

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Power Company
Minn-Kota Ag Products, Inc.
-- Richland County
Public Convenience & Necessity

Case No. PU-17-96

TRANSCRIPT OF WORK SESSION

February 5, 2018

1 CHAIRMAN CHRISTMANN: It is 1:05 p.m. on Monday,
2 February 5, 2018. I'm Randy Christmann, chairman of the
3 Commission. With me today are Commissioners Brian
4 Kroshus and Julie Fedorchak.

5 We're having a work session today on Case number
6 PU-17-96 regarding Minn-Kota Ag Products, Incorporated,
7 and Otter Tail Power Company's Richland County PC&N,
8 public convenience and necessity.

9 Just in way of kind of opening comments, some of
10 you met earlier, but I have a long time family friend
11 job-shadowing me today, McKayla Voegele is here from
12 Beulah, North Dakota, and she's met some of you.

13 Also at our table today is Jerry Lein. And
14 we'll go around and each be on the record. And Zach
15 Pelham does not actually work for the PSC, he is an
16 attorney here in town who we have hired to do legal work
17 for us on this specific case.

18 So that's all the opening comments I have.
19 Commissioner Kroshus -- Commissioner Fedorchak.

20 It's your portfolio, I'll come to you last.

21 COMMISSIONER FEDORCHAK: I do not have any
22 opening comments.

23 CHAIRMAN CHRISTMANN: Commissioner Kroshus.

24 COMMISSIONER KROSHUS: I don't have any opening
25 comments as well, I just want to dive into it and hear

1 from Zach, I think, to begin with in terms of a petition
2 to intervene. This is new for me, so I would welcome
3 your thoughts on that.

4 CHAIRMAN CHRISTMANN: And before I start,
5 though, Jerry also go on the record and just a little
6 description of what you do here for our guest.

7 MR. LEIN: Jerry Lein and I'm an advisor to the
8 Commission, analyst, public utility analyst.

9 CHAIRMAN CHRISTMANN: And an electrical
10 engineer.

11 MR. LEIN: And electrical engineer.

12 MR. PELHAM: Jerry is so humble.

13 (Laughter)

14 MR. PELHAM: Commissioner, to respond to your
15 question, the petition to intervene, it was -- it's a
16 little bit -- not as typical. Usually we see the
17 intervention request prior to the hearing.

18 The rule, however, in our administrative code
19 does allow for an intervention after hearing. I think
20 in both petitions it outlines what the rules are. But
21 basically, a petition to intervene in any proceeding
22 must be filed at least ten days prior to the hearing but
23 not after -- not after except for good cause shown.

24 So typically, an intervention request is decided
25 by the administrative law judge. The Commission can,

1 however, make the decision on its own. So it's probably
2 appropriate that the petition was made when it was,
3 fortuitous in a way so that at least it could be
4 discussed at the work session as to how to handle it.

5 You know, the Commission could go a couple
6 different ways. You know, Minn-Kota -- a representative
7 of Minn-Kota did testify and present evidence at the
8 hearing when the hearing was held. At the same time,
9 there was post-hearing briefing, so additional
10 information was made and argued by both Dakota Valley
11 and Otter Tail, to which, apparently, Minn-Kota felt
12 that it wanted or needed a spot at the table, so to
13 speak, and wanted to present its own evidence, and it's
14 requested to do that, either in writing -- well, it's
15 requested to do that in writing and orally.

16 The Commission can grant the intervention
17 request. It could defer to the ALJ to make the decision
18 on the intervention request.

19 Under the rule, it does allow for kind of
20 fine-tuning. I was just reading here:

21 Any person with substantial interest in a
22 proceeding may petition to intervene in that
23 proceeding by complying with the section,
24 and intervention may be granted if the
25 petitioner has a statutory right to be a

1 party to the proceeding or the petitioner
2 has a legal interest which may be
3 substantially affected by the proceeding and
4 the intervention would not unduly broaden
5 the issues or delay the proceeding.

