hearing officer erred as a matter of law in finding that the Burchill Farms property was not located on the proposed route.

However, even with Minnkota's proposed route variation that was filed with the Commission before the May 22, 2008 hearing, the Burchill Farms property remained located within the six-mile transmission corridor impacted by the proposed Minnkota transmission line. As long as Burchill Farms lies within the Corridor, Burchill Farms is affected by the proposed Minnkota transmission line and has a legal interest in participating as an intervenor. In addition, when Burchill Farms was not permitted to intervene, there was nothing to stop Minnkota from changing the proposed route back to Appellant Burchill Farms property and without notice to Appellant Burchill Farms and without providing Appellant Burchill Farms with due process. Electrical transmission lines act as the highway system for the transportation of electricity. To build a two lane highway when a six lane highway is needed, is not an orderly and timely method to build transmission. Transmission expansion planning is typically done well in advance of project construction, so that the system can be planned according to the needs of all parties, and to limit the impact to local landowners. For Minnkota to decide to build this project at the beginning of 2008, with no planning process at all, has led to the under-building of the transmission needed for the area. Clearly the ridge feature in the Valley City area of North Dakota alone possesses tremendous potential for, likely in excess of 1,000MWs, not to mention wind and coal resources further west that will want to travel east to Fargo.

As the parties heard all too often at the May 22, 2008 PSC hearing, landowners in the area are very concerned with new transmission lines. There already exists one Minnkota 345KV

transmission line a few miles south of the Proposed Transmission Line. The Proposed Transmission Line makes a second. Then, in a year or so, RES Americas and Peak will need to construct a third, right between the two. Minnkota has also announced a desire to build a fourth line, a 345KV line from the Bismarck area east, potentially to Fargo. If it goes to Fargo, it will likely cross this area. Others entities are likely to want to follow this corridor as well.

It is impossible to build transmission in an orderly fashion if there is no transmission planning done ahead of time, and no ability for entities other than Minnkota and their two partners to participate in an open planning forum. This lack of planning, and the associated lack of building sufficient transmission capacity, will increase the human and environmental impacts in the local area. It only takes one meeting like the May 22, 2008 PSC hearing, when listening to the significant concerns raised by the local landowners, to understand how big these impacts can be to local North Dakotan families. Building one line with sufficient transmission for future needs is the best way to limit these impacts.

Moreover, as developers of a wind generation project in the vicinity of the proposed corridor or route of the transmission line, the Appellants have a significant legal interest in a reliable transmission grid. To this end, Appellants question Minnkota's failure to submit any evidence of how its proposed transmission line has been coordinated with Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") and the Mid-Continent Area Power Pool (MAPP) and whether Minnkota's proposed line will, contrary to statutory goal, adversely impact reliability. In this regard, Appellants note that the Midwest ISO has opposed this project because it will overload transmission facilities operated by the Midwest ISO; even MAPP members recognize that the Proposed Transmission Line could adversely affect reliability – all of this

information is publicly available in the minutes of the May 30, 2008 meeting of MAPP's Design and Review Subcommittee, which is posted on MAPP's internet web site and of which Appellants request this court take judicial notice.

Similarly, section 69-06-08-02(4) of the North Dakota Administrative Code provides that the "commission may also give preference to an applicant that will maximize interstate benefits." The Commission adopted this rule because it recognized the need to consider the impact on interstate commerce and adjacent states of siting transmission lines. As noted below, Minnkota will not consume all the energy transmitted over proposed line; that is, energy owned by Otter Tail and FPL Energy will be transmitted in interstate commerce out of North Dakota. That impact has not been considered. In particular, RES Americas is developing other electric generation projects that are located in areas that could be affected by the siting and operation of Minnkota's proposed transmission line.

6. The Hearing Officer Acted Arbitrarily and Capriciously in Denying the Intervention by the Appellants in the Action.

The appropriate standard of review for evidentiary rulings in an administrative hearing is an abuse of discretion standard, and abuse of discretion occurs if a hearing officer acts in an arbitrary, unreasonable, or capricious manner or if the hearing officer misinterprets or misapplies the law. *Sonsthagen v. Sprynczynatyk*, 663 N.W.2d 161 (2003); Administrative Law and Procedure Section 754.1, 755.

The Order of the hearing officer in denying Intervention of Appellants is not in accordance with the law.

