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September 15, 2008

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PUBLIC SERVICE COMMISSION

Ms. Debra Simenson
Clerk of the District Court
Burleigh County
Box 1055
Bismarck, ND 58502-1055

*Re: RES Americas Inc., et al v. Minnkota Power Cooperative, Inc., et al
Civil No. 08-08-1474*

Dear Ms. Simenson:

Enclosed for filing in the above-entitled matter is Brief of Appellee Minnkota Power Cooperative, Inc. Thank you for your attention to this matter. If you have any questions, please contact me.

Very truly yours,

PEARCE & DURICK

By 

Jerome C. Kettleison

Phone: (701) 333-0104

JCK/ef

Enclosure

cc. (w/encl.) Thomas D. Kelsch
(w/encl.) Wayne Stenehjem
(w/encl.) Illona Jeffcoat-Sacco

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,

Appellants,

Vs.

Public Service Commission and Minnkota Power Cooperative, Inc.,

Appellees.

Civil No. 08-08-1474

BRIEF OF APPELLEE MINNKOTA POWER COOPERATIVE, INC.

I. INTRODUCTION

Minnkota Power Cooperative, Inc. (hereafter “Minnkota”) filed an Application with the Public Service Commission in PU-08-48 requesting a Certificate of Corridor approval and a Route Permit for a Generation Outlet Line in Barnes and Cass Counties, North Dakota. RES Americas, Inc. (hereafter “RES”), PEAK Wind Development LLC (hereafter “PEAK”), and Burchill Farms Incorporated (hereafter “Burchill Farms”) filed a Petition to Intervene in the proceeding. The Petition was denied by the Public Service Commission on two occasions as to RES and PEAK. In this appeal, the petitioners appeal from the denial of intervention.

II. FACTS

Minnkota Power Cooperative, Inc. is a non-profit rural electric cooperative headquartered in Grand Forks, ND. Minnkota, through its generation plant near Center, ND, generates and supplies electricity to eleven distribution cooperatives and twelve municipalities located in eastern North Dakota and northwestern Minnesota. Together with the Northern Municipal Power

Agency, for which Minnkota acts as agent in supplying wholesale electricity, Minnkota serves nearly 130,000 customers via its network of high voltage transmission lines.

Minnkota, acting pursuant to North Dakota Conversion and Transmission Facility Siting Act as set out in N.D.C.C. Chapter 49-22, is the applicant in the underlying proceeding before the Public Service Commission of North Dakota, in which Minnkota asked the Public Service Commission to: 1) define a corridor and 2) to designate a route for a high voltage electric line (the "Generation Outlet Line") from a newly constructed substation near Pillsbury, ND to Minnkota's existing Maple River Substation near Fargo, ND, which is a distance of approximately 61 miles. The Generation Outlet Line, once completed, will accommodate electric energy generated from at least two large-scale commercial wind farms to be located in the vicinity of the Pillsbury Wind Substation. An application was filed with the Public Service Commission on March 15, 2008. Thereafter, Minnkota filed an amendment to the application, in which the route and corridor were altered in some respects, and the Public Service Commission was also informed that Otter Tail Power Company was no longer involved as a co-owning partner.

A public hearing, required by N.D.C.C. § 49-22-13 concerning both the corridor to be established in Steele, Barnes and Cass Counties, and the route of the Generation Outlet Line, was set by the Public Service Commission in Casselton, ND for May 22, 2008, at which time Minnkota, protestants, the public, and others had an opportunity to testify concerning the corridor and route requested by Minnkota.

RES Americas, Inc., a foreign corporation not authorized to conduct business in the State of North Dakota at the time of this brief, is an out-of-state developer of wind energy. Minnkota notes that a Delaware corporation based in Texas bearing the name "RES America

Developments, Inc.” has registered with the State of North Dakota, but is not in good standing with the North Dakota Secretary of State. In either event, Minnkota questions whether RES, being the corporation captioned above or as the entity not in good standing with the Secretary of State, may maintain an action in or perfect an appeal to state court in view of the requirements set forth in N.D.C.C. § 10-19.1-142.

