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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

OCT 30 2008

SOUTHWEST JUDICIAL DISTRICT

PUBLIC SERVICE COMMISSION

CIVIL NO. 08-08-C-1709

RES America Developments, Inc. PEAK)
Wind 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 29 day of October, 2008, this affiant served by depositing 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:

1. Appellant's Brief in Opposition to Appellees' Motion to Dismiss Appeal

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

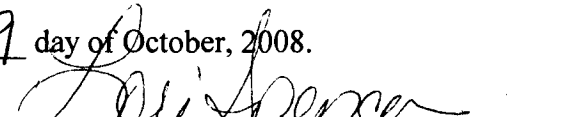
JEROME C. KETTLESON
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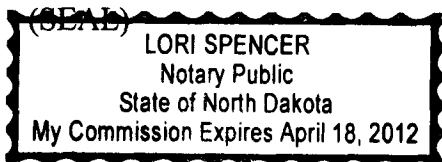
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MELISSA K SCHNEIDER

Subscribed and sworn to before me this 29 day of October, 2008.


Notary Public, State of North Dakota



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

Civil No. 08-08-1709

Appellants,)

APPELLANTS' BRIEF IN
OPPOSITION TO APPELLEES'
MOTION TO DISMISS APPEAL

vs.)

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

Appellees.)

The Appellants hereby request that the Court Deny the Appellees' Motion to Dismiss Appeal for the reasons provided herein.

LAW AND ARGUMENT

I. THE APPELLANTS HAVE APPEALED A FINAL ORDER AND THEREFORE, THE DISTRICT COURT HAS THE REQUISITE SUBJECT MATTER JURISDICTION.

In its, the Appellee Minnkota Power Cooperative, Inc. (Minnkota) alleges that the Appellants have appealed a "non-final Order" and as a result, Minnkota alleges that this Court lacks the requisite jurisdiction to preside over the above-captioned matter. Minnkota's claims concerning the Appellants' right to appeal the June 6, 2008 Order ignore the standard clearly established under Section 49-22-19 of the North Dakota Century Code. The Statute provides as follows:

"Any party aggrieved by the issuance of a certificate of site compatibility or transmission facility construction permit from the commission, certification of continuing suitability filed by a utility with the commission, or promulgation of a final order by the commission, may request a rehearing by the commission. The hearing shall be conducted pursuant to chapter 28-32. There shall be a right of appeal to the district court from any adverse ruling by the commission." (emphasis added)

N.D.C.C. § 49-22-19.

This aforementioned statute represents the provisions of the North Dakota Energy Conversion and Transmission Facility Siting Act and it authorizes any party who is aggrieved by the issuance of a certificate, permit, or final order of the Commission to request a hearing and also grants any aggrieved party a right to appeal any adverse ruling to district court. See generally, Application of Nebraska Public Power Dist. for a Certificate of Corridor Compatibility for a 500 KV AC Elec. Transmission Facility Extending from the Canadian Border Near Cavalier, North Dakota to South Dakota Border Near Forman, North Dakota, 330 N.W.2d 143 (N.D. 1983). Additionally, N.D.C.C. § 49-22-19 is not to be interpreted as to require an aggrieved party to request a rehearing before appealing to the district court. Id.

The June 6, 2008 Findings of Fact, Conclusions of Law and Order was a final order that granted Minnkota a Certificate of Compatibility for a transmission corridor No. 105, and granted a route permit for construction of a transmission facility No .115 . The Corridor, as requested by Minnkota, was approved along its full length. The route was finally approved except that no route was designated within the area of the Northeastern Portion of Rush River Township.

