

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

* * * *

Gerald Pesall, Appellant

v.

Montana Dakota Utilities, Otter Tail Power, Schuring Farms, Inc., Bradley Morehouse,
and the South Dakota Public Utilities Commission, Appellees

* * * *

No. 27324

* * * *

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, DAY
COUNTY, SOUTH DAKOTA

* * * *

THE HON. SCOTT P. MYREN, CIRCUIT COURT JUDGE, PRESIDING

* * * *

APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION'S BRIEF

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N. Bob Pesall, Attorney
P.O. Box 23
Flandreau, SD 57028
bob@pesall.com

Bradley R. Morehouse (Pro Se)
14026 416th Ave.
Andover, SD 57422
mhouse@nvc.net

Thomas Welk, Attorney
Jason R. Sutton, Attorney
Montana Dakota Utilities and Otter Tail
Power
P.O. Box 5015
Sioux Falls, SD 57117-5015
tjwelk@boycelaw.com
jrsutton@boycelaw.com

Randall Schuring (Pro Se)
Vice President, Schuring Farms, Inc.
507 S. Second St.
Andover, SD 57422
schuringrl@hotmail.com

John J. Smith, Attorney for Appellee
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
John.Smith3@state.sd.us

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JURISDICTIONAL STATEMENT

Appellee South Dakota Public Utilities Commission (“Commission”) agrees with Appellant Gerald Pesall’s (“Pesall”) jurisdictional statement.

STATEMENT OF LEGAL ISSUES

- I. Whether the Commission improperly delegated its authority when it imposed a condition on the Applicants to perform detailed soybean cyst nematode (SCN) surveys and prepare and submit detailed, parcel-specific mitigation plans after the permit was issued.**

The Circuit Court held that the Commission did not unlawfully delegate its authority.

SDCL 49-1-17 (repealed by 2009 SB 62)

In the Matter of the Application of the Nebraska Power District, 354 N.W.2d 713 (S.D. 1984)

- II. Whether the Commission issued its decision on the application for the permit within twelve months as required by SDCL 49-41B-24.**

The Circuit Court ruled that the Commission complied with SDCL 49-41B-24 by issuing its decision granting the permit within twelve months of the filing of the application for the permit.

SDCL 49-41B-24

STATEMENT OF THE CASE

This case involves an appeal from the Final Decision and Order; Notice of Entry (“Decision”) issued by the Commission granting an energy facility permit to Appellees Montana-Dakota Utilities Co. and Otter Tail Power Company (collectively, “Applicants”) to construct a 345-kilovolt (“kV”) electric transmission line. Applicants filed an application for the energy facility permit (“Application”) on August 23, 2013. Aprx 79.¹ Pesall filed for intervention on October 18, 2013. On November 6, 2013, the

¹Cites to “AR” refer to the certified record from the administrative proceedings before the Commission. Cites to “TR” refer to the Commission’s evidentiary (cont.)

Commission issued an Order Granting Intervention and Party Status granting intervention to Pesall. App 1.

The Commission held an evidentiary contested case hearing on the Application on June 10-11, 2014. Apx 80. Following the evidentiary hearing, the Commission issued a Final Decision and Order (“Decision”) granting the permit. Apx 79-94. The Decision contained 82 Findings of Fact and 20 Conclusions of Law. *Id.*

Pesall appealed the Decision to the Circuit Court in Day County. The South Dakota Circuit Court for the Fifth Judicial Circuit, Honorable Judge Myren presiding, affirmed the Commission’s Findings of Fact and Conclusions of Law, with a slight modification, and affirmed the issuance of the permit. Apx 96-108. As indicated at the oral argument, Judge Myren reviewed the extensive administrative record. App 3. Based upon his review of the record and the written and oral arguments of the parties, Judge Myren affirmed the Decision at the hearing. In fourteen pages of transcript, Judge Myren stated his reasons for rejecting Pesall’s arguments and affirming the Decision. Apx 96-108. Pesall now appeals to this Court.

