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STATE OF NORTH DAKOTA

NOV 04 2008

IN DISTRICT COURT

COUNTY OF BURLEIGH

PUBLIC SERVICE COMMISSION

SOUTHWEST JUDICIAL DISTRICT

CIVIL NO. 08-08-C-1709

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

vs.)

AFFIDAVIT OF SERVICE

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

STATE OF NORTH DAKOTA)
COUNTY OF MORTON) ss.

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 3 day of November, 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. Brief of Appellants RES America Developments, Inc., PEAK Wind Developments LLC, and Burchill Farms Incorporated

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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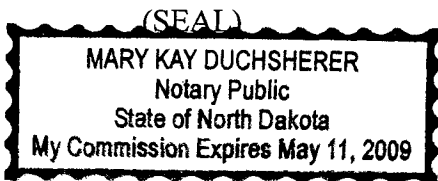
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Melissa K Schneider
MELISSA K SCHNEIDER

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

Mary Kay Duchscherer
Notary Public, State of North Dakota



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

Civil No. 08-08-C-1709

Appellants,)

Agency Case No. PU-08-48

vs.)

BRIEF OF APPELLANTS RES)
AMERICA DEVELOPMENTS INC, PEAK)
WIND DEVELOPMENT LLC AND)
BURCHILL FARMS INCORPORATED)

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

Appellees.)

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

Appellants RES America Developments Inc. (RES America), PEAK Wind Development LLC (PEAK Wind), and Burchill Farms Incorporated (Burchill Farms) [together Appellants], pursuant to N.D.C.C. § 28-32-42 and 49-22-19, appeal from Findings of Fact, Conclusions of Law, and Order of the North Dakota Public Service Commission (“Commission”), in Case No. PU-08-48, in which the Commission issued No. 105 Minnkota Certificate of Corridor Compatibility and Permit No. 115 to construct and operate the transmission line from Pillsbury to Fargo:

Executive Summary

On March 18, 2008, Otter Tail Power Company (Otter Tail) and Minnkota Power Cooperative, Inc. (Minnkota) filed a joint application for a Certificate of Corridor Compatibility and a Route Permit with the North Dakota Public Service Commission (Commission) for construction and operation of a 56.6 route 230 kV electric transmission line in eastern North Dakota. Otter Tail

and Minnkota knowingly designed the new transmission line with insufficient capacity to meet the needs of all of the potential wind generation capability in the area. Otter Tail and Minnkota knew prior to making any plans that Appellants are involved in a joint venture to build a 400MW wind farm located within 500 yards of the new Minnkota Transmission line. In fact, Appellants Glacier Ridge project is closer to the point of interconnection of the proposed transmission line than either of the two wind farms that are currently slated to use the line. Appellants sought to intervene in the permitting action before the Commission to raise the question of why a “two lane highway” was being built in an area that needed a “six lane highway”. Appellants requested that the transmission line be constructed either with sufficient capacity to permit Appellants to interconnect to the line or for the transmission line to be constructed in a manner that would allow a second circuit to be added to the line at a future date, so that the line would be capable of handling all of the energy needs in this region. As testimony by local citizens in this case clearly indicates, transmission lines have a significant impact on the citizens of North Dakota as well as other significant impacts to North Dakota. The Commission must make efforts to minimize such impacts when possible. Assuring that transmission lines are constructed with sufficient capacity at the outset is a great way to limit impacts to the environment and to North Dakota citizens. Otherwise, Appellants will be forced to appear in front of the Commission within a few years to seek approval of yet another line that has virtually the same starting point, the same ending point, and when assuming a ten year planning horizon, virtually the same on line date as the transmission line now in question. This is in addition to a third line that currently exists in the area, and the potential for even more lines along this important west/east transmission corridor

The Commission incorrectly denied Appellants Petition to Intervene and which decision was appealed in Civil No. 08—08-C-1474-001. Had the Commission allowed the Appellants to intervene as Appellants had timely requested to do, then the Commission could have more fully vetted the options available to the state to avoid transmission impacts to its citizens and the environment. By not allowing Appellants the right to intervene, the Commission violated the Appellants due process rights.

Appellants took every action available to them to make the Commission aware of the issues raised here-in, including an appearance at the public hearing that included testimony on the record.

The Commission entered an Order on June 9, 2008 issuing Minnkota Certificate of Corridor Compatibility No. 105, and Route Permit No. 115 to construct and operate the transmission line from Pillsbury to Fargo with the exception of a small portion of Rush River Township.

Appellants filed this appeal requesting that this Court reverse the Commission's determination and vacate the Commission's June 9, 2008 Order and remand this case back to the Commission with instruction to permit the intervention of Appellants and to hold a new hearing to correct the errors.

Statement of Issues

1. Was the Order of the Commission in accordance with the law?
2. Did the Commission fail to make Findings of Fact required by North Dakota Siting Laws?
3. Were the Commission's Findings of Fact supported by a preponderance of Evidence?
4. Were the Commission's Conclusions of Law supported by the Findings of Fact?