6 And then it goes on to say:

7 The Commission may impose conditions and
8 limitations on an intervention to promote
9 the interest of justice.

10 So I think if the direction from the Commission
11 was such that, you know, to limit what could be done,
12 say, for example, I'm just throwing out there, rather
13 than opening up for additional oral testimony, whether
14 it be limited -- it could potentially be limited to just
15 written testimony.

16 It's also something that I could go to the
17 attorneys for each of the parties, including the
18 proposed intervenor, Minn-Kota's attorney, and ask them
19 whether or not they'd agree to limiting to the
20 intervention to oral testimony.

21 Dakota Valley has responded in opposition.
22 You've all received that. I'm not going to read it,
23 because it's written down, but the gist of it is, well,
24 this information has already been received, Minn-Kota's
25 had their opportunity to present.

1 I spoke with Mr. Stephenson, counsel for Otter
2 Tail, and he indicated that Otter Tail was in support of
3 the intervention and, if it would be helpful, they would
4 simply file a short memorandum in support of Minn-Kota's
5 position.

6 So that's kind of a long-winded primer, I guess,
7 Commissioner, and I'll be quiet and you may have some
8 follow-up questions for me.

9 COMMISSIONER KROSHUS: How does prior testimony
10 by Otter Tail -- or not Otter Tail, by Minn-Kota, that's
11 already on the record.

12 MR. PELHAM: It is.

13 COMMISSIONER KROSHUS: So I guess it's hard to
14 speculate in terms of what additional information they
15 may want to add, but it wouldn't do anything if it was
16 basically a repeat of that information. Is that
17 correct? Or is that not the correct way to look at
18 that?

19 MR. PELHAM: Well, I think anything, if
20 permitted to intervene and permitted to present
21 testimony, whether it be orally or through an affidavit
22 or some other type of written additional argument, would
23 be for consideration by you and the other commissioners
24 in reaching a decision on this matter.

25 Kind of how I looked at it in the petition,

1 yeah, I mean, look, I mean, nothing in this world is
2 perfect. It would have been -- in a perfect world, the
3 intervention request would have been made prior to the
4 hearing and we'd have everything.

5 But looking at it from the standpoint of you as
6 commissioners having to make the decision that is the
7 right decision with everything that's presented, to
8 allow all of those who are involved in the process to
9 have sort of a place at the table and have their say if
10 the intervention is allowed, it completes that and then
11 you have everything.

12 And also, and I'm not saying that this would
13 happen, but if there were an appeal from one of the
14 sides, then if you had denied the intervention request,
15 that could be a point that could be picked up by the
16 court in saying, well, you know, intervention should
17 have been allowed. And I would hate for that to be a
18 reason for a remand when I don't see -- the downside
19 really is, is maybe, from a time perspective, more time
20 has had to be spent on this matter to allow for
21 Minn-Kota to say what they want to say in their
22 intervention. That, to me, is the downside.

23 Now, if everyone is allowed to present in
24 response to what Minn-Kota is going to say, if they're
25 allowed to be intervenors, I don't see how those

1 interests would be necessarily harmed because everyone
2 would have the opportunity, so to speak, to have their
3 say in response.

4 COMMISSIONER FEDORCHAK: Zach, I tend to be one
5 who argues for more is better and, yeah, let's have the
6 record as full as possible, but I am looking at the rule
7 that guides intervention and it says petition to
8 intervene in any proceeding must be filed at least ten
9 days prior to the hearing but not after except for good
10 cause shown.

11 So it seems like you'd always be able to make
12 the argument that whatever somebody is bringing is more
13 information and it's a good idea because the parties --
14 you know, you have a fuller record and all this and
15 that. So if that's always the case, why do we have
16 that?

17 MR. PELHAM: It's a very good question, and I'm
18 not sitting here and saying that you would not be within
19 your rights to deny the intervention.