PEAK Wind Development LLC is made up of a group of land-owning individuals, who at some indefinite point in the future, along with RES Americas, Inc., plan to develop a wind generation facility in Barnes County in the vicinity of Pillsbury, ND. On April 8, 2008, RES Americas, Inc. and PEAK Wind Development LLC filed a Notice of Petition and Petition to Intervene in the proceeding to establish a corridor and to permit a route from Pillsbury to Maple River Substation.

Significantly, in the statement of intent of RES Americas, Inc. and PEAK Wind Development LLC as set out in the Petition to Intervene was the following: “RES and PEAK are not opposed to the construction and siting of the proposed transmission line . . .”. However, RES and PEAK indicated, “. . . if RES and PEAK are not permitted to interconnect with the proposed transmission line, RES Americas and PEAK Wind will be adversely affected.” They further indicate that the interconnection by RES and PEAK will not unduly broaden the issues in the present proceeding, or unduly delay the proceeding.

Following the April 8th filing by PEAK and RES, Minnkota filed its objection to the Petition for Intervention. Minnkota claimed that the petitioners did not have a substantial interest which would require the granting of intervention. Minnkota in the record had indicated it important that the project not be delayed, as companies working with it to make the project financially feasible, needed the Generation Outlet Line in order to qualify for the Federal

Production Tax Credit, 26 U.S.C. §45, (the “PTC”), which was (and still is) scheduled to expire at the end of 2008. Given the literally hundreds of millions of dollars in difference made by the PTC to Minnkota members and other North Dakota ratepayers who are to pay to comply with renewable energy objectives passed by the State Legislature, it was very important that the Generation Outlet Line be completed before the end of 2008, so that those working with Minnkota could qualify their wind generation projects. The Public Service Commission acknowledged those concerns.

The Petition to Intervene by RES and PEAK was denied by the Public Service Commission in an Order dated April 23, 2008. The Order was served on the parties on April 25, 2008. No appeal was taken from the Order. The time to appeal the ruling by the Public Service Commission expired on May 23, 2008. Minnkota, as will be argued herein, contends the first intervention order dated April 23, 2008 is a final order and is thereby appealable.

On May 5, 2008, RES and PEAK filed a second Petition to Intervene using as the basis the same reason they used for the first intervention. The difference, if any, in this intervention is that Burchill Farms, Inc. joined with RES and PEAK in the second petition. Burchill Farms, Inc. is a North Dakota corporation which operates a farm in Barnes County, ND, part of which is located within the corridor requested by Minnkota. Originally, the proposed route passed over the Burchill property for part of a mile, but when Minnkota was unable to obtain an easement from Burchill, the route was changed so that it would not cross the Burchill property.

In their second Petition to Intervene, filed and served just 17 days before the scheduled public hearing in Cassleton, ND, the appellants boldly alleged once again that intervention would not delay and would not unduly broaden the issues of the proceeding before the Public Service Commission. Minnkota served and filed its objections to the intervention on May 8, 2008

asserting that none of the parties had a substantial interest that would require intervention and asserting that granting intervention would result in delay and a broadening of the issues that were pending before the Commission. A public notice was published before May 8, 2008 in the newspapers of the counties involved announcing the hearing for May 22, 2008.

In their first intervention request, the petitioners asked for 60 days in which to complete discovery. No specific request of time for discovery was set out in the second request, but as determined by the Public Service Commission in its Order, any grant of discovery would likely have resulted in delay of the scheduled hearing. The request for interconnection with other utilities would have immeasurably broadened the issues as well. It is clear in the Petition to Intervene, RES, PEAK and Burchill Farms were all requesting the same relief that had already been denied RES and PEAK. They all wanted interconnection and a reserved spot on the transmission line should they eventually be able to bring a generation project to fruition. The Public Service Commission properly concluded in its order that it had no jurisdiction to grant either of those requests, and that it was unable to address interconnection issues as those issues were within the jurisdiction of the Federal Energy Regulatory Commission (FERC), a federal agency.¹