5. Did the Findings of the Commission sufficiently address the evidence presented by Appellants?

Procedural History

1. On February 5, 2008, Minnkota Power Cooperative, Inc. (Minnkota) and Otter Tail Corporation d.b.a. Otter Tail Power Company (Otter Tail), filed a Letter of Intent (LOI) to submit siting applications for a proposed 230kV electric transmission line and associated facilities to be constructed within Griggs, Steele, Barnes and Cass Counties of North Dakota. In the LOI, Minnkota and Otter Tail also requested that the Commission shorten the one-year waiting period required between the submission of the LOI and the filing of an application. (Doc. No. 1, Commission Record of Appeal)

2. On February 13, 2008, the Commission acknowledged the Letter of Intent, shortened the one-year waiting period between filing a letter of intent and a siting application to one day, and assessed a filing fee of \$100,000 due upon the filing of an application. (Doc. No. 7, Commission Record of Appeal)

3. On March 18, 2008, Otter Tail and 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 a 56.6 mile, 230 kV electric transmission line located in Cass, Barnes, and possibly Steele Counties of North Dakota, Case No. PU-08-48. (Doc. No. 8, Commission Record of Appeal)

4. In a timely petition to intervene filed on April 9, 2008, RES America and PEAK Wind stated that they were developing a wind generation project approximately 500 yards away from where the Ashtabula FPL Energy Wind Farm's proposed transmission would originate to be carried on the Otter Tail / Minnkota line and, as such, had previously filed with the Midwest Independent Transmission System Operator a request to interconnect with the electric transmission system owned by Otter Tail. Noting that Otter Tail was required to file an application requesting an application for public convenience and necessity (PCN), RES America and PEAK Wind suggested that the Commission hold hearings on the PCN before addressing the corridor certificate and route permit requested by Otter Tail and Minnkota. (Doc. No. 14, Commission Record of Appeal)

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 America and PEAK Wind as parties. Administrative law judge Allen C. Hoberg was designated procedural hearing officer in this case. (Doc. No. 11 and 12, Commission Record of Appeal)

6. On April 17, 2008, Minnkota, with the concurrence of Otter Tail, filed an Amendment to the Application which made several material modifications, including (i) purportedly removing Otter Tail as an owner of the project and (ii) changing the route of the high voltage transmission by increasing the length of the line to 61.6 miles and crossing 13.5 miles more of "green field" areas than the March 18 Application.

7. On April 21, 2008, the Commission acknowledged the withdrawal of Otter Tail Corporation as an applicant, and deemed the application complete, conditioned upon the filing of a map showing proposed final transmission line structure locations with said map filed by Minnkota

on or before May 15, 2008. The Commission issued a Notice of Filing and Notice of Hearing, scheduling a public hearing to begin May 22, 2008 at 10 a.m. CDT at the City Auditorium in Casselton, North Dakota. The notice identified the following issues to be considered:

- A. Will the location, construction, and operation of the proposed electric transmission facility produce minimal adverse effects on the environment, natural resources, and upon the welfare of the citizens of North Dakota?
- B. Is the proposed transmission facility compatible with the environmental preservation and the efficient use of resources?
- C. Will the proposed electric transmission facility 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? (Doc. No. 18, Commission Record of Appeal)

8. On April 23, 2008, the Commission denied the petition to intervene of RES America and PEAK Wind. (Doc. No. 21, Commission Record of Appeal)

9. In response to the amended application on May 5, 2008, RES America, PEAK Wind, and Burchill Farms filed a "Petition to Intervene and Request for Shortened Notice and Response Periods, Expedited Consideration, and Expedited Discovery" (the Petition to Intervene). (Doc. No. 26, Commission Record of Appeal)

10. On May 8, 2008, Minnkota filed an objection to the Petition to Intervene recognizing corridor and route of the proposed transmission line (as identified in amended Application) would cut through land owned by Burchill Farms, but that the proposed route would be changed once again

at the public hearing, this time detouring around the land owned by Burchill Farms. (Doc. No. 27, Commission Record of Appeal)

11. On May 9, 2008, before the Appellants could respond to Minnkota's objection, the procedural hearing officer issued an Order Denying Appellants Second Intervention. The hearing officer held 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 commented 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. (Doc. No. 30, Commission Record of Appeal)

12. On June 9, 2008, Appellants filed a Notice of Appeal and Specifications of Error from the May 9, 2008 Order denying their Intervention. This Appeal was filed in Burleigh County as Civil No. 08-08-C-01474/001. (Doc. No. 47, Commission Record of Appeal)

13. On May 15, 2008, Minnkota filed a map showing proposed final transmission line structure locations. The total distance of the line as determined in the final structure placement was found to be 61.1 miles. (Doc. No. 31, Commission Record of Appeal)

14. A public hearing on Minnkota's amended Application was held as scheduled on May 22, 2008 in Casselton, North Dakota. (Doc. No. 18, Commission Record of Appeal)

15. At the public hearing, Appellants appeared and offered testimony as follows:

A. PEAK Wind is comprised of 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 and RES America are developing a wind project that is located adjacent to the Proposed Transmission Line. (Tr. Pg. 215)

