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STATE OF NORTH DAKOTA

CASE NO. 20190127
Burleigh Co. No. 2018-CV-01142

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Minn-Kota Ag Products, Inc.,

Appellant,

v.

North Dakota Public Service Commission, et al.,

Appellees.

Reply Brief of Appellant Minn-Kota Ag Products, Inc.

Appeal from the District Court Order Affirming a Decision by the North Dakota Public Service Commission

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Oral Argument Requested

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Argument

I. Both the Commission and Dakota Valley ignore the liberal construction of standing required by *Bank of Rhame*.

[1] Minn-Kota has standing to appeal the Commission's decision because Minn-Kota was directly interested in the outcome of Otter Tail's application, aggrieved by the Commission's decision, and participated in the proceedings below by submitting an Appearance of Customer, testifying in support of the application, and attempting to intervene in its own right. *See Application of Bank of Rhame*, 231 N.W.2d 801, 806 (N.D. 1975) (providing the three prong test for standing in the administrative context).

[2] The Commission only challenges whether Minn-Kota's conduct meets the participation prong of the standing test. Although the Commission does not specifically address Minn-Kota's written Appearance, it argues that George Schuler IV's testimony at the hearing cannot constitute participation for the purposes of a standing inquiry because Minn-Kota is a corporation and therefore should be represented by counsel. (PSC Br. ¶ 25.) Yet the Commission disproves its own argument, acknowledging that its own administrative rules allow for participants to "appear in any proceeding in person or by an attorney or other qualified representative." N.D.A.C. § 69-02-01-05. Those rules specifically provide for the appearance of "an officer or authorized employee of a corporation, association, group, government agency, department, or subdivision." *Id.*

[3] There is no dispute that Minn-Kota's eventual petition to intervene was signed by an attorney and that Minn-Kota was represented by counsel from that point on.[1] This is

[1] The Commission concedes that Minn-Kota has standing to appeal the denial of its motion to intervene, but argues that standing extends no further. (*See* PSC Br. at ¶ 27 n.1.) The Commission fails to address how such a holding would limit the adversarial system where, as in this case, Otter Tail has declined to itself appeal the decision despite supporting Minn-Kota's position.

therefore not some question about the unauthorized practice of law, as the Commission suggests with inapt citations to *Wetzel v. Schlenvogt*, 2005 ND 190, or *Blume Const., Inc. v. State ex rel. Job Service North Dakota*, 2015 ND 285. Instead, the question in this appeal—not addressed in those cases—is simply whether Minn-Kota's involvement in the proceedings below were sufficient to meet this Court's broad construction of "who may be party for purposes of appeal of review." *Application of Bank of Rhame*, 231 N.W.2d 801, 806 (N.D. 1975). As this Court already explained, and as the Commission's argument ignores, "[a]ny doubt on the question of standing involving a decision by an administrative body should be resolved in favor of permitting the exercise of the right of appeal by any person aggrieved in fact." *Rhame* 231 N.W.2d at 808.

[4] The Commission, like the district court below, does not challenge or dispute the fact that Minn-Kota was aggrieved in fact. Dakota Valley, however, argues that Minn-Kota was not aggrieved because, according to Dakota Valley, the only interest Minn-Kota had in the proceedings was the rate that it would pay, which Dakota Valley claims was too uncertain an outcome to warrant aggrievement.

[5] The record shows that Dakota Valley is wrong, and that Minn-Kota was aggrieved by the Commission's decision. For the purposes of appeal, a party is "factually aggrieved" if a decision has enlarged or diminished such party's interest. *Washburn Public School Dist. No. 4 of McLean County v. State Bd. of Public School Educ.*, 338 N.W.2d 664, 667 (N.D. 1983). Put another way, for an appeal from an administrative agency, an appellant falls under the statute if its interest would be prejudicially affected by modification or reversal, regardless of whether party appeared as plaintiff, defendant,

or intervenor. *Pederson v. North Dakota Workers Compensation Bureau*, 534 N.W.2d 809 (1995).