In the second petition to intervene, on page 5 in footnote #3, the petitioners suggest they should get a second bite at the apple. In that footnote, the petitioners quote a case as providing a precedent for a second bite at requesting intervention when an amended application is filed. An amendment to the application was filed in this case on April 16, 2008, which was acknowledged at a special meeting of the Commission on April 21, 2008 when the matter was set on for public hearing. Minnkota contends the petitioners should not be permitted to take a second bite – that

¹ RES and PEAK filed a complaint with FERC (Docket Number EL08-86) on August 29, 2008, naming Minnkota and Otter Tail Power as respondents. The filing with FERC is over 450 pages and concerns interconnection and a myriad of other issues relating to the transfer of electricity over the Generation Outlet Line.

the intervention request as to re RES and PEAK already has been denied by the Public Service Commission. In fact, the authority cited is not relevant to this issue and does not speak to their theory as discussed later in this brief.

The petitioners in their second Petition to Intervene, dated May 5, 2008, again indicated, this time including Burchill Farms, Inc., that: “The petitioners are not generally opposed to the construction of transmission lines. However, if the proposed transmission line is not constructed with sufficient capacity for the energy generated from the area, including the wind generation project being developed by PEAK Wind and RES Americas, the petitioners will be forced to oppose the construction of the proposed transmission line because it will cause additional and unnecessary environmental impact when subsequent transmission lines are required.” (App., #26, p. 13).

The Public Service Commission, in an opinion prepared for it by an administrative law judge, denied intervention for all three petitioners and instead indicated the petitioners were protestants and as protestants, as defined in the North Dakota Administration Code, would have the right to testify at the public hearing in Casselton, ND. They would also have the right to offer any evidence they felt appropriate, and to appeal from the findings of fact, conclusions of law and order. In fact, while admittedly not germane to the Court as a fact not in the record at the time of the decision that is complained of, RES, PEAK and Burchill Farms all appeared and testified at the public hearing in Casselton, ND. PEAK appeared by its attorney, Thomas Kelsch; RES appeared by its representative, Joseph M. DeVito; and Burchill Farms was represented by Mr. Nyle Burchill.

In denying the intervention by its order dated May 9, 2008, the Public Service Commission found that to grant the order would appear to broaden the issues and would result in

a real possibility of delay as the parties again requested discovery. The Commission found that the three petitioners have no substantial legal interest that would require intervention, and that “as to their principal concern, the Commission had already ruled denying intervention” in its earlier intervention order.

Following the denial of the intervention order on May 9, 2008, the three petitioners noticed the instant appeal with the District Court of the South Central Judicial District, dated June 9, 2008.

III. SCOPE OF REVIEW

The review requested by the appellants in this case is governed by Administrative Agencies Practice Act, N.D.C.C. 28-32-46:

“ **28-32-46. Scope of and procedure on appeal from determination of administrative agency.** A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.”

IV. ARGUMENT

1. The Public Service Commission properly denied intervention status to RES Americas, PEAK Wind Development LLC and Burchill Farms, Inc.

On May 9, 2008, 17 days before a noticed and scheduled public hearing to be conducted in Casselton, ND in this case, the Public Service Commission denied RES, PEAK and Burchill Farms' request to intervene in the proceeding. The petition, the second attempt to intervene by two of the petitioners, was filed with the Commission on May 5, 2008. The PSC found that RES, PEAK and Burchill could appear at the hearing on May 22, 2008, as protestants instead of as intervenors. Protestants are defined at N.D.A.C. 69-02-01-07 as: "A person opposing on grounds of private or public interest the approval of an application, petition, motion, or other matter under consideration by the Commission." The Commission concluded that the three petitioners did not have a statutory right to intervenor status, nor did any of the three claim that right. The PSC found that the petitioners did not have a substantial legal interest that required intervention. If granted intervenor status, the three petitioners would be treated as parties and would have the right at the public hearing to cross-examine witnesses, to call witnesses, to otherwise participate in the hearing, and could request permission to conduct discovery of relevant information. As protestants, they have the right to appear before the Commission, present evidence, but not to call witnesses or cross-examine them.