20 I think the question is, you know, has good
21 cause been shown by Minn-Kota in their briefing? And
22 that's ultimately a decision that you as commissioners
23 have to decide and of course --

24 COMMISSIONER FEDORCHAK: I didn't see any
25 reference to the rationale for why they waited in their

1 briefing. Like, I didn't see a single mention of why
2 they didn't intervene before or even immediately after
3 the December 20th. It seems as if they completely
4 ignored that piece in their briefing.

5 MR. PELHAM: I think there's probably some
6 extrapolation that has to be read into what they're
7 arguing and --

8 CHAIRMAN CHRISTMANN: I sort of thought that,
9 and I remember it because at least one of his points, I
10 think, had to do with my question in our work session, I
11 said I wonder if Mr. Schuler still feels the same now
12 having heard from Dakota Valley Electric that they
13 wouldn't require those soft start motors at a big
14 expense. And in the petition to intervene, he talks
15 about that and -- and what he thinks could potentially
16 happen with not having those soft start motors, so it is
17 a somewhat responsive --

18 MR. PELHAM: And I think --

19 CHAIRMAN CHRISTMANN: And of course that --
20 their offer that they would not require them was after
21 he had done his testimony.

22 MR. PELHAM: As to Commissioner Fedorchak's
23 point, and I think you probably have a point in the
24 sense that, you know, if they were permitted to
25 intervene before, would this have been addressed at the

1 time? Would it have been addressed in the briefing
2 afterwards? When would it have been addressed? Would
3 it have been addressed? Could it have been addressed
4 after the first work session?

5 Those are all difficult questions to answer
6 because we'll never know because they, Minn-Kota, hadn't
7 intervened. But now we look at it and they are seeking
8 to intervene. And they are the subject of this
9 proceeding in many respects in the sense that they are
10 the reason for the hearing and they've indicated that
11 they wish to formally intervene.

12 As I said before, the timing isn't the greatest,
13 but at the same time, I think the question is, do we
14 grant them the right? Does that overcome not granting
15 and not giving them a place at the table?

16 Under our rules, I think our rules do allow it
17 for good cause shown. The question is, is good cause
18 shown?

19 COMMISSIONER KROSHUS: Even in this particular
20 case, could you truly argue they didn't have a place at
21 the table?

22 MR. PELHAM: Well, they had a place at the table
23 in a way in the sense that their representative did
24 testify and their position, you know, and has admitted
25 in the briefing is very similar to Otter Tail's,

1 although it is not identical to Otter Tail's position.
2 So I mean in that respects, they did -- maybe they had a
3 seat next to the table but they didn't have a seat at
4 the table because they weren't a party.

5 COMMISSIONER FEDORCHAK: Well, before we can
6 continue, from my perspective, I think we should let the
7 ALJ decide. I mean, I have these thoughts and concerns
8 and can see a lack of addressing the issue of timing and
9 why they waited, but I think it's best for the ALJ to
10 weigh the issues as a whole and make the recommendation.
11 That's what we typically do when it comes to matters of
12 intervention and I think we should stick with that.

13 CHAIRMAN CHRISTMANN: I agree. That's what we
14 hired him for, one of the things that we hired him for.

15 COMMISSIONER FEDORCHAK: We did have, I believe
16 -- I mean, these cases tend to be, now having done this,
17 the second one, there's a pattern that I see where you
18 have the hearing and then we have a work session and the
19 parties listen to us and they get worried about what
20 they hear and they want to -- I think the last time
21 there was a request for a rehearing, wasn't there?

22 MR. PELHAM: It was oral argument on --

23 COMMISSIONER FEDORCHAK: Oral arguments.

24 MR. PELHAM: Yeah.

25 COMMISSIONER FEDORCHAK: And so, you know, it's

1 like that's kind of part of how this seems to work, is
2 there's, like, whoop, we need another stab at this and
3 make sure that they have everything that they need.

