

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

Case No. 08-08-C-01474

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

Appellants,

vs.

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

Appellees.

ORDER

On March 18, 2008, Minnkota Power Cooperative, Inc., (Minnkota) filed an application with the Public Service Commission (PSC) for a certificate of corridor compatibility and a route permit to construct a generation outlet line in Barnes County and Cass County, North Dakota. The application indicated that the generation outlet line would transmit electric energy from two wind farms. On April 9, 2008, RES America Developments, Inc. (RES) and PEAK Wind Development, LLC (PEAK) filed a petition to intervene to establish connectivity rights to the generation outlet line. Minnkota objected to the petition to intervene, arguing that RES and PEAK did not have a substantial interest in the matter. Minnkota also argued that the proceedings could not be delayed because companies working with Minnkota needed to qualify for the Federal Production Tax Credit, which was scheduled to expire at the end of 2008. The PSC denied the petition to intervene. On May 5, 2008, Burchill Farms, Inc. (Burchill) joined RES and PEAK in a second petition to intervene. The PSC again

denied the petition, but provided Burchill, RES, and PEAK with an opportunity to be heard as protestants at the public hearing. This appeal followed.

LAW AND ANALYSIS

A party may appeal the decision of an administrative agency within thirty days from the date of the order, except when the order of the administrative agency is declared final by another statute. Section 28-32-42 of the North Dakota Century Code. The Court will affirm an agency's decision unless any of the factors under Section 28-32-46 are met. *Leno v. North Dakota Dep't of Transp.*, 2008 ND 10, ¶ 6, 743 N.W.2d 794, 796. Specifically, Section 28-32-46 provides that a district court shall affirm the order of the agency unless the Court finds any of the following:

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.

Section 28-32-46. When reviewing the findings of an agency, the Court should not make independent findings of fact or substitute its own judgment for that of the agency; instead, the Court should only determine whether the facts and conclusions of the agency were reasonably based on the weight of the entire evidence in the record.

Tortenson v. Moore, 1997 ND 159, ¶ 8, 567 N.W.2d 622, 624.

The appellants argue that they should have been allowed to intervene because they had a significant legal interest and would not have unduly broadened the issues.

The North Dakota Administrative Code addresses intervention in an administrative proceeding. The code provides as follows:

Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding. The commission may impose conditions and limitations on an intervention to promote the interests of justice.

N.D. Admin. Code Section 69-02-02-05.

Under Section 69-02-02-05, the PSC is not required to grant a petition, but rather, "may" grant a petition. "The use of the word 'may' is permissive and indicates it is a matter of discretion." *Bernhardt v. Bernhardt*, 1997 ND 80, ¶ 9, 561 N.W.2d 656. Thus, under the statute, even when the PSC finds that a party has a statutory right or legal interest to the proceeding, and even when the PSC finds that intervention would not unduly broaden the issues, it still is not required to grant a petition for intervention. However, it "may" do so. That being said, the PSC did find that intervention would unduly broaden the issues and did find that the petition did not establish a statutory or legal interest in the proceedings.

At oral argument, the appellants stated that they have a significant legal interest in this matter because the PSC needed to determine whether the appellants could connect to the transmission line. The appellants argue that Minnkota's transmission line will not be big enough to accommodate PEAK's project and RES's project. In *In re the Application of Nebraska Public Power District for a Certificate of Corridor Compatibility for a 500 KV AC Electric Transmission Facility Extending from the Canadian Border Near Cavalier, North Dakota to the South Dakota Border near Forman*, 330 N.W.2d 143 (N.D. 1983), our Supreme Court addressed the scope of the PSC's authority over projects involving a party's need. In *Nebraska*, the Court noted that "[t]he stated policy in the Siting Act is 'to route transmission facilities in an orderly manner compatible with environmental preservation and the efficient use of resources.'" *Id.* at 148. According to the Court, the PSC's authority "is limited to that given by the Legislature." *Id.* at 149. The Court further opined that the PSC's authority under the Siting Act is limited to ensuring that "the location, construction, and operation . . . produce minimal adverse effects on the environment and upon the welfare of the citizens of this state." *Id.* In sum, the Court stated that there is "no direction in the Siting Act or its legislative history giving the PSC the authority to determine if a need has been shown. The North Dakota Legislature has demonstrated that, when it desires to do so, it can mandate that an administrative agency consider the issue of need." *Id.*

Applying *Nebraska*, this Court has not found any statutory authority that establishes that the PSC can decide issues regarding the need of multiple parties connecting to a single transmission line. Nor have the appellants cited any statutory or legal authority which indicates that they have any interest in connecting to the line.

Indeed, the PSC determined that "[i]nterconnection is not an issue that can be addressed in a siting application under" the Siting Act. Because there is no statutory or other legal authority which establishes that the PSC can determine issues of interconnection to the transmission line, this Court cannot say that the PSC erred in denying the appellants' application for intervention.

Moreover, the appellants first requested intervention on April 9, 2008. In the first request for intervention, the appellants stated that they wanted sixty days to conduct discovery. Minnkota objected because it had a time line that it needed to adhere to. Particularly, Minnkota was concerned that the Federal Production Tax Credit was scheduled to expire at the end of 2008. As Minnkota had a time line that it needed to adhere to, allowing sixty days for discovery could have delayed the proceedings. Allowing discovery could have created more issues and unduly broadened the issues before the PSC. Likewise, if the PSC had permitted testimony regarding interconnection at the hearing, the issues could have been unduly broadened. Therefore, the PSC acted within its discretion under the statute in denying the appellants' petition.

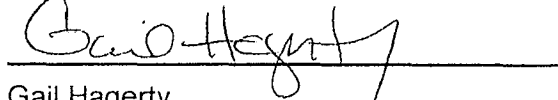
The appellants also argue that they were denied due process rights at the hearing. "Due process is an issue of time, place, and circumstances." *Whitecalfe v. North Dakota Dep't of Transp.*, 2007 ND 32, ¶ 22, 727 N.W.2d 779. "Due process requires a participant in an administrative proceeding be given notice of the general nature of the questions to be heard, and an opportunity to prepare and be heard on those questions." *Morrell v. North Dakota Dep't of Transp.*, 1999 ND 140, ¶ 9, 598 N.W.2d. "Notice is sufficient if it informs the party of the nature of the proceedings so there is no unfair surprise." *Id.*

In this case, the appellants were not a "party" to this proceeding, because the PSC denied intervention. Due process only needs to be given to parties. However, the appellants had notice of the hearing, and were still given an opportunity to be heard at the hearing as protestants. There is not a due process violation.

"The commission in all cases may conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice." Section 49-01-07 of the North Dakota Century Code. Because the PSC exercised its discretion in denying the appellants' petition for intervention, the PSC's denial of intervention is **AFFIRMED**.

Dated February 9, 2009.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Gail Hagerty", is written over a horizontal line.

Gail Hagerty
District Judge