The Commission denied the petition of the three petitioners because it concluded they did not have a substantial legal interest that required intervention. The Commission further found that if intervention was granted, the hearing before the Commission which involved establishing a corridor and permitting a route would likely broaden issues and that “a real possibility of delay would exist.” The rule governing intervention in Public Service Commission proceedings in N.D.A.C. 69-02-02-05 makes it clear granting intervention is a discretionary act. The language of the rule first requires that the qualifying petitioner must have a substantial interest in the proceeding, and then indicates that the Public Service Commission “may” grant the intervention. Courts routinely, when rulings are within the discretion of the Public Service Commission, do not substitute their own judgment for that of the Public Service Commission. Power Fuels, Inc. v. Richard Elkin, Ben Wolf, and Bruce Hagen, Respondents and Northern Tank Lines and Big “M” Oil Field Services, Inc., Protestants, and Getter Trucking, Inc., Protestant, and Matador Service, Inc., Protestant, 283 N.W.2d 214 (N.D. 1979); “. . . the manner and means of exercising an administrative agency’s power to the discretion of the agency implies a range of reasonableness within which the agency’s exercise of discretion will not be interfered with by the judiciary.” Cass County Electric Co-Op, Inc. v. Northern States Power Company, 518 N.W.2d 216, 220 (N.D. 1994) as cited in Kasprowicz v. Finck, 574 N.W.2d 564, 568-69 (N.D. 1998), and as cited in State of North Dakota and Heidi Heitkamp, Attorney General for the State of North Dakota, Bismarck State College, Department of Human Services, et al v. The Honorable Gail Hagerty, Judge of the District Court, South Central Judicial District and W.R. Grace and Co., 580 N.W.2d 139, 147 (N.D. 1998).

The intervention rule, N.D.A.C. 69-02-02-05, provides that there are two means of accomplishing intervention. The rule is set out hereafter:

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.

1. **Contents of petition to intervene.** A petition to intervene must be in writing and must set for 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."

In this case, the petitioners make no claim for statutory intervention, and the Public Service Commission in its order found no statutory right on the part of the petitioners. The Public Service Commission also found that none of the appellants had a legal interest that may be substantially affected by the proceeding, and found that the intervention would likely unduly broaden the issues or delay the proceeding.

In their first request for intervention, both RES and PEAK requested permission to conduct discovery for a lengthy period (60 days). If the Public Service Commission had permitted discovery, the May 22, 2008 hearing would likely have needed to have been rescheduled. The aggressive timeline forced upon the parties by the failure by Congress to

extend the PTC, made such a delay particularly troublesome and financially burdensome. In its order, the Public Service Commission found that the proposed intervention was driven by an issue concerning interconnection and the ability to reserve space on the line proposed by Minnkota. The Public Service Commission, in its first order denying intervention, concluded that it had no jurisdiction in this proceeding with regard to either of those questions or concerns and correctly determined that “[i]nterconnection is not an issue that can be addressed in a siting application under Chapter 49.22.” (App., #21).

The Public Service Commission did have the opportunity to review information regarding interconnection matters and line sizing when it reviewed Minnkota’s application. (App. #8) The application, dated March 14, 2008, filed March 18, 2008, is part of the record and contains information on matters such as line sizing, capacity and it also contains mention of interconnection. The application makes it clear there is a need to transport the electricity from Pillsbury to Fargo and an overall need for the electricity to be generated in the first place. In particular, the application includes a substantial amount of material including: at 2. 1, NEED FOR FACILITY, at subparts 2.1, NEEDS ANALYSIS, 2.2 ALTERNATIVES 2.2.1, 230 kV ANALYSIS and 2.2.2, 345 kV ANALYSIS, and the application further contains a discussion of the ten-year plan. In the following section of the application, 3.0, TRANSMISSION FACILITY, CORRIDOR AND ROUTE CRITERIA matters, to include design and construction limitations and economic considerations are discussed. With this data, the Public Service Commission clearly had an ample record available for it to consider, information on the subjects complained of by the petitioners.