- B. The Proposed Transmission Line would not 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. Granting Minnkota's Application would not result in routing transmission facilities in an orderly manner as required by statute, but rather would create a hodge-podge of multiple high voltage transmission lines criss-crossing farm land. Multiple transmission lines will have multiple impacts on the environment. (Tr. Pg. 216-217)
- C. PEAK Wind and RES America encouraged the Commission to urge Minnkota to consider the adverse direct and indirect environmental effects which cannot be avoided should the proposed site or route be designated. Those effects include requiring electric transmission providers to construct multiple high voltage transmission lines, instead of a single line that can accommodate the many customers and needs. (Tr. Pg.217)
- D. As landowners and farmers, PEAK Wind (including Burchill Farms) had a significant concern regarding the siting of multiple, unnecessary transmission lines. (Tr. Pg. 210-211)
- E. PEAK Wind and RES America are not opposed to the construction of transmission lines, but simply desire that Minnkota's proposed transmission line be constructed with sufficient capacity for the energy generated from the area including the wind generation project being developed by PEAK Wind and RES America. (Tr. Pg. 216)
- F. If Minnkota's proposed transmission line is constructed with sufficient capacity for the energy generated from the area, it will prevent the additional and unnecessary environmental impact when subsequent transmission lines are required running from the same place of origin to the same end point. (Tr. Pg. 217)
- G. Minnkota did not include the proposed transmission line in its 10 year plan, nor did it include the PEAK Wind farm. (Tr. Pg. 218)
- H. Any delay caused by the proper construction of the transmission line to the proper capacity is not the fault of the Commission, or of the Appellants, but is the fault of Minnkota, for not properly considering the PEAK Wind farm in its planning. (Tr. Pg. 243)

I. Minnkota could build the line for double circuit to allow for an additional line to be put in place on the same towers when PEAK Wind comes on line in either 2009 or 2010. (Tr. Pg. 217)

16. The Commission entered its Findings of Fact, Conclusions of Law, and Order for Judgment in the Minnkota Power Cooperative, Inc. Pillsbury-Fargo 230 kV Transmission Line Siting Application Case No. PU-08-48 on June 9, 2008. Pursuant to the Order, the Commission issued No. 105 Minnkota Certificate of Corridor Compatibility and Route Permit No. 115 to construct and operate the transmission line from Pillsbury to Fargo with the exception of a portion of Rush River Township. (Doc. No. 42, Commission Record of Appeal)

17. The Appellants Appeal from the June 9, 2008 Order, and requested that the Court consolidate this appeal with Appellants' previous appeal of the May 9th Order denying intervention, Civil Case No. 08-08-C-01474/001. (Doc. No. 80, Commission Record of Appeal)

18. The Commission continued the public hearing in PU-08-48 to July 8, 2008, at the Commission Hearing Room in Bismarck, ND. Issues were limited to the proposed alternate route located in Rush River Township within or near sections 3, 4, 9, 10, 13, 14, 15, and 16, Township 14 North, Range 151 West. (Doc. No. 44, Commission Record of Appeal)

19. On July 8, Appellants filed their Notice of Appeal and Specifications of Error with the District Court of Burleigh County and requested that the Court consolidate their appeal Burleigh County Civil Case No. 08-8-C-1709 with the Appeal of the Denial of Intervention, Burleigh County Civil Case No. 08-08-C-1474.

20. Venue lies with this Court pursuant to N.D.C.C. § 38-32-42(3) (a), which provides that the appeal of an agency determination may be taken to the district court designated by law, and if none is designated, to the district court of the county in which the hearing or a part thereof was held.

No other district court is designated by law for this appeal, and hearings in this matter were held in both Cass County and at the Commission hearing room at the State Capitol Building, Burleigh County, North Dakota.

Statement of Facts

Minnkota and Otter Tail filed a joint application for a certificate of corridor compatibility and a route permit with the Commission for the construction of a 56.6 mile 230 Kv electrical transmission line located in Cass, Barnes, and Steele counties in North Dakota to the Maple River substation in Fargo. (Doc. 8, Commission Record on Appeal) The purpose of the line is to transfer electricity from wind generation facilities in Barnes, Griggs, and Steele counties, operated by FPL Energy and M-Power LLC, to Minnesota. (Doc. 8, Pg. 17)

Minnkota and Otter Tail considered building the transmission line as a 230 kV line and as a 345 kV line. Minnkota and Otter Tail decided against building a 345 kV line because the line would cost 140% as much as the 230 kV line. (Doc. 8, pg. 18-19) The proposed transmission line was not included in either Minnkota's or Otter Tail's 2007 ten-year plan filed with the Commission. Minnkota and Otter Tail did not file an updated ten-year plan which would include this transmission line with the Commission until July 2008. (Doc. 8, Pg. 19, Commission Record on Appeal)

RES America and PEAK Wind are developing a wind generation project located approximately 500 yards away from where the proposed Minnkota transmission line would originate. This wind farm is proposed to be built in 2009 or 2010, and depends on RES America and PEAK Wind obtaining a means for transmission of the electricity along the same route as the Minnkota line.

RES America and PEAK Wind, in October 2007, had filed a request to interconnect with Otter Tail. RES America also spoke with Minnkota in February 2008 and was not informed about the proposed Minnkota-Otter Tail transmission line nor asked if RES America and PEAK Wind would be interested in jumping on the line. (Tr. Pg. 242-243)

RES America and PEAK Wind were not notified by either Minnkota or Otter Tail about this proposed transmission line until Minnkota and Otter Tail issued a press release in the spring of 2008 announcing their filing with the Commission. (Tr. Pg. 243) RES America and PEAK Wind understand that the building of additional transmission capacity in North Dakota needs to happen and they are supportive of it -- they just want to have an equal opportunity to participate. (Tr. Pg. 244)