The Administrative Law Judge found that granting the intervention had the possibility of delaying the proceeding. This is in an incorrect ruling of the Appellant Law. § 69-02-02-08 states that the intervention does not "unduly broaden the issues or delay the proceeding" (emphasis added).

Under §§ 49-22-08 and 49-22-08.1, the Commission has three months after the filing of a complete application for a certificate of corridor compatibility to issue its findings and six months after the filing of a completed route application to file its findings. The notice that the application was complete was not issued by the Commission until April 21, 2008. This notice indicated that the application was not complete because the structures' location was not provided. These were provided by Minnkota on May 15, 2008.

The Commission as of May 9, 2008 had not ruled that it should waive its procedures and permit Minnkota to have a single consolidated application for both corridor and route.

Absent showing of good cause, the Commission had until July 21, 2008 to issue its findings on corridor certificate and until October 21, 2008 or November 15, 2008 to issue its findings on the route permit.

There is no evidence on the record that granting the intervention of the Appellants had the potential of delaying the scheduled May 22, 2008 hearing or requiring an additional hearing. Even if the intervention would have delayed the hearing (and there is no record evidence of that), delay of a hearing is not a valid ground for denying a rehearing request. See N.D.C.C. § 28-32-28; N.D.Admin. Code § 69-02-02-05. While the administrative rules recognize that an "undue delay" of the proceedings may be grounds for denial, nothing in the record indicates that any delay would have been "excessive." Furthermore, N.D.Admin. Code § 69-02-02-05 provides:

"The commission may impose conditions and limitations on an intervention to promote the interests of justice." If delay was a concern, the Commission could have imposed reasonable conditions or limitations on the intervention; denial was not necessary. Finally, even if there would have been a delay, the Commission certainly could have been able to complete their findings within the statutory time line if intervention had been granted.

The Commissioner's Statement of Issues to be considered in this proceeding both issues (1) that the line produce minimum adverse effects on the environment and welfare of citizens of North Dakota; and (2) will transmission line ensure energy needs are met in an orderly and timely fashion, give the Commission authority to act as requested by Appellants.

NDCC §49-22-02 states that it is the "policy of the State to site . . . route transmission facilities in an orderly manner comparable with environmental preservation and the efficient use of resources.

Appellants PEAK Wind and RES Americas wind farm will become operational in the next couple of years. This could require the Commission to site another transmission line from Pillsbury to Fargo within the next two years, at the same location. Based on these facts and the above legal authority, the Commission had the following two options:

1. Deny the requested authorization because the Proposed Transmission Line is not adequately sized for the known energy production in the area. Permitting a known undersized line will not minimize adverse human or environment impacts; as required by law, or

2. Grant the requested authorization on the condition that Minnkota builds the transmission line with either sufficient transmission capacity to accommodate the Appellants' wind generation project.

The Commission has legal authority under NDCC §49-22-08.1(5) to issue the permit "with such terms, conditions, or modifications deemed necessary." North Dakota Administrative Rule 69-06-04-02 also provides that (1) "any modifications or special conditions required by the Commission shall be deemed accepted unless the Applicant petitions for a rehearing".

7. Procedural Hearing Officer Does Not Have Authority to Deny Intervention

The hearing officer in this case was appointed by the Commission as a procedural hearing officer only. As such, the hearing officer has no legal authority to issue Final Order Denying Intervention by the Appellants under N.D.C.C. Chapter 28-32.

The North Dakota Supreme Court has determined that a denial of intervention is a final and appealable order. *Wyatt V. R. O. Werner Co., Inc.*, 524 N.W.2d 579 (ND 1994). The Supreme Court determined that denial of intervention was final so far as the would be intervenor is concerned.[3] As the decision of the Administrative Law Judge in denying intervention was a final and appealable order as to Appellants, the Administrative Law Judge went beyond his authority as a procedural hearing officer only.

CONCLUSION

Appellants respectfully request the Court to reverse the order denying Appellants the right to intervene in this action reverse the Order issuing a certificate of corridor compatibility, and route permit dated June 6, 2008, and to remand the matter back to the Commission with the

instructions that Appellants be made a party to the action, that they be entitled to conduct discovery, and to have a hearing in the action.

Dated this 15 day of August, 2008.

Respectfully submitted,

RES Americas Inc., PEAK Wind Development LLC, and Burchill Farms Incorporated

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[3] The court in *Wyatt* found that the trial court has abused its discretion in denying the intervention.