Minnkota, based on this order and the two-permits issued, immediately began construction of the transmission line (see Minnkota's Weekly Construction Reports filed with the Commission starting on June 13, 2008) (Doc. 57 and 58, Commission Record on Appeal)

The law governing the Appeal at issue is not so narrowly consumed with "Final Order" language as are the arguments presented by Minnkota in its Brief. The North Dakota Century Code clearly includes certificates, permits, and final orders under the ambit of the Commission's

appealable orders. N.D.C.C. § 49-22-19. In the current case, the Appellants have appealed certificates and permits issued by the Commission. Minnkota bases its subject matter jurisdiction argument on the fact that the Commission's Order excepted the "northeastern portion of Rush River Township" from the certificates and permits issued. The supplemental hearing was limited to issues relating to the proposed alternate route in Rush River Township. It did not affect the issuance of the permits for the remainder of the transmission line. The exclusion of a very small portion of Minnkota's siting application and the permit does not strip the Appellants of their right to appeal the very large portion of the application that was approved. The two certificates and permits granted by the Commission are appealable final orders under N.D.C.C. § 49-22-19. If the Court were to accept Minnkota's interpretation of the Appellants' right to appeal the Order(s) at issue in this case, the Appellants could potentially lose their right to an appeal all together, so long as issues concerning the transmission line's alternative route, located in the "northeastern portion of Rush River Township," remain in dispute. Furthermore, given the fact that Minnkota began construction of their electric transmission line and associated facilities following the Commission's June 6, 2008 Order, and issuance of a construction permit it is clear that Minnkota and the Commission too have deemed the Order and issuance of the permits to be final, and thus appealable, in nature.

II. THE APPELLANTS HAVE APPEALED TO THE PROPER DISTRICT COURT.

Under current North Dakota law, this Court has subject matter jurisdiction over the matters now presented before the Court on Appeal. Therefore, it was proper for the Appellants to file their Appeal in Burleigh County. In their Brief, Minnkota alleges that the June 6, 2008 Order could only be appealed in Cass County. Minnkota, is relying on the Court's decision in Happy Day Day Care Center v. Social Service Bd. of North Dakota, 313 N.W.2d 768 (N.D. 1981). Minnkota

further alleges that no hearing took place prior to the May 22, 2008, Cass County hearing. In their Brief, Minnkota fails to mention that the Courts have since moved away from their decision in Happy Day, and that they currently take a more tolerant approach when interpreting the term “hearing” for the purposes of determining jurisdiction. Happy Day, 313 N.W.2d 768.

In Aggie Investments GP v. Public Service Com’n of North Dakota, the Court held that an informal “public input” hearing held in Fargo, North Dakota constituted a “hearing or a part thereof” under N.D.C.C. § 28-32-15 and that such hearing was sufficient to establish subject matter jurisdiction in the district court for Cass County upon appeal. Aggie Investments GP v. Public Service Com’n of North Dakota, 451 N.W.2d 141, 143-144 (N.D. 1990). Similar to the facts under the current case, in Aggie, informal hearings were held in one county prior to the “technical hearing,” as defined in Happy Day, which was held in a different county. Id.; See generally, Happy Day, 313 N.W.2d 768. The Appellee in Aggie argued that “allowing a public input hearing, where no sworn testimony is given and no exhibits are formally introduced in evidence, to be considered a ‘hearing’ for jurisdictional purposes ‘will result in real confusion and uncertainty regarding the proper forum for future administrative appeals.’” Aggie, at 143. The Aggie court was left unconvinced by the appellees’ argument and held that”

“We see less uncertainty in treating a public input hearing as a ‘hearing’ than in conditioning that determination on an after-the-fact appraisal of whether witnesses were sworn or exhibits were formally introduced in evidence, and if so, whether the testimony or exhibits were properly received in evidence. We do not believe the Legislature intended that appellate jurisdiction rest upon such fine legal nuance when it enacted § 28-32-15. We conclude that the Fargo public input hearing was a “hearing or a part thereof” under § 28-32-15, and that the district court for Cass County had subject matter jurisdiction to entertain Aggie’s appeal.”

Id.

On February 13, 2008, the Commission, at a public hearing held in Bismarck, Burleigh County at the Commission Chambers, acknowledged receipt of Minnkota's Letter of Intent. On March 18, 2008, Minnkota filed with the Commission in Bismarck, Burleigh County, its Application for Corridor and Route Permits. On April 21, 2008, the Commission, at a public hearing held in Bismarck, Burleigh County at the Commission Chambers, issued an order acknowledging the withdrawal of Otter Tail, that the filing was complete, and issued a Notice of Hearing. (Docs. No. 16 and 17, Commission Record on Appeal)

On April 23, 2008, the Commission, at a public hearing in Bismarck, Burleigh County, moved and entered an order denying the first intervention by RES America and PEAK Wind. (Doc. No. 21, Commission Record on Appeal)

On May 9, 2008, in Bismarck, Burleigh County, the Administrative Hearing Officer, Allen Hoberg, entered an Order denying the second petition to intervene, filed by Appellants.