hearing transcript. Cites to “Ex” refer to exhibits at the evidentiary hearing. Cites to “Finding(s)” refer to the Findings of Fact issued by the Commission in the Decision followed by the Finding of Fact number. Appellant’s Appendix page numbers are referenced by “Apx” followed by the Appendix page number. The Commission’s Appendix page numbers are referenced by “App” followed by the Appendix page number. The entirety of the documents in the proceedings before the Commission in Docket EL13-028 can be accessed on the Commission’s web site at: <http://www.puc.sd.gov/Dockets/Electric/2013/EL13-028.aspx> The entirety of the certified record of proceedings in Docket EL13-028 submitted to the Circuit Court in docket CIV 14-53 can be accessed on the Commission’s web site at: <http://www.puc.sd.gov/Dockets/Civil/2014/18civ14000053.aspx>

STATEMENT OF FACTS

A. Background of the Project

The Decision allows the construction and operation of 160 to 170 miles of 345kV transmission line between a substation near Ellendale, North Dakota, and a substation near Big Stone City, South Dakota (“the Project”). The Project is jointly owned, approximately 50 percent each, by Montana-Dakota Utilities Co. (“MDU”) and Otter Tail Power Company (“OTP”). Findings 2-5, Apx 81.

The Project’s 345-kV transmission line will run south from Ellendale, North Dakota, and enter South Dakota in northern Brown County. The transmission line will then route through Brown, Grant, and Day Counties before terminating near Big Stone City in Grant County, South Dakota. Approximately 150 to 160 miles of transmission line will be located in South Dakota. Finding 11, Apx 82. The Project is estimated to cost between \$293 and \$370 million in 2013 dollars. Finding 13, Apx 82.

B. Procedural History Prior to Contested Case Hearing before Commission

On August 23, 2013, the Applicants filed the Application. Decision p. 1, Apx 79. Before filing the Application, the Applicants conducted an extensive route selection process that considered several factors. Finding 25, Apx 84. As part of the route selection process, Applicants engaged in over a year of public input and outreach. Ex 1, at § 8.1, App 4-7. Based on this route selection process, Applicants selected the route in the Application. Finding 25, Apx 84.

After the filing of the application, the Commission scheduled and held three separate public input hearings. AR 1040-43, App 18-21, 139-141. At these hearings, the Commission heard over 10 hours of public comments regarding the Project.

On October 18, 2013, Pesall filed for intervention. AR 1477, App 22. The Commission granted Pesall intervention and party status on November 6, 2013. App 1.

The Project crosses one parcel of Pesall's farm ground. Finding 6, Apx 82. Only two monopole² structures will be placed on Pesall's property. Exs. 21A-C, App 23-25; TR 290, App 137. The poles will be more than one-half mile from Pesall's residence. *Id.* Additionally, the structures will be placed on open farm ground with no other obstructions. Finding 36, Apx 85-86; Exs. 21A-C, App 23-25. Based on Pesall's testimony, the Commission expressly found Pesall's objection is less an objection to the issuance of the Permit but instead an objection to placement of the transmission line on his property. Finding 37, Apx 86.³

In addition to Pesall, on May 1, 2014, the Commission granted intervenor status to the following landowners: Schuring Farms, Inc., Bradley Morehouse, James McKane, III, Clark Olson, and Kevin Anderson. AR 3525, App 26. Intervenors McKane, Olson, and Anderson did not participate in the evidentiary hearing, present any evidence for consideration, or state whether they objected to issuance of the permit. Finding 9, Apx 82. Intervenor Schuring Farms, Inc., through its owner Randy Schuring, and Bradley Morehouse participated and presented evidence at the evidentiary hearing on the permit. Neither Schuring Farms, Inc. nor Morehouse appealed the Decision or participated in the appeal to the Circuit Court.

² The monopoles used on the Project are a single steel power pole between 122 and 155 feet tall with a concrete base with a diameter between 6 and 11 feet wide. (Ex. 1, at § 23.1).

³ Statutorily, the Commission cannot determine the route for the Project. SDCL 49-41B-36.

As part of the discovery in this contested case, Applicants answered 48 separate data requests from the Commission Staff and 32 interrogatories from Pesall. Exs 2-4, App 27-81. During the discovery process, Pesall raised concerns regarding the spread of Soybean Cyst Nematode (“SCN”)⁴ from construction of the Project. Pesall’s identification of SCN raised a new issue for the Applicants. TR 33, App 113. In Applicants’ prior experience of constructing, operating, and maintaining over 5,700 miles of transmission lines in North Dakota, South Dakota, Minnesota, Montana, and Wyoming, the construction and maintenance of transmission lines had not materially contributed to the spread of soil borne pests. Ex 5, at Interrogatory No. 9, App 87. Additionally, before Pesall, none of the 500 landowners who attended the Project’s open houses expressed any concern over SCN. TR 153, App 121. As a result, when Pesall raised the spread of SCN as a concern, the Project investigated SCN and developed an appropriate mitigation plan. TR 33, App 1113; Exs 16B, 16C, and 23, App 93-100.