4 And I think -- I can understand that, because
5 there's a lot at stake for the parties, so...

6 COMMISSIONER KROSHUS: I would say this. In
7 terms of letting the ALJ decide, I could probably go
8 along with that, but also, to be perfectly honest in
9 that, at this stage of the game, the issues to be
10 considered in terms of what we look at haven't changed
11 one bit. To my knowledge, the dynamics of what they're
12 looking for hasn't changed.

13 So I've spent an enormous amount of time on
14 this, as I'm sure my colleagues have as well. Maybe
15 it's still a little bit of my old prior days where you
16 want things to move faster and this feels a bit like
17 throwing an anchor over the side of the boat trying to
18 get across the lake.

19 (Laughter)

20 COMMISSIONER KROSHUS: But I also realize that
21 the dynamics in government are somewhat different but...

22 Just one more question. Would the potential for
23 remand be lessened due --

24 MR. PELHAM: Yes.

25 COMMISSIONER KROSHUS: -- to the fact that they

1 had the opportunity to testify, or is that a moot point?

2 MR. PELHAM: I think, hypothetically speaking,
3 if the petition were denied by, say, the Commission
4 itself rather than the ALJ, you know, that's kind of
5 breaking with kind of standard practice, although it
6 would be within your rights to do, if it was denied and
7 if there was an appeal and one of the issues on appeal
8 was intervention should have been granted and it wasn't,
9 that could be a reason for remand. Now, whether or not
10 it would be a good reason or not I'm not going to really
11 opine on, but it would be a reason, an additional
12 argument that could be made.

13 And if we can -- my view is if we can prevent
14 that from even being an issue when the downside is,
15 perhaps, yes, it's going to take a little bit longer,
16 that would be my preference, is to avoid that as an
17 issue altogether as a potential reason for remand.

18 CHAIRMAN CHRISTMANN: If we allow intervention
19 or if the ALJ allows intervention, are there constraints
20 to the constraints that can be applied to the intervenor
21 and then is there something automatic? Do the existing
22 parties automatically have a chance to respond to the
23 intervenor's statements? Or how does that play out?

24 MR. PELHAM: From a practical standpoint,
25 Commissioner, I can't imagine a situation where the

1 ALJ's order would not address the ability for another
2 party to address what the intervenor is throwing into
3 the mix.

4 But what I can do is I can file just a short
5 statement indicating that this work session took place,
6 the Commission is asking the ALJ to make a decision, but
7 something along the lines of, you know, constraints on
8 the matter should be limited to the subject matter of
9 the hearing as well as ensuring that all sides have the
10 opportunity to respond to whatever the intervenor plans
11 to put in, something along those lines.

12 Does that sound okay?

13 CHAIRMAN CHRISTMANN: That's what I'm thinking,
14 but I do want to clarify something. You had mentioned
15 early on something about kind of a qualifier if these
16 things don't have a big impact on the time schedule of
17 whatever the project you're talking about is.

18 It's my recollection that building this facility
19 is already well underway and moving forward and so this
20 probably doesn't have much impact on their construction
21 schedule except for maybe which -- I don't think it
22 should probably have much of any. And so if this does
23 delay anything, it might be actually getting the
24 electric service there when they're done. And so I
25 would think that the intervenor is going to want to move

1 very quickly if allowed to address this further.

2 MR. PELHAM: That would be a good assumption, I
3 would think.

4 CHAIRMAN CHRISTMANN: You recall, too, that the
5 project is under construction, correct?

6 MR. PELHAM: Yeah, yeah, that's my
7 understanding.

8 CHAIRMAN CHRISTMANN: Okay.

9 COMMISSIONER KROSHUS: And so Otter Tail, I
10 think, would be providing temporary power into this site
11 right now.

12 UNIDENTIFIED SPEAKER: Yeah, right now.

13 COMMISSIONER KROSHUS: Okay.

14 CHAIRMAN CHRISTMANN: Well, then I side with
15 having the ALJ determine, make the determination on the
16 intervention request.

17 MR. PELHAM: Would it be safe to say that I can
18 say something to the effect that the Commission is not
19 opposing, or should I just -- neutral?