In addition, questions of need are not addressable by the Public Service Commission in proceedings or applications for a corridor certificate or a route permit. The Supreme Court of

North Dakota has found that “until the legislature specifically directs the PSC to use the information to evaluate the need for a line, the PSC believes it does not have the authority to do so.” The Court goes on to say: “we found no direction in the siting act or its legislative history giving the PSC the authority to determine if a need has been shown”. 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 board near Forman, ND, 330 N.W.2d 143 (Feb. 1983).

The petitioners contend the Generation Outlet Line is not large enough to accommodate all the wind projects being constructed in the area by wind power. The PSC in this application for a corridor and route cannot, nor should it consider, the question. To permit testimony with regard to the capacity of the line would serve to unduly and illegally broaden the issues that need to be addressed and would likely result in a request for additional discovery which would trigger an undue delay all of which would be for naught, as the Public Service Commission has no jurisdiction in either area.

An additional reason not to consider the need-based analysis is that there is no indication that PEAK Wind and RES Americas are prepared to proceed to build facilities. They have not made information available to show their ability to proceed and when they may be prepared to proceed.

As a further “need” related argument, the petitioners indicate that transmission lines are not being developed in an orderly manner and that somehow there will be a “hodgepodge of multiple high voltage transmission lines crisscrossing farmland”. Even if that were true, it is not a subject for this proceeding. The PSC’s responsibility is to certify a corridor and permit a route, and to review information related thereto. The Public Service Commission had the opportunity

to review the information as set out in the application by Minnkota and as set out in the petition by the appellants, but need not be distracted in this proceeding by claims related to “a hodgepodge of multiple high voltage transmission lines” for projects that might be built. The real and current interests of Minnkota in the form of a tangible project proposed in the Application should be the focus.

The petitioners, RES and PEAK, make clear in their initial petition and also in the second petition (except Burchill Farms, Inc.) that they desired discovery in this matter, and presumably discovery with regard to their primary concern -- interconnection. They made it clear in the initial petition, and also in the second, that they were not opposed to the power line, necessarily. They just wanted relief with regard to their perceived interconnection issues and matters relating to reserving space on the line.

On August 29, 2008, RES Americas and PEAK filed a complaint with FERC, which possesses jurisdiction over matters regarding interconnection. It appears that RES Americas and PEAK agree with the Commission that for their primary complaint, FERC is the more suitable venue. It is also clear that for the Public Service Commission to do anything more than review the materials contained in the application and the amended application with regard to the issues of interconnection and who has reserved space on the transmission line, would result in waiting for a determination by FERC and perhaps other regulatory agencies. The record in this case contains sufficient information for the Public Service Commission to have properly made its threshold determination on these two issues. The Public Service Commission, in the proper exercise of its discretion, found that under the circumstances intervention was not warranted.

The intervention rule also requires that the petition of potential intervenors first must be in writing, which is not a concern in this case. The rule also requires that the grounds for

intervention must be set forth. In this case, the three potential intervenors set out as their grounds for intervention issues related to interconnection and a review with regard to sizing of the line. Both of those issues, according to the Public Service Commission Order are beyond the authority of the Public Service Commission, and are within the purview of federal agencies. The three potential intervenors did not indicate that they objected to the corridor, nor did they indicate they objected to the route of the transmission line within the corridor. It is not possible under the circumstances to discern either the “why” of their position or “what” can be done about it.

The rule requires the petitioners indicate what they might contribute to the hearing. In their petition, it is clear they feel they could provide information concerning interconnection and sizing of the line. However, neither of those is within the purview of the authority of the Public Service Commission or encompassed by the hearing that was noticed by the Commission. The petitioners do not indicate what other information of value they might contribute. The information regarding interconnection was provided by the three petitioners at the hearing on May 22, 2008 when they appeared as protestants. The Public Service Commission was correct in determining before the hearing that their interest in the hearing was not a substantial interest, but was an interest that could be and was permitted to be fleshed out at the public hearing when all three appeared as protestants.