Before the evidentiary hearing on the permit, the Applicants and the Commission Staff entered into a settlement stipulation (“Settlement Stipulation”) in which the Commission Staff recommended issuance of the permit subject to the conditions in the Settlement Stipulation. Ex 301, App, 101-111. The Settlement Stipulation contained 33 separate conditions for issuance of the permit including, among other things, Condition 17 relating to the SCN Plan. Condition 17 states: “Applicant shall develop and implement

⁴SCN is a parasitic microscopic worm that feeds on the outside of the roots of soybean plants. (TR 229-233). App 122-126. Each female SCN can generate up to 200 eggs, and because the eggs are cysts, the eggs can survive up to 10 years after the death of the female SCN. (*Id.*). Each pregnant SCN female is the size of a newspaper period. (*Id.*) Anything that spreads soil can spread SCN. (*Id.*).

a mitigation plan to minimize the spread of [SCN], consistent with Exhibit 23, in consultation with a crop pest control expert.” Ex 301, at ¶ 17, App 106.

C. Contested Case Hearing

The Commission held an evidentiary hearing on the Application on June 10-11, 2014. One of the key issues at the evidentiary hearing related to the spread of SCN. Substantial evidence indicated that the construction of the Project will not materially increase the spread of SCN. Findings 40-41, Apx 86. Although SCN is present in Brown, Grant, and Day Counties, there was no evidence presented indicating whether the specific parcels on the Project route are infected with SCN. Finding 40, Apx 86. At the time of the evidentiary hearing, even Pesall did not know whether his property is infected with or free of SCN. TR 246, App 129. Additionally, no academic studies confirm construction of transmission lines causes the spread of SCN. TR 246, App 129. Conversely, Dr. Tylka, an expert witness testifying on behalf of Pesall, admitted that SCN is spread by wind, water erosion, birds, typical farming practices, and even boots. Finding 41, Apx 86; TR 244-45, 256-57, 259-60, 270-71, App 127-128, 131-136. Once a field is infected with SCN, there is no way to determine how the field was infected. TR 256-257, App 131-132. Further, even if infected, farmers can employ mitigation techniques to reduce the impact of SCN, such as growing non-host crops, including non-host crops in a crop planting rotation, and planting SCN resistant variety seed. Finding 46, Apx 87; TR 248 App 130.

Despite the lack of evidence indicating Project construction will actually spread SCN, Applicants investigated SCN and created a mitigation plan after Pesall raised the issue. TR 34-36, App 114-116; Ex. 23, App 99-100. As part of the SCN Mitigation Plan,

Applicants will test each parcel of tilled ground that the Project crosses to determine if the parcel is infected with SCN. *Id.* Depending on the test results, Applicants will choose the most appropriate mitigation technique for the parcel. Ex 23, App 99-100; TR 34-36, 83-85, App 114-119.

Based upon the testimony at the evidentiary hearing, the Applicants and the Commission Staff entered into an Amended Settlement Stipulation which was entered into the record without objection. Ex. 301A, Apx 51-61. The Amended Settlement Stipulation did not change Condition 17 relating to the SCN Mitigation Plan.

Following the evidentiary hearing and post-hearing briefing, the Commission issued 82 Findings of Fact and 20 Conclusions of Law in the Decision. Apx 79-94. Regarding the SCN Mitigation Plan, the Commission concluded that Condition 17 of the Amended Settlement Stipulation relating to the SCN Mitigation was not sufficient. As a result, the Commission modified Condition 17 in Finding of Fact 47. Finding 47, Apx 87. Based upon the modified Condition 17, the Commission expressly found that Applicant's SCN Mitigation Plan will reasonably minimize the risk of spreading SCN during the construction. Finding 48, Apx 87. Because Applicants bore their burden of proof, the Commission granted the facility permit on August 22, 2014. Apx 79-94.