After RES America and PEAK Wind filed its initial petition for intervention and raised the necessity of Otter Tail obtaining a Certificate of Public Convenience and Necessity, Minnkota filed an amendment to the joint Minnkota-Otter Tail application, purportedly removing Otter Tail as an owner of the project. (Doc. 17, Commission Record on Appeal)

Production Tax Credits for wind energy generation do not impact Minnkota directly because Minnkota as a cooperative is not a tax-paying entity. (Trans. Pg. 37) The Federal PTCs were scheduled to expire at the end of the year, and if that were to come about, it would impact other parties (Wind Energy Developers). (Trans Pgs 37, 152) Nyle Burchill of Burchill Farms testified that FPL Energy had plans to put a temporary line from the Ashtabula FPL Energy Wind Farm to the existing Pillsbury substation which would have the effect of qualifying for the Federal Production Tax Credit scheduled to expire in 2008. (Tr. Pg. 212)¹

¹ These Federal PTCs were in fact extended through 2009 as part of the Emergency Economic Stabilization Act of 2008 which was signed into law on October 3, 2008.

PEAK Wind is able and ready to develop their wind farm in 2009 or 2010 (Tr. Pg. 216). The PEAK Wind Transmission Line will be built from the same place to the same place as the Minnkota Line (Tr. Pg. 216).

PEAK Wind is looking at a 400 megawatt wind generation site. The Commission should not approve the building of a two lane highway for Minnkota traffic, then, in two years, have to approve the building of another two lane highway adjacent to the first line. (Tr. Pg. 217)

If the Commission doesn't require Minnkota to build a transmission line of adequate size now, then there will have to be two transmission lines built in the same place which will cause a much greater environmental and personal impact on the citizens of North Dakota than if the Commission required one transmission line be with higher capacity, or with the capacity to install double capacity lines. (Tr. Pg. 217).

In the present case, Minnkota's 2007 ten-year plan filed with the Commission did not contain the proposed Pillsbury to Fargo transmission line as required by §49-22-04 N.D.C.C. Nor did Minnkota's 2007 ten-year plan describe any efforts by Minnkota to coordinate the plan for the Pillsbury to Fargo transmission line with other utilities including RES America and PEAK Wind as required by §49-22-04(3) N.D.C.C.

If two transmission lines are required to be built instead of one sized for the transmission needs in the area, it will result in extra costs for construction of the lines. These costs will have to be passed on to the consumers in North Dakota. (Tr. Pg. 220).

In addition to the increased costs of building the Minnkota transmission line in 2008-2009 and another PEAK Wind-RES America transmission line in 2009-2010, there will be additional

environmental impacts from two adjacent transmission lines compared with the environmental impact of only one adequately sized line. (Tr. Pg. 220).

The Commission did not believe that it had the authority to make required changes to the capacity of the proposed Minnkota transmission line before them. Commissioner Wefald requested authority to show that the Commission could require Minnkota to build a 345 Kv line instead of a 230 Kv Line. (Tr. Pg 221). This authority was provided in a letter to the Commission filed by Appellants. (Doc. No. 34, Commission Record on Appeal)

Commissioner Cramer in his concurring opinion indicated that he had a concern whether the proposed transmission line was big enough. Commissioner Cramer was concerned that it might be impossible to change plans and still meet the deadline for Production Tax Credits. Commissioner Cramer also did not see where the Commission has the authority to order a 345 kV capacity to an application for a 230 kV line. (Concurring Opinion Document No. 42 Commission Record of Appeal)

The vitality of the PEAK Wind Farm is dependent upon PEAK Wind having transmission from the PEAK Wind farm to areas where the electricity can be used or sold. PEAK Wind is planning to utilize transmission to Fargo and into Minnesota. (Tr. Pg. 225).

Minnkota, in its application, discussed the cost comparison of constructing its transmission line with a capacity of 345 KV or 230 Kv. (Tr. Pg. 227, Doc. No. 3, Commission Record on Appeal, Pg. 18-19). A transmission line can be built with towers that would prevent the installation of another transmission line at the tower or the line can be built with higher voltage lines and capacities. (Tr. Pg. 229) It would probably be less costly to and certainly would have less impact on the environment and on the people to construct the line with this ability to be expanded than to have to

construct two separate lines. (Tr. Pg. 229) It may be questionable that Minnkota can build the transmission line in 2008 as this is an aggressive timetable. (Tr. Pg. 231)

RES America has an important and unique relationship with PEAK Wind. It is a true joint venture-type situation that has a tremendous value for the landowners. (Tr. Pg. 240) RES America and PEAK Wind are producing renewable energy, but they are doing it in a way that keeps money in North Dakota. (Tr. Pg. 241) The investment in the PEAK Wind Farm, if the full project size of 400 megawatts is completed, is \$800 million. From a scale perspective, the transmission cost is five percent of the total cost of the project. (Tr. Pg. 241) If Minnkota would double circuit the transmission line (i.e., preparing the line for a double circuit), there is about a 20% additional cost to prepare the line for a double circuit. (Tr. Pg. 241)

Utilities in fast growing areas prepare transmission lines for double circuits all of the time because, although they don't have a need right away, within five years, they will. In this case, with Minnkota's transmission line, the timeframe for needing to expand transmission capacity will be a lot sooner. (Tr. Pg. 241-242) In terms of construction, the Minnkota transmission line, the Ashtabula Wind Farm and the PEAK Wind Farm are happening at virtually the same time. (Tr. Pg. 242)

