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November 6, 2008

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PUBLIC SERVICE COMMISSION

Ms. Debra Simenson
Clerk of Court
Burleigh County Courthouse
P.O. Box 1055
Bismarck, ND 58502-1055

Re: *RES Americas Inc., et al v. Public Service Commission, et al*
Civil No. 08-08-1709

Dear Ms. Simenson:

Enclosed for filing please find Minnkota Power Cooperative, Inc.'s Reply Brief in Support of Motion to Dismiss Appeal, and Notice of Hearing, together with an Affidavit of Service.

Thank you for your attention to this matter.

Sincerely,

PEARCE & DURICK

By 

Jerome C. Kettleison
Phone: (701) 333-0104

JCK/ef
Enclosures

cc. (w/encls.) Thomas D. Kelsch
(w/encls.) Wayne Stenehjem
(w/encls.) Darrell Nitschke

125 PU-08-48 Filed: 11/7/2008 Pages: 11
APPEAL - Reply Brief in Support of Motion to
Dismiss Appeal and Notice of Hearing, case 08-1709

Minnkota Power Coop., Inc.

Pearce&Durick - Jerome C. Kettleison

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-C-1709

REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS APPEAL

I. The District Court Lacks Subject Matter Jurisdiction in an Appeal from a Non-final Order.

Appellants' reliance on N.D.C.C. § 49-22-19 for the proposition that they have appealed from a "final order" is misplaced. N.D.C.C. § 28-32-42 sets forth the procedure for appealing an administrative agency decision. Only "final orders are appealable." *Id.*

Appellants concede that there was something left for the PSC to decide after the June 6, 2008, Findings of Fact, Conclusions of Law, and Order were issued. Appellants concede the "route was finally approved except that no route was designated within the area of the Northeastern Portion of Rush River Township." (Appellants' Brief at p. 2 (emphasis added)). A route application cannot be finally approved when a portion of the route is not approved. **There can be no "final order" to appeal until the PSC has "nothing more to decide."** *Henry v. Securities Comm'r for State of N.D.*, 2003 ND 62, ¶7, 659 N.W.2d 869. Clearly, as Appellants concede, the PSC had something more to decide.

Appellants argue that the *Henry* case is too strict for application in this matter. But Appellants do not put forth any case law to the contrary. *Henry* is the law of North Dakota as applied to the appealability of administrative “final orders.”

The size of the route that was not approved by the PSC bears no relevance. That the route was not given final approval is relevant. The Appellants assert that the supplemental hearing bore no relevance to their arguments on the merits. But this assertion bears no relevance as to whether the June 6, 2008, Order was the PSC’s “final order” on Minnkota’s Application. Appellants seem to expect the Court to bend the law just this one time because they do not believe the application of the law is fair. But application of statutory law in this case required Appellants to appeal from an administrative decision that was a final order—with nothing left for PSC to decide. There is no ambiguity in application of the statute. And even if there was, *Henry* is directly on point.

Appellants complain that they could lose their right to appeal. Yet the only way Appellants would lose their right to appeal is failure to follow the Administrative Agencies Practices Act—something over which they had ultimate control. The AAPA clearly sets forth what must be done to preserve issues for appeal. If Appellants were concerned about losing their right to appeal, they could have appealed the supplemental Findings of Fact, Conclusions of Law, and Order issued on July 14, 2008.

The PSC’s June 6, 2008, Order gave Minnkota the right to begin construction on its route. But that does not mean it was a final order. Administrative agencies, and indeed even courts, frequently grant parties partial relief. The issuance of a partial order allowing Minnkota to begin construction on a portion of its route is not final because the PSC was not done with its analysis of the application. Appellants’ appeal should be dismissed because they failed to appear from a final order.

II. Alternatively, Appellants Failed to Appeal the Matter to the Proper District Court.

Appellants argue that procedural steps taken by Minnkota in the application process equate to hearings. Appellants list off events which they incorrectly identify as hearings. While these events are all part of the record, they are not hearings in the context of N.D.C.C. § 28-32-42(3)(a).

Appellants rely on *Aggie Investments GP v. Public Service Commission of North Dakota*, 451 N.W.2d 141 (N.D. 1990), for the proposition that “hearings” were held by PSC in Burleigh County prior to its public hearing in Cass County. But *Aggie* did not supercede the *Happy Day* case relied on by Minnkota—it merely distinguishes circumstances not found in *Happy Day*. See *Happy Day Care Ctr. v. Soc. Serv. Bd. of N.D.*, 313 N.W.2d 768 (N.D. 1981).

