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PUBLIC SERVICE COMMISSION

JEROME C. KETTLESON

[jck@pearce-durick.com](mailto:jck@pearce-durick.com)

October 3, 2008

HAND DELIVERED

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

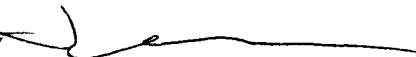
Re: *RES Americas Inc., et al v. Minnkota Power Cooperative, Inc., et al*  
*Civil No. 08-08-1474*

Dear Ms. Simenson:

Enclosed for filing in the above-entitled matter is Minnkota Power Cooperative, Inc.'s Response to Motion to Offer Additional Documents. 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.) Darrell Nitschke

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

MINNKOTA POWER COOPERATIVE,  
INC.'S RESPONSE TO MOTION TO  
OFFER ADDITIONAL DOCUMENTS

**ANALYSIS**

N.D.C.C. § 28-32-45 does not set a timeframe in which an appealing party must move the appellate court to order an administrative agency to consider additional evidence. If the motion had any merit at all, however, then it would be made *prior* to the filing of appellate briefs. The Appellants, having waited until after the filing of appellate briefs, consider this motion to be an afterthought. The material is not relevant and – if it was, would have been offered *before* the filing of both appellate briefs. The Court should deny their request. To do otherwise will result in the remand of this case to the PSC to consider an issue that was never considered by PSC in the first place.

The documents presented by Appellants are both irrelevant and immaterial. The focus of Appellants’ appeal is a denial from a request to intervene. Appellants do not even offer a reason as to why these documents are necessary for consideration as to the intervention issue—stating only that ownership is “highly relevant.” Indeed, there is not even a basis in the application of the administrative intervention regulations that would consider who owns the transmission line to be relevant in determining whether to grant intervention status. And, more importantly,

Appellants do not even attempt to make a connection between the documents and the intervention analysis.

The issue on appeal, as already briefed by both parties, is whether the PSC properly denied the intervention request of Appellants. The issue on appeal is *not* who has, and does not have, an ownership interest in the transmission line. The hearing officer adequately addressed each of the arguments raised by Appellants at the administrative level. Appellants may not just now raise a new issue for consideration—one that was not even considered by the PSC when the second intervention was denied.

Appellants failed to raise this issue in their second intervention request to the PSC—which is the subject of this appeal.<sup>1</sup> The North Dakota Supreme Court has stated: “[i]t is well settled that one of the guidelines for an appeal on any issue or contention is that the issue on appeal was adequately raised in the lower court.” *Williams County Soc. Servs. Bd. v. Falcon*, 367 N.W.2d 170, 176 (N.D. 1985); *see also Skjonsby Truck Line, Inc. v. Elkin*, 325 N.W.2d 271, 275 (N.D. 1982) (general rule “also applies to consideration of issues on appeal from administrative agency proceedings.”).

Appellants in the Background section of their intervention brief to the PSC indicate the fact that “Otter Tail is no longer an owner of the project, but will likely contract with Minnkota Power Cooperative to provide some services.” (Pet. of Res America Inc., Peak Wind Dev. LLC, and Burchill Farms, Inc. to Intervene, dated May 5, 2008, at p. 5). But Appellants do not make any *argument* to PSC that this ownership fact was a cause for justifying their intervention. Furthermore, the Appellants concede in their Specifications of Error to this Court that this issue was not raised to the PSC in their second intervention request. (Appellants’ Notice of Appeal and Specifications of Error, p. 7 at ¶ 27). **A reviewing Court cannot review an alleged error of an issue that was not even an issue before the administrative agency;** logic dictates that an

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<sup>1</sup> Appellants state in their Notice of Appeal that they “Appeal from the May 9, 2008 Order denying their Intervention.” (Appellants’ Notice of Appeal and Specifications of Error, p. 3 at ¶ 9). Appellants have not appealed the PSC decision denying their first intervention request.

administrative agency cannot commit error on an issue that was not presented to it for consideration. Because Appellants failed to raise ownership of the line as an issue to the PSC, the Court should not permit consideration of it here on appeal.

**CONCLUSION**

The Court should DENY Appellants' Motion for Leave to Offer Additional Documents because the documents represent an issue that the Appellants failed to raise for PSC consideration.

Dated this 3 day of October, 2008.

PEARCE & DURICK

By  

\_\_\_\_\_  
JEROME C. KETTLESON, # 03095

ZACHARY E. PELHAM, # 05904

Individually and as a Member of the Firm  
Attorneys for Minnkota Power Cooperative

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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 3rd day of October, 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:

MINNKOTA POWER COOPERATIVE, INC.'S RESPONSE TO MOTION TO OFFER ADDITIONAL DOCUMENTS

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

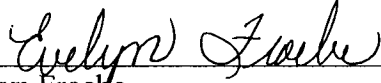
Thomas D. Kelsch  
Kelsch, Kelsch, Ruff & Kranda  
103 Collins Avenue  
P.O. Box 1266  
Mandan, ND 58554-7266

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

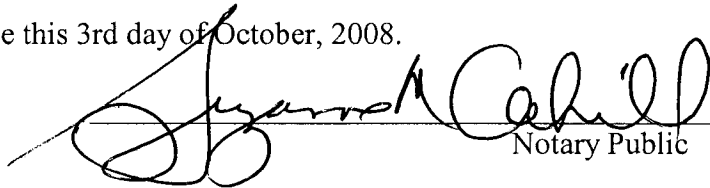
Darrell Nitschke  
Executive Director  
Public Service Commission  
State Capitol Building  
600 E. Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-0480

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

Subscribed and sworn to before me this 3rd day of October, 2008.

  
\_\_\_\_\_  
Notary Public

