

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

RECEIVED

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

DEC 15 2008

Appellants,)

PUBLIC SERVICE COMMISSION

v)

**ORDER GRANTING APPELLEE'S
MOTION TO DISMISS**

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

Case No. 08-C-1709

Appellees.)
.....)

THE APPELLEE'S MOTION TO DISMISS IS HEREBY GRANTED.

The Appellant's Notice of Appeal and Specifications of Error refers to only the Order issued by the Public Service Commission dated June 9, 2008, which Order followed a public hearing held in Casselton, North Dakota on May 22, 2008. The Order of June 9, 2008 authorized the issuance of a Certificate of Corridor Compatibility and a Route Permit allowing construction and operation of a transmission line. However, the Public Service Commission (PSC) excepted from the route designation a portion of the proposed route located in Rush River Township. The PSC noticed a supplemental hearing on the issue of the Rush River Township portion of the route in the June 9, 2008 Order. A supplemental hearing was later held, and the PSC issued an order disposing of that issue. An appeal from an administrative agency decision is governed by N.D.C.C. §28-32-42. Said section includes a requirement that only "final orders" are appealable. N.D.C.C. §28-32-42(3)(a). A "final order" is one that "terminates an issue, leaving the agency with nothing more to decide." See, Henry v. Securities Comm'r for State of N.D., 2003 N.D. 62, 659 N.W.2d 869). Here, there was clearly

something left to decide, the Rush River Township portion of the proposed route. The PSC noticed a supplemental hearing, which was in fact held. Even though Minnkota apparently began construction of the transmission line before the resolution of the Rush River Township issue, the fact is that the transmission line would be incomplete without resolution of that issue. The Appellants appealed from an Order that was not a "final order" therefore this Court lacks jurisdiction to hear the appeal.

N.D.C.C. 28-32-42(3)(a) governs the venue of appeals from administrative agency decisions. The statute states, in relevant 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 part thereof was held." The record reveals that a public hearing was held May 22, 2008 in Casselton, North Dakota at which evidence was taken and exhibits received. The only other proceedings in the record at which public input was included were two "public information meetings" held by Minnkota on February 25, 2008 and February 28, 2008 in Page and Mapleton, both in Cass County. The Appellants cite a number of other proceedings connected to the case that occurred in Burleigh County and argue that these proceedings were "part" of a hearing. The Appellants cite the North Dakota Supreme Court's decision in Aggie Investments GP v. Public Service Comm'n of North Dakota, 451 N.W.2d 141 (N.D. 1990), which decision stands for the proposition that a hearing is not necessarily a formal proceeding involving sworn witnesses and exhibits. However, the North Dakota Supreme Court in Aggie Investments suggested that public input was a key factor in determining whether a proceeding is a "hearing." Here, each of the proceedings cited by the Appellants (other than those mentioned above) were procedural matters that did not include public input, nor

an opportunity for public input. While the proceedings were public in the sense that the public was not excluded, there was no public input, therefore there was no hearing nor part of a hearing conducted in Burleigh County.

The proper venue for this appeal is Cass County.

Dated at Bismarck, North Dakota, this 11th day of December, 2008.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bruce B. Haskell", written over a horizontal line.

Bruce B. Haskell, District Judge
South Central Judicial District

Thomas D. Kelsch
Annette Bendish
Jerome Kettleson