The fourth of the requirements concerning intervention is whether the petitioners support or object to the relief sought. In this case, it is difficult to tell from the petition on which side of the issue the petitioners fall. Two of the petitioners earlier had indicated they do not object to the line, nor to the corridor, and in the second of the petitions for intervention, they indicate in

language that is not completely clear, but certainly does not make it clear whether they support or oppose the relief sought.

Because the appellants failed to comply with the requirement concerning contents of the petition to intervene, it was within the discretion of the Public Service Commission to deny intervention. The protestants have the right to present evidence and testimony at the hearing, and they also have the right to appeal from the Public Service Commission ruling or order. They have the right to present evidence which is adverse to the position of Minnkota, the applicant at the hearing, if that is appropriate, and the Public Service Commission has an obligation to review that information. Minnkota contends the only advantage the intervenor has that the protestant does not, is the right to cross-examine witnesses called by the applicant.

2. The appeal to the District Court is based on the record before the Public Service Commission and submitted by the Public Service Commission to the District Court.

At the time the Commission's order denying intervention was served on the parties, the petitioners had only filed a petition complaining about the various problems and concerns. The appellants could have provided an affidavit with their Petition to Intervene and could have developed some of the factual recitations they felt compelling, but they did not. Minnkota at the time of the intervention petition had already filed its application and its amendment to the application which contained significant information from its perspective in parts 2.0 and 3.0 of the Application and in other parts of the Application. If appellants intended to rely upon certain information to suggest they should have been permitted to intervene, then that information should have been made available at the time of the petition so that the Public Service Commission would have something in its record to consider.

It is apparent, in Minnkota's view, that a good part of the brief of the appellants contains information and material that is not contained in the record and should not be considered by the

Court. The inadmissible information is intermingled with legitimate admitted facts. Some facts are admissible, some not. In this respect, the brief is difficult and improper, and should be disregarded, or the unapparent to Minnkota references to the record should be made clear.

The more egregious inclusions in the brief of materials from outside the record are contained in Part 3, Appellants have a legal interest that may be substantially affected by the proceeding. The material complained of starts on the 8th page of the brief. Some of the initial information is contained within the record in the first two and a half pages, but some is not. The petition is not a verified petition. The only testimony given by RES, PEAK and Burchill Farms was provided at the hearing on May 22, 2008 by the attorney for PEAK, an officer of RES and the owner of Burchill Farms. But, that information was provided long after the fact and did not include all of the information contained in the brief.

In fact, information provided in Part 3 of the brief is not relevant to the issue in the underlying case before the Public Service Commission. The underlying case identified a specific corridor and a specific route located in Cass and Barnes Counties, and did not involve a history of RES, PEAK, or others, or the other subjects explored by petitioners.

The notice of hearing outlined the issues to be considered at the public hearing on May 22, 2008. The order on intervention was issued several weeks before the hearing. The subject of the hearing was set out as follows:

- a. Will a 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 the corridor, certificate and route permit?

The issues as set out above are localized and specific. The information provided in Part 3 of the appellants' brief, and other parts as well, is not and should, in that respect, be disregarded.

An example of materials from outside the record is found on the 10th page of the brief, beginning with the third paragraph when the speculation is to how long the line should be, speculation about where other lines will be located, and how much power will be used in the state and how much power will go out of the state. In fact, on page 13, the appellants ask the District Court to take judicial notice of a study that they describe in their brief, but the study is not included in the record, and in fact, the date of the study, the location of the study, and the content of the study is not indicated.

In summary, Part 3 of the appellants' brief, because of its speculative nature, because much of the information contained is from outside the record, should be disregarded by the Court. Even the title of the section suggests that it is speculation and has no place in this appeal.