In *Aggie*, Northern States Power (“NSP”) filed a rate increase application with the PSC. The PSC suspended the rate increase pending investigation, formal hearing, and issuance of a final order. *Aggie*, 451 N.W.2d at 141. The PSC also ordered that “public input hearings” be held over several days in Fargo, Grand Forks, and Minot. *Id.* The intent was “to give the public opportunity to present comments or statements on NSP’s proposed rate increase.” In addition, a “technical hearing” was set “to take testimony and evidence” in Bismarck after the public input hearings. *Id.*

Members of the public voiced their opinion regarding the rate increase proposal at the Fargo public input hearing. But no exhibits were formally offered or received and no statements under oath were taken. *Id.*

The PSC issued an order after the “technical hearing” denying NSP’s rate increase. *Id.* The PSC subsequently issued an order approving a settlement offer submitted by NSP. *Id.* at 142. *Aggie*, which had been deemed an intervenor by PSC, filed its notice of appeal with the Cass County District Court. *Id.*

NSP argued that the district court lacked jurisdiction because a “hearing” did not take place in Cass County; the district court agreed with NSP and dismissed the action. *Id.* But the North Dakota Supreme Court deemed the “public input hearings” to constitute hearings pursuant to N.D.C.C. § 28-32-15 (later re-numbered N.D.C.C. § 28-32-42). *Id.* If not required otherwise, the statute requires administrative appeals to be made in the district court of the county where the hearing, or part of the hearing, was held. *Id.*

In *Happy Day*, a hearing before a referee was held in Minot—exhibits and oral testimony were taken. *See Aggie* 451 N.W.2d at 142. The agency board then retired to Bismarck where it received the referee’s recommendation. *Id.* The agency board considered the recommendation at two meetings in Bismarck and eventually issued a final order. *Id.* The Supreme Court rejected the argument that there had been a “hearing or part thereof” in Bismarck because the board reviewed the referee’s recommended decision in Bismarck. *Id.* The Supreme Court also rejected the argument that a “hearing” occurred in Bismarck because the board permitted counsel to submit additional written argument to respond to the referee’s recommendation to the board. *Id.* The Supreme Court was primarily concerned with the board’s decision-making meetings in Bismarck: whether those decision-making meetings in Bismarck where written argument of the attorneys was presented constituted a hearing or a part thereof. *Id.* at 143.

The public input hearings that took place in *Aggie* were deemed hearings, or a part thereof. *Id.* at 143. The Supreme Court re-affirmed the broad meaning of a “hearing” in *Aggie*: “a formal meeting (as of an investigative body or legislative committee) before which evidence is presented, testimony is given, etc.” *Id.* (citation omitted). The Supreme Court noted that the Fargo public input hearing had been publically noticed as a hearing by the PSC; it also was intended to give the public the chance to comment on the proposed rate increase. *Id.* A hearing examiner was present and presided over the public input hearing. A court reported transcribed the comments of

local citizens in attendance. *Id.* “Unlike the ultimate decision-making meetings at issue in *Happy Day*, the Fargo public input hearing clearly contemplated the public’s opportunity to have their statements included as part of the “official record.” *Id.*

The North Dakota Supreme Court has further clarified both *Happy Day* and *Aggie*. *Gale v. North Dakota Bd. of Podiatric Medicine*, 1997 ND 83, 562 N.W.2d 878. In *Gale*, the Supreme Court considered whether an “investigatory hearing” had been conducted without giving notice to a podiatrist. *Id.* at ¶ 17. *Gale* re-affirmed the legal principle that “a hearing generally contemplates the presentation of evidence and testimony.” *Id.* at ¶ 20 (citing *Happy Day*, 313 N.W.2d at 771; *Aggie*, 451, N.W.2d at 143). *Gale* explained that “unlike the ultimate decision-making meetings at issue in *Happy Day*, the public input hearing [in *Aggie*] clearly contemplated the opportunity for the public to have their statements included as part of the record. . . .” *Id.* at ¶ 22. *Gale* held that the three-member committee’s consideration of medical records, without formal introduction of evidence or testimony at its meetings, did not constitute an “investigatory hearing.” *Id.* at ¶ 23.