Nyle Burchill of Burchill Farms testified that when you build a power plant you don't build it just for the size you need right now. You build it for the future projected needs. (Tr. Pg. 210-211)

RES America and PEAK Wind made an interconnection request of the Otter Tail system back in October 2007. Despite this, no one from Otter Tail or Minnkota came to RES America or PEAK Wind to ask whether RES America or PEAK Wind would be interested in jumping on this transmission line. (Tr. Pg. 243)

While Minnkota is making room on the line for Otter Tail and for FPL Energy, but they have not made room on the transmission line for RES America and PEAK Wind. (Tr. Pg. 243)

RES America and PEAK Wind are not opposed to the transmission line; they just want the equal opportunity to participate in the transmission line. (Tr. Pg. 244) RES America and PEAK Wind recognize that extra costs would need to be expended to build an expanded line and they were and are ready to discuss a mutually satisfactory arrangement on this with Minnkota. (Tr. Pg. 245)

Scope of Review on Appeal

§ 28-32-46 N.D.C.C. Scope of and procedure on appeal from determination of administrative agency provides:

“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.”

It is Appellants position that the order of the Commission is not in accordance with the law. Also, Appellants were not afforded a fair hearing because of the denial of their request for intervention. This argument has been made in Civil No. 08-08-C-1474-001.

Appellants also contend that the Commission’s Order is deficient in that certain findings of fact were not supported by the preponderance of evidence, that the conclusions of law are not supported by the findings of fact, and the findings of fact do not sufficiently address the evidence provided by the Appellants.

Due to these reasons, the Appellants respectfully request the Court to reverse and rescind the Order back to the Commission for disposition in accordance with the Order of the Court.

Issue 1: The Order of the Commission is not in accordance with the law pursuant to N.D.C.C. § 49-22-02 or § 49-22-04 N.D.C.C.

On appeal from decision of public service commission under Administrative Agencies Practice Act, district court must review evidence in record certified from commission to determine whether findings made by commission are supported by evidence and whether commission’s decision is in accordance with law. NDCC 28-31-01 et seq., 28-32-19. Eklund Bros. Transport, Inc. v. Thompson, 146 N.W.2d 613 (ND 1966)

N.D.C.C. 49-22-02 provides as follows:

“The legislative assembly finds that the construction of energy conversion facilities and transmission facilities affects the environment and the welfare of the citizens of this state. Therefore, it is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and upon the welfare of the citizens of this state by providing that no energy conversion facility or transmission facility shall be located, constructed, and operated within this state without a certificate of site compatibility or a route permit acquired pursuant to this chapter. The legislative assembly hereby declares it to be the policy of this state to site energy conversion facilities and to route transmission facilities in an orderly manner compatible with environmental preservation and the efficient use of resources. In accordance with this policy, 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.” (emphasis added)

§49-22-02 N.D.C.C. requires the State to site energy route transmission facilities in an orderly manner compatible with environmental preservation and the efficient use of resources.

The Commission did not, as a part of this action, assess whether the development of the proposed Minnkota Pillsbury to Fargo transmission facilities will be sited in an orderly manner compatible with environmental preservation and efficient use of resources. The Commission did not consider the impact of the proposed line on RES America and PEAK Wind’s proposed wind farm or the orderly development of transmission needs in the area. When a governmental agency disregards the requirements of the law, a court may reverse a decision in favor of the government to prophylactically ensure that the government acts consistently and predictably in accordance with the law. May v. Sprynczynatyk, 695 N.W.2d 196 (ND 2005)

The Commission by its too-narrow review of the impact of the Minnkota line, is encouraging a hodge-podge transmission line system in violation of the requirements of §49-22-04 N.D.C.C. The proposed Minnkota transmission line is not being sited in an orderly manner compatible with environmental preservation and efficient use of resources. The line should be built with sufficient

capacity to include the wind generation from the PEAK Wind farm that will be built within the next two years. By not requiring Minnkota to adequately size the line, it will result in much increased costs required to construct an additional line. The increase in costs to build an additional line in the near future will be passed on to the consumers by the utility companies. More importantly, if an additional line is required to be built, there will be two times the environmental impact on the citizens of North Dakota, who do not want to have multiple poles on their land. For instance, Brenda Staples already has seven transmission poles on her property. The Minnkota transmission line will add another 18-20 poles. (Tr. Pg. 260) If another line is necessary for RES America and PEAK Wind because the Minnkota line is not adequately sized, Ms. Staples may have to have another 18-20 poles on her property. This certainly does not minimize adverse human and environmental impact.

Pursuant to § 49-22-04 N.D.C.C.:

“Every utility that owns or operations, or plans within the next ten years to own, operate, or start construction on any facility shall annually develop a ten-year plan as specified in this section. On or before July first of each year, the utility shall submit its ten-year plan to the commission...An identification of the location of the tentative preferred site for all energy conversion facilities and the tentative location of all transmission facilities on which construction is intended to be commenced within the ensuing five years...A description of the efforts by the utility to coordinate the plan with other utilities so as to provide a coordinated regional plan for meeting the utility needs of the region...Upon receipt of the ten-year plans the commission shall proceed to assess the impact of the development proposed within the state to ensure that energy conversion facilities and transmission facilities will be sited in an orderly manner compatible with environmental preservation and efficient use of resources.” (emphasis added)