3. The Appeal of RES and PEAK should be from the First Intervention Order.

The appellants claim the intervention order appealed from is an appealable final order. Minnkota agrees with that assessment. Wyatt v. R. D. Werner Co., Inc., 524 N.W.2d 579 (N.D. 1994). However, because there was a previous final order on the same intervention subject in this case, Minnkota contends that the first final order is the binding order. That order was entered on April 23, 2008 and was not appealed from. The first intervention order, then, is the rule of the case with regard to the intervention or RES and PEAK. In the first intervention order, the Court found no substantial interest which would require intervention, and also found the

intervention, if granted, would likely result in undue delay and would broaden the issues. There was no appeal by RES and PEAK. or Burchill of the first intervention order. Those issues, then, are off the table as to RES and PEAK. The law of the case is contained within the order.

Minnkota contends neither RES nor PEAK should be permitted to appeal from the second “final order”. Res judicata in an administrative context requires that a final order be treated as a final order, just as res judicata does in other civil litigation. Ziesch and Workforce Safety and Insurance v. Aviko USA, LLC, 713 N.W.2d 525, 530 (N.D. 2006). Neither RES nor PEAK are proper parties to the appeal of the second intervention order. They already had their bite of the apple and are not permitted a second bite (the second bite being the second intervention request after the amendment to the application was filed). In the second petition for intervention, on page 5, footnote 3, RES, PEAK and Burchill Farms say they should get “two bites” The case they cite does not speak to intervenors who have been denied intervenor status, but rather speaks to prospective intervenors after the filing of an amended application. The language in the footnotes does not suggest two bites is appropriate, and when read in the context of the case, two bites are not allowed. See DTE Energy Company v. International Transmission Company, Docket No. ECO1-137-000, 97 FERC P 61330, 2000 Westlaw 34075799.

4. Appellants were not denied due process.

The appellants were not denied due process in the intervention proceeding before the Court. Due process in an administrative proceeding requires the “participant” be given notice of the general nature of the proceeding. In this case, it cannot be effectively be argued that no notice of the intervention proceeding was provided, as they brought the intervention motion. It is also not the case that the notice, as published, was inappropriate. The appellants do not argue

that. The Estate of Robertson by Roberson v. Cass County Social Services, 492 N.W.2d 599 (N.D. 1992).

The Public Service Commission followed the rules set out in the Administrative Procedures Act and in N.D.C.C. 49-22 of the Siting Act for the general nature of the proceeding before the Public Service Commission. The proceeding involving the intervention was known to the appellants, or the appellants should have known of the procedure, and the general nature of the proceeding. The administrative rule with regard to intervention is clear. It lays out for appellant all that it might need to know. There is in this case no denial of due process. There is no obligation on the part of the Public Service Commission in the statute to provide an opportunity to petitioners to argue and call witnesses before entering an order after having given the petitioners and respondents ample time to respond. The tribunal in both the first intervention and the second were impartial, neutral and disinterested tribunals and there is no evidence in this record to show or suggest the contrary. See State v. Jacobson, 747 N.W.2d 481. Minnesota maintains that appellants were permitted to participate in the hearing by filing a petition for intervention, and that they knew what the rules with regard to intervention, or should have known the rules, makes the proceeding facially fair and impartial.

5. The hearing officer did not act arbitrarily and capriciously in denying the intervention by the appellants.

In denying the intervention the hearing officer found three things: (1) that none of the appellants had “a legal interest which may be substantially affected by the proceeding”; (2) the intervention would likely unduly broaden the issues; and (3) the intervention would delay the proceeding. N.D.A.C. 69-02-02-05. The petition filed by the appellants indicate that the appellants wished to address interconnection and also wished to address reservation of space on the transmission line. In neither the first nor the second intervention request did the appellants

contest the location of the corridor and the route. In the earlier intervention request, the petitioners indicated that they would need up to 60 days discovery to address the interconnection question. Appellees contend there is nothing arbitrary and capricious in the reasons set out by the Administrative Law Judge.