ARGUMENT

Pesall's appeal of the Commission's decision granting the facility permit is governed by SDCL 1-26-36. See *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26, 744 N.W.2d 594, 602 (*Big Stone II*). This Court reviews the Commission's factual Findings under the clearly erroneous standard. *Id.* Conclusions of law are reviewed *de novo*. *Id.*

This Court also has recognized that the Commission is an administrative agency with expertise. *In re W. River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 25, 675 N.W.2d 222, 229-30. As such, courts “give ‘appropriate deference to [Commission’s] expertise and special knowledge in the field of electric utilities.’” *Id.* (quoting *In re Northern States Power Co.*, 489 N.W.2d 365, 370 (S.D. 1992)).

I. The Commission, which granted the facility permit subject to 33 separate conditions, did not delegate its authority to a private party but instead properly exercised its authority to oversee the construction of the transmission line.

Following a two day evidentiary hearing involving testimony from nine witnesses, and after considering a docket file exceeding 8,000 pages, over 100 pages of pre-filed testimony, hearing testimony, and hundreds of pages of exhibits, the Commission granted the facility permit. In granting the permit, however, the Commission exercised its regulatory authority to impose 33 separate conditions on the facility permit. Ex. 301A, Apx 79-94. These 33 conditions were memorialized in an Amended Settlement Stipulation between Applicants and PUC Staff. Apx 51-61. Concluding that the condition in paragraph 17 of the Amended Settlement Stipulation addressing the SCN Plan was not sufficient, however, the Commission exercised its regulatory authority in Finding of Fact 47 to further modify Condition 17 as follows:

After Applicant has finished the soil sample field assessment in accordance with the specifications for such assessment prepared in consultation with an expert in the proper methodology for performing such a sampling survey, Applicant shall submit to the Commission a summary report of the results of the field assessment and Applicant's specific mitigation plans for minimizing the risk of the spread of soybean cyst nematode from contaminated locations to uncontaminated locations. At such time and throughout the construction period, one or more Commissioners or Staff shall have the right to request of Applicant confidential access to the survey results to enable the verification of the survey results, assess the appropriateness of the mitigation measures to

address such results, and monitor the execution of the plan during construction.

Finding 47, Apx 87. According to the Commission, this additional language was necessary for the Commission to “exercise its oversight authority over the development and execution [of the SCN Plan] during construction.” *Id.* The Commission thus granted the facility permit provided Applicants comply with amended Condition 17. Apx 79-94.

Disregarding the Commission’s proper exercise of its regulatory authority, Pesall argues that the Commission wrongfully delegated its authority regarding SCN mitigation to the Applicants. The Commission, however, never delegated any regulatory authority to Applicants (or any other private party).

Regarding SCN, Applicants proposed a mitigation plan. Ex. 23, App 99-100. The PUC Staff, which negotiated the Amended Settlement Stipulation, did not simply accept the Applicants’ mitigation plan. Instead, paragraph 17 of the Amended Settlement Stipulation imposed an additional requirement that Applicants consult with a crop pest control expert in developing its mitigation plan. Ex 301A, Apx 56. Then, in granting the permit, the Commission further modified the required SCN Mitigation Plan in Finding of Fact 47. Finding 47, Apx 87. The Commission thus properly exercised its authority to issue the permit subject to conditions imposed by the Commission. SDCL 49-41B-24 provides that the Commission can grant a permit “upon such terms, conditions, or modifications of the construction, operation, or maintenance as the commission deems appropriate.”

Finding of Fact 47 imposed additional requirements on the Applicants relating to the SCN Mitigation Plan. Finding of Fact 47 requires the Applicants to file their recommended mitigation plan to prevent spread of SCN. It also reserves the power of

both the Commission and PUC Staff to “assess the appropriateness of the mitigation measures” The requirements imposed by Condition 17, as amended by Finding of Fact 47, are the only conditions relating to SCN mitigation for issuance of the permit. Apx 56, 87. These very typical conditions are imposed by the Commission, not a private party.

Essentially ignoring the Commission’s adoption and modification of Condition 17, Pesall argues that the Commission wrongfully delegated its authority to private parties. Pesall then argues that the Decision must be reversed based upon this Court’s decision *In the Matter of the Application of the Nebraska Power District*, 354 N.W.2d 713 (S.D. 1984) (“the Mandan Case”). Pesall Brief at pp.14-19. The Mandan Case does not, however, require reversal of the permit here.