Here, no hearings took place before the May 22, 2008, public hearing in Casselton, ND. While Minnkota held public open houses for members of the public in February 2008, these were held outside of Burleigh County and did not involve the PSC. Appellants allege that procedural statutory requirements of Minnkota somehow constitute hearings. But these procedural requirements do not fit the definition of “hearings, or a part thereof” as contemplated by the statute or interpreted by *Aggie*, *Happy Day*, or *Gale*.

Appellants assert that the following actions taken by the PSC constituted hearings:

- February 13, 2008: Letter of Intent—simple motion by PSC acknowledging receipt of the Letter of Intent. The Letter of Intent is required by statute to be filed with the PSC. (Record No. 2)
- March 18, 2008: The application for a Certificate of Corridor Compatibility and Route Permit—another statutory procedural requirement. (Record No. 8)

- April 21, 2008: PSC motion acknowledging the withdrawal of Otter Tail Power Company. (Record Nos. 16 and 17)
- April 23, 2008: PSC order denying the intervention of Res America and Peak Wind. Legal written argument was presented, but no hearing or oral argument occurred. (Record No. 21)
- May 9, 2008: PSC order denying intervention of Appellants. Again, legal written argument was made and considered, but no hearing or oral argument was held on the matter. (Record No. 30)
- May 28, 2008: Filing of late exhibits per the request of the PSC at the May 22, 2008, Cass County hearing. There was no hearing on the filing of the exhibits. (Record No. 36)
- June 6, 2008: PSC approved the findings of fact, conclusions of law, and order. No additional hearing on this and no opportunity to submit any evidence or testimony. (Record No. 42)

These events listed by Appellants were not similar to those described in *Aggie*, *Happy Day*, or *Gale*. These were procedural events required by PSC administrative regulation and statutory law. These events were not public input hearings as in *Aggie*. These events are akin to procedural processes endemic to governmental regulatory agencies such as the PSC. To construe these events as Appellants do would cause the Burleigh County District Court to have jurisdiction over nearly every matter appealed from a PSC action—by virtue of the PSC taking action on applications at its headquarters in Bismarck.

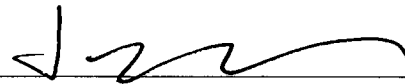
Appellants' decision to break up their appeals has no bearing on the issue before the Court. It is unclear why Appellants chose to appeal in the manner that they did, but this is not this Court's concern. Nor does it matter that the Appellants want to consolidate two separate appeals. It is unclear why Appellants would have taken this course in the first place, but Minnkota is forced to address each appeal separately and distinctly from the other because of Appellants choice in tactics. Appellants argue that Minnkota did not raise this issue in the separate appeal. What Minnkota decides to do in a wholly separate appeal is irrelevant for purposes of this appeal: jurisdiction is always an issue that can be raised at a later time.

CONCLUSION

For the reasons stated here, as well as in Minnkota's Brief in Support of Motion to Dismiss, Minnkota requests that the Court Dismiss the appeal for lack of jurisdiction.

Dated this 6 day of November, 2008.

PEARCE & DURICK



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Attorneys for Minnkota Power Cooperative, Inc.

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-C-1709

Appellants,

NOTICE OF HEARING

vs.

Public Service Commission and
Minnkota Power Cooperative, Inc.,

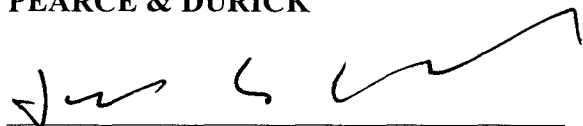
Appellees.

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that Appellee Minnkota Power Cooperative, Inc.'s Motion to Dismiss Appeal will be heard before The Honorable Bruce R. Haskell, Judge of the District Court at the Burleigh County Courthouse, Bismarck, North Dakota, on the 11th day of December, 2008, at 1:30 p.m., or as soon thereafter as can be heard.

Dated this 6 day of November, 2008.

PEARCE & DURICK



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Attorneys for Minnkota Power Cooperative, Inc.

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. 08-08-1709

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 6th day of November, 2008, this affiant served a true and correct copy of the following documents in the above-entitled action:

- (1) Reply Brief in Support of Motion to Dismiss Appeal; and
- (2) Notice of Hearing

That copies of the above documents were securely enclosed in an envelope 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
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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 address of the party intended to be so served.

That the above documents were 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 6th day of November, 2008.

Cari Timmons
Notary Public