Neither Minnkota nor Otter Tail included the proposed transmission line in their ten-year plans filed in 2007 with the Commission. Minnkota and Otter Tail did not, as required by § 49-22-04 N.D.C.C., “describe its efforts to coordinate and plan with other utilities so as to provide a coordinated regional plan for meeting the energy needs of the region.” In fact, RES America and

PEAK Wind filed a request for interconnection with Otter Tail in the fall of 2007, and spoke with Minnkota as late as February 2008, inquiring into electrical transmission for the PEAK Wind farm scheduled to be constructed in 2009 or 2010. Minnkota and Otter Tail did not coordinate with RES America or PEAK Wind; they did not even advise them of the proposed line until their press release in March 2008. Thus, their actions violated § 49-22-04 N.D.C.C. and made it impossible for the Commission to “assess the impact of the development within the State” and “ensure that transmission facilities are sited in an orderly manner compatible with environmental preservation and efficient use of resources.”

Issue 2: Commission failed to make the following Findings of Fact Required by North Dakota Siting Laws

The notice issued by the Commission on April 21, 2008 identified the following issues that the Commission was required to consider before issuing a Certificate of Corridor Compatibility and Permit for the proposed transmission line:

- A. Will the location, construction, and operation of the proposed electric transmission facility produce minimal adverse effects on the environment, natural resources, and upon the welfare of the citizens of North Dakota?
- B. Is the proposed transmission facility compatible with the environmental preservation and the efficient use of resources?
- C. Will the proposed transmission facility 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?

The only finding of facts by the Commission that the proposed transmission facility “will produce minimal impact” are: Finding of Fact 16 which deals with exclusive areas; 17 which

addresses occupied residences within 500 feet of the line; 18 which indicates no cultural resources are anticipated to be impacted by the project; and 19 which addresses woodlands and wetlands. The Commission did not make any Finding of Fact directly on the four issues specifically identified in its Notice of Hearing.

ND Rule Admin Code 60-06-06-02 requires an order approving a request to waive procedures and time schedules to “contain findings in support of such approval”. The Commission’s Order does not contain any findings of fact holding that is appropriate for the Commission to waive procedures and consolidate the Corridor Certificate and Route Permit.

Issue 3: Finding of Fact 14 is not supported by the preponderance of the evidence as required by N.D.C.C. 28-32-46(5).

In determining whether an agency’s findings of fact are supported by preponderance of evidence, the reviewing court does not make independent findings of fact or substitute its judgment for that of the agency; rather, it determines only whether a reasoning mind could have reasonably determined that the agency’s factual conclusions were supported by the weight of law. Ohlson v. North Dakota Dept. of Human Services, 552 N.W.2d 73 (ND 1996)

Finding of Fact 14 is a mere recital of the administrative rule contained in chapter 69-08-08 and does not include any findings of fact at all. In fact, the evidence supported a finding of fact that the proposed transmission line will not minimize adverse human and environmental impact. There was testimony that it would be less costly and certainly have less impact on the environment and on the people to construct the line with the ability to be expanded rather than have to construct another adjacent line for RES America and PEAK Wind. (Tr. Pg. 229)

At the public hearing held in Casselton, North Dakota on May 22, 2008, Commissioner Wefald requested a statement of legal authority for the Commission to do as RES America and PEAK Wind were requesting -- that the Commission order Minnkota to build the transmission line properly. Commissioner Cramer in his concurring opinion also doubted whether the transmission line was being constructed large enough for the transmission needs in the area (i.e., to include PEAK Wind's transmission needs). In order to build the transmission line properly, Minnkota should be required to either build the transmission line with enough capacity (i.e., a 345-kV line) to include the PEAK Wind Farm energy production that would come on line in 2009 or 2010, or to build the towers to add a second conductor or double circuit in 2009 or 2010 when PEAK Wind's power would come on line. However, the Commission did not believe it had authority to require Minnkota to build the transmission line with sufficient capacity.

The Commission's failure to correctly interpret and apply controlling law is arbitrary, capricious, and unreasonable. Burlington Northern and Santa Fe Ry. Co. v. Benson County Water Resource Dist., 618 N.W.2d 155 (ND 2000).

As identified at in the Commission'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; imply that the Commission understood that it had authority to act as requested by RES America and PEAK Wind.

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.

The uncontradicted testimony is that PEAK Wind and RES America will have its up to 400 MW wind farm constructed in either 2009 or 2010. The Commission will then have 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 cited legal authority the Commission had the following two options:

1. Deny the proposed minimal transmission line because it is not adequately sized for the known energy production in the area. Permitting a known undersized line will not minimize adverse human or environmental impact; as required by law, or
2. Condition the permit on Minnkota's building the transmission line with either sufficient capacity for the PEAK Wind Project, i.e., a 345-kV line, or constructing it with a bundled conductor, or constructing the poles so that a double circuit could be installed in 1009 or 2010 when PEAK Wind comes on line, without the necessity of siting and constructing a separate transmission line.

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".

Minnkota is urging the Commission to waive time lines in this case to construct the line in 2008. Though this is an ambitious time line, Minnkota's preferred schedule is not the problem of the Commission, or of RES America, PEAK Wind, or the citizens of North Dakota.

Administrative Rule 60-06-03.01 requires that a letter of intent be filed with the Commission at least one year prior to the application for a certificate. While the Commission granted a waiver, this extra time would have given the Commission and the public additional

time to ensure the transmission line was done right the first time.