As an initial matter, the unlawful delegation issue in the Mandan Case rests upon SDCL 49-1-17, which has been repealed. *See* 2009 SB 62. App 138. Relying on testimony before the State Affairs Committee, Pesall argues the repeal of SDCL 49-1-17 was of no moment. Pesall Brief at pp.16-17. This Court cannot resort to legislative history to breathe life back into SDCL 49-1-17 because the unequivocal repeal of that statute is unambiguous. *See Jensen v. Turner County Bd. of Adjustment*, 2007 SD 28, ¶ 5, 739 N.W.2d 411, 413 (stating that legislative history can only be considered when construing ambiguous statutes).

Further, even if the unlawful delegation portion of the Mandan Case survived the repeal of SDCL 49-1-17, no wrongful delegation occurred here. In the Mandan Case, the Commission granted a facility permit but rejected the Applicants’ proposed mitigation plan for replacing subsoil. As stated in Finding-of Fact 29 in the Mandan Case, which is

quoted on page 14 of Pesall's Brief, the Commission granted the permit in the Mandan Case but gave landowners *carte blanche* authority to devise conditions regarding top soil preservation and mitigation:

[Applicants] would be required as a condition of construction to send written notice to each affected landowner as soon as practicable after issuance of a permit. The written notification of topsoil treatment options would be on a form approved by the South Dakota Public Utilities Commission, and would set forth specific landowner options with regard to separation and stockpiling of topsoil. The landowner would be given an opportunity to specify other specific procedures he wished to have employed on his particular land in regard to topsoil preservation. . . . (emphasis added).

Because the landowners had unlimited authority to decide the procedures for topsoil preservation, the Court concluded that the Commission wrongfully delegated its authority to impose conditions to private landowners, stating that the Commission wrongfully delegated its authority because no statute indicates "landowners can dictate topsoil restoration conditions." Mandan Case at 719.

Unlike the Mandan Case, no private party here was granted unfettered authority to decide the conditions imposed to prevent spread of SCN. Applicants proposed various mitigation techniques. Ex. 23, App 99-100. As explained by Applicants at the evidentiary hearing, Applicants cannot choose the specific technique to be used until the concentration of SCN contamination is determined following appropriate testing. TR 34-36, App 114-116. Nevertheless, believing that more detail was needed in specifying what the plan development should entail and the Commission's oversight role, the Commission adopted Finding of Fact 47 which enables the Commission to oversee the SCN mitigation plan and modify mitigation techniques if inappropriate. Finding 47, App 87. Thus,

Pesall's argument that Applicants have the power to determine the conditions for issuance of the facility permit is simply incorrect.

For the first time on this appeal, Pesall argues that the Commission's actions are an unconstitutional delegation of authority that violates Pesall's due process rights and conflicts with basic separation of powers requirements. (Pesall's Brief at pp.18-19). Pesall never raised these arguments to the Commission or on appeal to the Circuit Court. Pesall thus failed to preserve this argument for appeal. *See Casey Ranch Ltd. P'ship v. Casey*, 2009 SD 88, ¶ 19 n.6, 773 N.W.2d 816, 823 n.6 (stating that the Court will not consider arguments first asserted on appeal).

Even if preserved, Pesall's constitutional arguments fail. Pesall cites two federal cases involving alleged unconstitutional delegation of authority which do not apply to this case. *See Association of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), *vacated on other grounds by sub nom., Dep't of Transp. v. Assoc. of Am. R.R.*, 135 S. Ct. 1225 (2014); and *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). The cases cited by Pesall all involve an instance where a private actor is actually exercising regulatory authority over other private actors. Unlike those cases, the Applicants are not exercising any regulatory authority, and no unconstitutional delegation of authority occurred.

In sum, the Commission did not wrongfully delegate its authority regarding the SCN Mitigation Plan. It imposed a condition as contemplated by SDCL 49-41b-24. The Circuit Court thus properly affirmed the issuance of the permit.

II. The Commission complied with SDCL 49-41b-24 when it issued the Decision within twelve months of when Applicants filed the Application.

Pesall argues that the Commission violated SDCL 49-41B-24, which states:

Within twelve months of receipt of the initial application for a permit for the construction of . . . transmission lines of two hundred fifty kilovolts or more, . . . the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate.