On May 28, 2008, Minnkota filed late file exhibits 1 and 2 with the Commission in Bismarck, Burleigh County, North Dakota.

On June 6, 2008, at a public hearing in the Commission Chambers in Bismarck, Burleigh County, the Commission met and moved to approve the Findings of Fact, Conclusions of Law, and Order. (Doc. No. 42, Commission Record on Appeal)

Prior to May 22, 2008, hearings similar to those described by the Court in Aggie were held at the State Capitol Building in Burleigh County. Id. Thus, in accordance with the decision in Aggie, it was proper for the Appellants to file their appeal of the June 6, 2008 Order in Burleigh County. Id. Therefore, the Appellants respectfully request that Minnkota's Motion to Dismiss Appeal be denied.

Notwithstanding the fact that the hearings held in the State Capitol Building prior to the May 22, 2008 Cass County hearing sufficiently establish this Court's jurisdiction, the relevant statute clearly states in part that:

“The appeal of an order may be taken to the district court designated by law, and if none is designated then to the district court of the county in which the hearing or a part thereof was held.”

See N.D.C.C. § 28-32-42(3)(a).

In the current case, no district court is designated by law. Therefore, the Appellants had the right to appeal the June 6, 2008 Order to a district court where the “hearing or a part thereof was held.” Id. (emphasis added).

Clearly parts of this hearing and proceedings occurred in Burleigh County at the Commission Chambers so Burleigh County is a proper jurisdiction for this appeal. In the unlikely chance that the Court does not agree Appellants position regarding hearings held in Burleigh County prior May 22, 2008, the Court should still find that it has subject matter jurisdiction under N.D.C.C. § 28-32-42(3)(a). On July 8, 2008, the same day that the Appellants filed their Notice of Appeal and Specification of Error, a supplemental hearing in this matter was held in the Commission Hearing Room of the State Capitol Building in Burleigh County. (Doc. No. 46, Commission Record on Appeal) Therefore, considering the fact that a “hearing or a part thereof” was held in Burleigh County, it was proper for the Appellants to file their Appeal with this Court which has subject matter jurisdiction over the issues presented herein. Therefore, the Appellants respectfully request that the Appellees' Motion be denied.

The Appellants filed an appeal of the order denying intervention by ALJ Hoberg. (Doc. No. 29, Commission Record on Appeal) This appeal was filed in Burleigh County, North Dakota as Civil

No. 08-08-C-1474-001. Minnkota did not object to the jurisdiction of Burleigh County to hear the appeal of the denial of intervention.

Then Appellants filed this appeal of the Commission's June 9, 2008 Findings of Fact, Conclusions of Law or Order for Judgment with District Court Burleigh County. In Appellants Notice of Appeal and Specifications of Error, Appellants requested that this appeal be consolidated with the initial appeal in Civil No. 08-08-C-1474-001 because both appeals dealt with the same parties, same subject matter, and same Order.

CONCLUSION

The basis for Minnkota's Motion essentially rests on two arguments: (i) The Appellants have not appealed a "final order", and (ii) the Appellants have not appealed to the proper district court. With regard to Minnkota's first argument, pursuant to N.D.C.C. § 49-22-19, appealable orders issued by the Commission include certificates, permits, and final orders. Therefore, the Appellants' Appeal of the certificates and permits contained in the June 6, 2008 Order was proper. In response to the Appellees' second argument, hearings were held in Burleigh County both before and after the May 22, 2008 Cass County hearing. Therefore, the Appeal was properly filed in a district court that a "hearing or a part thereof was held." See N.D.C.C. § 28-32-42(3)(a).


Finally, in filing their appeal in this matter, Appellants filed in Burleigh County, the county where they had filed its first appeal of the denial of intervention and requested that the two appeals be consolidated.

For the reasons provided herein, the Appellants respectfully request this Court deny Minnkota's Motion to Dismiss Appeal.

Dated this 29 day of October, 2008.

Respectfully submitted,

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



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