Minnkota has also sought a waiver of procedures to consider a single consolidated application for corridor certificate and route permit. The Commission has, by statute, six months from the filing of a completed application for certificate of corridor compatibility, to issue its order. Further, if the Commission does not approve the single consolidated application, the Commission will have another six months for approval of the route permit. These six month periods may be extended by the Commission for just cause.

The Commission found Minnkota's application for Corridor Compatibility and application for Route permit to be complete on April 21, 2008. The Commission has by law until October 21, 2008 before it must issue its order, absent showing of good cause.

It was not reasonable for Minnkota to rely on the Commission waiving all of these time lines and procedures and approving the order, all in time for Minnkota to complete construction in 2008, when the application was not complete until April 21, 2008. The fact that Minnkota may have to order some of the towers based on this unreasonable time line should not be a factor in rushing through the approval of an undersized transmission line.

The stated reason for this rush for approval of the order is the federal PTCs for wind farms may expire at the end of 2008. In fact, Ashtabula is placing a temporary line to conduct to the existing Pillsbury substation which would protect the PTCs. In any case, as noted earlier, in fact these PTCs were extended through 2009.

RES America and PEAK Wind encourage the Commission to condition Minnkota's transmission line to include capacity for, or the ability to add capacity for the PEAK Wind farm wind production. Given the opposition to this line by a number of property owners as well as concern over

duplication of towers expressed by Reed Townships, RES America, PEAK Wind, and the Commission do not want to have to go through another transmission siting in the exact same area, and across the same property in the next year to two. If this happens, what will be the Commission's answer to the public when they ask why wasn't the PEAK Wind project considered in the Minnkota line approved last year?

Issue 4: The following conclusion of law and order of the Commission are not supported by its findings of fact pursuant to N.D.C.C. § 28-32-46(6).

An administrative agency's decisions on questions of law are fully reviewable. Estate of Pladson v. Traill County Social Services, 707 N.W.2d 473 (ND 2005)

- A. The Commission's Conclusion of Law No. 3 that "the proposed project is of such length, design, location and purpose that it will produce minimal adverse effects, as defined under Section 49-22-05.2, of the North Dakota Century Code."
- B. The Commission's Conclusion of Law No.4 that "the Application submitted by Minnkota meets the corridor and route evaluation criteria required by Chapter 49-22 of the North Dakota Century Code."
- C. The Commission's Conclusion of Law No. 5 that "the location, construction, and operation of the proposed transmission facility will produce only minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota."
- D. The Commission's Conclusion of Law No. 6 that "the proposed transmission facility is compatible with the environmental preservation and the efficient use of resources."
- E. The Commission's Conclusion of Law No. 7 that "the proposed transmission facility corridor and route will 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."

- F. The Commission's Conclusion of Law No. 8 that "the proposed transmission facility corridor and route are of such length, design, location, and purpose that they will produce minimal adverse affects."
- G. The Commission's Conclusion of Law No. 9 that "the requested waivers of procedures and time schedules are justified based upon: the minimal impacts on the environment and the welfare of the citizens of North Dakota; the lack of objection to the proposed transmission facility by federal, state, and local government bodies and agencies or by the vast majority of landowners along the route; and the objective to have area wind generation projects in operation by December 31, 2008."

Despite these "Conclusions of Law," the Commission made no Findings of Fact that the transmission line will produce minimal adverse effects. Further, the Commission made no specific finding and, more importantly, made no finding concerning the orderly siting of transmission facilities compatible with environmental preservation and efficient use of resources.

Due to the threat of Federal PTCs being scheduled to expire at year end, the Commission did everything it could to push the approval of the Minnkota transmission line along the fast track. The Commission waived the following statutory requirements:

- 1) The requirement under ND Admin Code 69-06-06-01 to file the letter of intent with the Commission at least one year prior to the filing of an application;
- 2) The three month period for approval of certificate of corridor compatibility under NDCC 49-22-08(5);
- 3) The six month period for approval of a route permit under NDCC 49-22-08.1(5);
- 4) Waiver of the requirements of a ten-year plan to be included in the application (Doc. No. 8, Pg 2); and
- 5) That the Commission hold a single consolidated hearing on the Application for a Certificate of Corridor Compatibility and Route Permit.

The Commission rushed the approval of Minnkota's proposed transmission line because of potential loss of Federal PTCs for third parties who are not part of these proceedings.

By approving a transmission line that is not large enough for the transmission needs in the area, the Commission is encouraging a hodge-podge construction of transmission rather than ensuring that energy needs are met and fulfilled in an orderly and timely fashion. NDCC 49-22-02.

The Commission's own staff admitted that if a second transmission line is required to be built adjacent to the Minnkota transmission line in the next two years, it will cost more than building the Minnkota line with sufficient capacity now, and will result in a greater adverse human and environmental impact on the people of North Dakota.

The interests of non-parties should not trump the interests of the people of North Dakota whom the Commission by law is required to protect.²

Issue 5: The findings of fact made by the agency do not sufficiently address the following evidence presented to the agency by the Appellants pursuant to N.D.C.C. §28-32-46(7).