20 COMMISSIONER FEDORCHAK: Neutral.

21 MR. PELHAM: Gotcha, I would leave it neutral.
22 And then I'll just put it in terms that, in the event
23 that it is granted, that we should limit the scope to
24 what's already been discussed and allow all parties to
25 have response to what is going to be filed by the

1 intervenor, if it's granted.

2 CHAIRMAN CHRISTMANN: And if it's possible, put
3 on some reasonable but tough time constraints. We do
4 want to keep this moving along.

5 MR. PELHAM: Uh-huh.

6 COMMISSIONER KROSHUS: Do you mean by what's
7 already been discussed? If they've got additional
8 evidence, we'd like to hear it, right?

9 MR. PELHAM: Well, the subject matter. I mean,
10 if there's new evidence --

11 COMMISSIONER KROSHUS: Issues that were noticed.

12 MR. PELHAM: The issues that were noticed. I
13 mean, we can't re-open this to issues that were not
14 noticed, which I don't -- in reading their petition, I
15 don't read that as being done, but just to be clear.

16 COMMISSIONER KROSHUS: Okay.

17 COMMISSIONER FEDORCHAK: Who is the judge? Is
18 it Pat?

19 MR. PELHAM: Yes.

20 COMMISSIONER FEDORCHAK: I'd be inclined to just
21 leave it entirely up to him. He's got a lot of
22 experience and he's going to know what's the best
23 approach for getting this -- a fair, timely hearing, I
24 think, but -- so I don't know that he needs much
25 direction from us --

1 MR. PELHAM: Okay.

2 COMMISSIONER FEDORCHAK: -- to get to that end.

3 MR. PELHAM: You're probably right and we're
4 probably making more of this, because we all like to
5 have control.

6 COMMISSIONER FEDORCHAK: Yeah, like then he has
7 to read into it, like what do --

8 MR. PELHAM: Yeah, yeah, yeah.

9 COMMISSIONER FEDORCHAK: -- exactly are they
10 meaning here? And I'd almost just rather --

11 MR. PELHAM: Okay.

12 COMMISSIONER FEDORCHAK: -- let him look at the
13 request and the response and make the best decision for
14 a fair, timely resolution.

15 CHAIRMAN CHRISTMANN: That's not a bad point.
16 There's that inclination, oh, yeah, and one more thing.

17 (Laughter)

18 CHAIRMAN CHRISTMANN: But it's your case.

19 COMMISSIONER KROSHUS: Well, I think you have a
20 sense of how I feel about it at this stage, but they are
21 within the parameters of the law by making their
22 request. And if this, in the end, solidifies the final
23 outcome, whatever that may be, and not that anything is
24 ever completely final in this world, but it reduces the
25 chances that we're reviewing it yet again beyond that

1 because of however it went, because there's only one
2 party that's going to be happy in all of this and one
3 party that's going to be unhappy, then I'm okay with
4 letting the ALJ make the decision.

5 COMMISSIONER FEDORCHAK: He might decide not to.

6 COMMISSIONER KROSHUS: He could.

7 COMMISSIONER FEDORCHAK: I mean, it sounds like
8 you're assuming he'll decide to, and 50/50 chance he
9 decides the other way.

10 CHAIRMAN CHRISTMANN: So I think that's probably
11 all we need to address today.

12 MR. PELHAM: Yeah, I think until we have a
13 decision, we'd be spinning our wheels on others. I mean
14 if -- the only way we wouldn't be is if he wouldn't
15 grant it and then -- but, you know, I think we come back
16 after we have a decision from the ALJ and proceed
17 appropriately.

18 CHAIRMAN CHRISTMANN: Anything else?

19 COMMISSIONER KROSHUS: Not for me.

20 COMMISSIONER FEDORCHAK: Nothing.

21 CHAIRMAN CHRISTMANN: Okay. We're wrapped up.

22 Thank you.

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24

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