The Administrative Law Judge found in his order that intervention would likely “unduly broaden the issues” or delay the proceeding. His ruling is in keeping with N.D.A.C. 69-02-02-05, and is also in keeping with the statute on intervention. N.D.C.C. § 28-32-28, Intervention. The statute indicates that “an administrative agency may grant intervention in an adjudicative proceeding to promote the interest of justice if intervention will not impair the orderly and prompt conduct of the proceeding . . .”. N.D.C.C. 28-32-28. Both the statute and the rule address delay and do not permit it, and also address “unduly broadening of the issues”, and prohibit that, as well.

In the argument on this issue, the appellants contend the ruling to be incorrect. They state that the rule speaks in terms of “does not unduly broaden” issues. In fact, the rules speaks of terms of “would not” broaden issues. The distinction seems important because in this circumstance, the appellants are asking for relief before a hearing has taken place. There is no basis for “does not unduly broaden the issues”. In any case, the rule speaks in terms of “would not”. The rule should be applied as written.

The appellants also argue that because the Commission has three months after filing a complete application for a certificate of corridor, and six months after filing a complete application for a route permit, before it needs to issue its findings, that somehow for an order to be entered before those times have passed is arbitrary and capricious. The rules nor the statute indicate when the Public Service Commission must act, but only sets the outer limit as to when

the action by the Public Service Commission on Finding of Fact, Conclusions of Law and Order is mandatory.

6. The Public Service Commission has authority to deny intervention.

Minnkota agrees the order denying the second intervention, dated May 9, 2008 is a final order. Wyatt v. I.O. Werner Co., Inc., 524 N.W.2d 579 (N.D. 1994). The petition, which preceded the order in this case, was filed with the Public Service Commission, as was the response to the petition filed by Minnkota. No hearing was held, nor was one required before the intervention order was denied. There is no requirement that the Public Service Commission hold a hearing on a petition for intervention. The statute provides: "Whenever it appears to the satisfaction of the Commission that all the interested parties have agreed concerning the matter at hand, or that no interested party asked for hearing, the Commission may issue its order without a hearing." N.D.C.C. 49-02-02. The petition was decided on the record in this case. The order denying intervention is signed as follows: "North Dakota Public Service Commission: Allen C. Hoberg, Administrative Law Judge Hearing Officer." The order is part of the record in this case, and is the order of the Public Service Commission, and an order the Public Service Commission relied upon as it went forward. There is no reason to suggest the order is not an enforceable order of the Public Service Commission.

Based on the order, the petitioners were not permitted to appear as intervenors at the hearing on the matter on May 22, 2008, but rather as protestants. The hearing officer has the authority to perform ". . . any and all other functions required by law, assigned by the director of the Office of Administrative Hearing or delegated to the hearing officer by the agency." N.D.C.C. 28-32-31. From the record in this case, it is clear the Commission agreed with the order and has adopted it. It had entered a similar order as to result in the same case when two of

the same petitioners were denied intervention. The order is included in the official record and they, as a Commission, rely upon the order as they go forward, which is especially apparent when the appellants appear and participate in the May 22, 2008 hearing as protestants and not as intervenors.

Dated this 15 day of September, 2008.

PEARCE & DURICK

By 

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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,

AFFIDAVIT OF SERVICE

Vs.

Public Service Commission and Minnkota Power Cooperative, Inc.,

Appellees.

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

Evelyn Froebe, being first duly sworn, on oath, deposes and says: That she is over the age of eighteen and not a party to the above-entitled action.

That on the 15th day of September, 2008, this affiant deposited in the United States Post Office at Bismarck, ND, a true and correct copy of the following document in the above-entitled action:

BRIEF OF APPELLEE MINNKOTA POWER COOPERATIVE, INC.

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

Thomas D. Kelsch
Kelsch, Kelsch, Ruff & Kranda
103 Collins Avenue
P.O. Box 1266
Mandan, ND 58554-7266

Wayne Stenehjem
Attorney General
600 E. Boulevard Avenue, Dept. 125
Bismarck, ND 58505

Ilona Jeffcoat-Sacco
Public Service Commission
State Capitol Building
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be so served.

That the above document was duly served in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Evelyn Froebe
Evelyn Froebe

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

Annette Kirschenheiter
Notary Public