Under Administrative Agencies Practice Act provision authorizing judicial reversal of agency decision if agency's rules or procedure have not afforded parties (such as Appellants) a fair hearing, parties not afforded a fair opportunity to prepare their cases are entitled to second chance. NDCC 28-32-19, subd. 4. Flink v. North Dakota Workers Compensation Bureau, 574 N.W.2d 784 (ND 1998)

- A. PEAK Wind is comprised of 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

² Indeed, as the Federal PTCs have been extended by law through 2009, the urgency to complete the transmission line by year-end 2008 has been removed and the Commission has time to consider the case in a complete, orderly and proper manner.

customers of Minnkota. PEAK Wind and RES are developing a wind project that is located adjacent to the Proposed Transmission Line.

- B. Land owned by Burchill Farms (a PEAK Wind member) is located within the transmission corridor proposed by Minnkota and authorized by the Commission.
- C. PEAK WIND had met with Minnkota and had advised Minnkota of PEAK WIND's plans to develop a wind project and expressed its desire to connect to Minnkota's transmission lines.
- D. Though Minnkota knew of PEAK WIND's plans, it does not appear that the Proposed 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. Granting Minnkota's 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. Multiple transmission lines will have multiple impacts on the environment.
- E. PEAK Wind and RES America encourage the Commission to direct Minnkota to consider the adverse direct and indirect environmental effects which cannot be avoided should the proposed site or route be designated. Those effects include requiring electric transmission providers to construct multiple high voltage transmission lines, instead of a single line that can accommodate the many customers and needs.
- F. As a group consisting of local landowners and farmers, PEAK Wind has a significant concern regarding the siting of multiple, unnecessary transmission lines.
- G. PEAK Wind and RES America are not opposed to the construction of transmission lines. They just want the Proposed Minnkota Transmission Line to be constructed with sufficient capacity for the energy generated from the area including the wind generation project being developed by PEAK Wind and RES America.
- H. If the proposed Minnkota transmission line is constructed with sufficient capacity for the energy generated from the area, it will prevent the additional and unnecessary environmental impact when subsequent transmission lines are required running from the same place of origin to the same end point.
- I. Minnkota did not include the proposed transmission line in its Ten-Year Plan nor did it justify the deviation from the plan, (nor did it include the PEAK Wind farm).

- J. Any delay caused by the proper construction of the transmission line to the proper capacity is not the fault of the Commission, or of the Appellants, but is the fault of Minnkota, for not properly considering the PEAK Wind farm in its planning.
- K. Minnkota knew that RES America and PEAK Wind were developing a wind generation project. RES America and PEAK Wind had asked to interconnect to Minnkota's transmission system and to be a part of the proposed transmission line. Minnkota could have designed the line to have included enough capacity for the RES America/PEAK Wind project by building the line for double circuit to allow for an additional line to be put in place on the same towers.

The Commission denied Appellants the right to intervene in the action and then ignored the evidence presented by Appellants in violation of § 28-32-46 (7) N.D.C.C.

ND Admin Code 69-06-04-02 Designation of Sites and Corridors gives the Commission authority to require "modifications or special conditions".

If the Commission requires modifications or special conditions, the applicant can accept them or can request a hearing. If the applicant rejects the modifications or special conditions without requesting a rehearing, the Commission shall rescind the order and deny the application.

In this case, the Commission, given that the proposed Minnkota transmission line was not built with sufficient capacity for the energy transmission needs of the area, should have modified the application or required a special condition that the line be constructed as a 345 kV line or that the towers be constructed to permit a double circuit to be installed where the PEAK Wind Farm comes on line in 2009 or 2010. The Commission failed to do this under the mistaken belief that it had no authority to require such a determination. Therefore, the Commission's Order must be reversed.

Appellants raised legitimate issues:

1. Concerning hodge-podge multiple transmission lines having multiple human and environmental impacts;

2. Requiring transmission lines to be constructed with sufficient capacity to meet the energy transmission needs of the area.
3. Concerning the requirement that utilities coordinate with other utilities to provide a coordinated regional plan for meeting the energy needs of the region (NDCC 49-22-04(3)).

The Commission completely ignored this evidence and the legal arguments in its order other than mistakenly stating that the commission does not have authority to require a 345kV line. The Commission seemed to be more concerned with the fact that Minnkota had already ordered certain transmission towers and that, if it had to reorder towers with the capacity to handle a double circuit or a 345kV line, it could cause some delay.

The Commission's focus on potential delay to Minnkota rather than on the human and environmental impact on the people of North Dakota is misplaced and is in violation of the Commission's statutory requirements.

Moreover, the delay in requiring Minnkota to build the transmission line with sufficient capacity would not result in a delay beyond the statutory schedules set out in the North Dakota Siting Laws.

For the complete failure of the Commission to address Appellant's legitimate concerns the Commission's Order should be reversed and the matter remanded to the Commission.

Conclusion

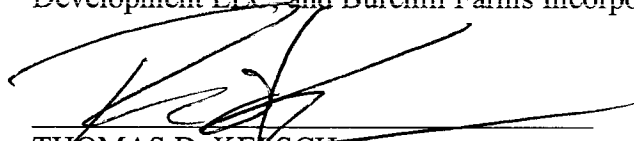
The Appellants request that the Court reverse the Commission's determination pursuant to the specifications of error, reverse and vacate the Commission's June 9, 2008 Order, and remand the case

to the Commission with instructions to permit the Intervention of the Appellants, to hold a new hearing and to correct the errors specified by Appellants. The Appellants also request any such further relief as the Court may deem appropriate, including the assessment of costs to the Commission.

Dated this 3 day of November, 2008.

Respectfully submitted,

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



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