SDCL 49-41B-24.

Consistent with SDCL 49-41B-24, the Commission issued its Decision on the Application for the energy facility permit within twelve months. Applicants filed the application with the Commission on August 23, 2013. The Commission issued its Decision on August 22, 2013. Apx 79-94. Thus, the Commission issued its Decision within one year.

Without citing any authority, Pesall argues that the one-year time limit prohibits the Commission from enforcing compliance with the conditions of the permit, including the SCN Mitigation Plan. The language of SDCL 49-41B-24 does not support that interpretation. Instead, the statute merely requires the Commission to rule on the Application within one year of filing. The plain language of SDCL 49-41B-24 also expressly authorizes the Commission to grant the permit “upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate.” As recognized by the Circuit Court, the ability for the Commission to mandate compliance with the conditions of its permit during future construction, including the SCN Mitigation Plan, does not violate SDCL 49-41B-24. December 23, 2014, Circuit Court Hearing TR at 48, Apx 104.

The vast majority of the energy facility permitting dockets since the Energy Facility Permit Act, SDCL Chapter 49-41B, became law have occurred within the past

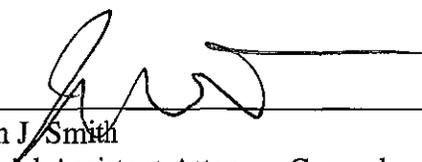
ten years, and in each of these, the Commission has imposed a significant number of conditions on the project as is authorized by 49-41B-24. Virtually all of these conditions are forward-looking. They are almost all forward-looking because conditions are essentially inherently forward-looking, requiring the project to take, and refrain from taking, certain actions, including reporting back to the commission with respect to certain types of conditions, during the construction and operation phases of the project.

In *Big Stone II*, this Court upheld the decision of the Commission granting a permit for the construction of the Big Stone II power plant. In that decision, the Commission imposed a number of conditions on the project, all of which were forward-looking. With respect to linear facilities such as transmission lines and pipelines, the need for the Commission to have the authority to impose forward-looking conditions, including those that require or allow future project site condition assessments, surveys, and plan preparations based on conditions observed prior to construction or encountered during construction are much more necessary than with a non-linear project such as Big Stone II. Among the reasons for this necessity is the fact that project route surveys, etc., such as the SCN condition imposed by the Commission in this docket, simply cannot be completed prior to the issuance of the permit, when the project then acquires the right to access lands crossed by the project, including those owned by persons unwilling to provide access voluntarily. The fact that energy facility permit conditions involve reporting to the Commission during the project pre-construction and construction process and potential future Commission actions involving such conditions do not violate the one year decision issuance requirement set forth in SDCL 49-41B-24 and are not improper delegations. Circuit Court Hearing TR 46-49, Apx 102-105 .

CONCLUSION

The Commission respectfully request that the Court affirm the Circuit Court's Findings of Fact and Conclusions of Law granting the facility permit.

Dated this 13th day of April, 2015



John J. Smith
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
(605) 773-3201
john.j.smith@state.sd.us

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, the undersigned attorney certifies that the foregoing brief complies with the statutory font, character, and volume limitations, containing 4451 words and 24521 characters in less than 19 pages.

Dated this 13th day of April, 2015.



John J. Smith
Special Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true and correct copies of the foregoing Appellee's Brief were served upon the following individuals by first class mail and electronic service this 13th day of April, 2015:

N. Bob Pesall, Attorney
P.O. Box 23
Flandreau, SD 57028
bob@pesall.com

Bradley R. Morehouse (Pro Se)
14026 416th Ave.
Andover, SD 57422
mhouse@nvc.net

Thomas Welk, Attorney
Jason R. Sutton, Attorney
Montana Dakota Utilities and Otter Tail
Power
P.O. Box 5015
Sioux Falls, SD 57117-5015
tjwelk@boycelaw.com
jrsutton@boycelaw.com

Randall Schuring (Pro Se)
Vice President, Schuring Farms, Inc.
507 S. Second St.
Andover, SD 57422
schuringrl@hotmail.com

John J. Smith, Attorney for Appellee
South Dakota Public Utilities
Commission
500 E. Capitol Ave.
Pierre, SD 57501
John.Smith3@state.sd.us



John J. Smith
Special Assistant Attorney General