[6] The Commission's decision undoubtedly aggrieves, or prejudicially affects, Minn-Kota. The Commission acknowledged that the service provided by Otter Tail offered greater reliability to the Minn-Kota facility. A-50-51 at ¶¶ 19, 20, 22. Moreover, the Commission also inherently recognized that Otter Tail's rates will likely result in a savings to Minn-Kota over time. *See* A-52 at ¶¶34, 35. In short, the Commission acknowledged that Minn-Kota will have inferior electric service and incur more cost over the life of the Facility with Dakota Valley. Minn-Kota's interests are certainly diminished by the Commission's decision.

[7] For these reasons, the district court was wrong to conclude Minn-Kota's participation was insufficient to confer standing to appeal the Commission's decision and should be reversed.

II. The merits of the Commission's decision should be reversed because they are not supported by facts or law.

[8] Both the Commission and Dakota Valley argue that the Commission's weighing of ten factors satisfies N.D.C.C. § 28-32-46. But as Minn-Kota pointed out in its opening brief, of the ten factors considered by the Commission, only three weighed in favor of Dakota Valley: (1) the number of customers within a two-mile radius; (2) wasteful duplication, and (3) orderly and economic development of the general area. A fourth factor, reliability, was found by the Commission to support neither company, even though the Commission acknowledged that Otter Tail's proposal was more reliable. Minn-Kota has demonstrated, and the Appellees have failed to rebut, that these three factors should weigh in favor of Otter Tail.

A. Neither the Commission nor Dakota Valley provides justification for use of an arbitrary two-mile radius in analyzing customers served.

[9] Minn-Kota demonstrated in its opening brief that the Commission's consideration of customers served "within at least a two-mile radius"—one of the three factors it concluded weighed in favor of Dakota Valley—was incorrectly based on a rigid and arbitrary test that is not required or supported by the Territorial Integrity Act or this Court's case law. The Commission does not address Minn-Kota's argument on appeal, much less try to refute it. (*See* PSC Br. at ¶35.) Indeed, the Commission does not even acknowledge that its analysis really looked only at customers in a "*no more than* two-mile radius" rather than the "*at least* a two-mile radius" it announced as a consideration in determining whether to grant Otter Tail's Application.

[10] The Commission's error here was not a mere transcription mistake—it applied an erroneous standard, and therefore its order was not in accordance with the law. The transcript of the December 20, 2017, work session demonstrates that the Commission erroneously believed that the "no more than two-mile radius" was actually *required* by the Act. *See* CR Ex. 87 (Hrg. Tr. at 11:8 – 11:23.) But the Act itself does not specify this two-mile radius. When one Commissioner asked where the two-mile radius came from and whether it was judicially created, the Commission's technical advisor admitted:

> You know, there's not really a good—it was kind of arbitrary. . . . [T]here used to be a one in a two-mile and a four-mile or similar, three-mile radius or something like that, the way the thing used to read, and over the years it's turned into a two-mile radius. And I don't know that it's—that the two miles has a good reason other than it just represents what's right around the load. In this case, it's a rural area.

CR Ex. 87 (12/20/17 Working Session Tr. at 12:2 – 12:16.)

[11] Had the Commission considered customers just outside its arbitrary boundary, it would have made a significant difference. Dakota Valley actually concedes that a three-

mile radius rather than a two-mile radius would have favored Otter Tail because of its customers in Barney and Mooreton, (*See, e.g.* A-16), but Dakota Valley suggests that the arbitrary cutoff was somehow necessary or justified because—according to Dakota Valley—it has been "utilize[ed] for decades." (DVEC Br. at ¶ 44.) Contrary to Dakota Valley's argument, this Court has concluded that the Territorial Integrity Act does not preclude the Commission from considering the number of customers served in a larger area. *Capital Elec. Cooperative, Inc. v. North Dakota Public Service Com'n*, 2016 ND 73 at ¶ 12.

[12] The Commission arbitrarily limited its consideration based on an erroneous view of the legal requirements of the Act, and is therefore not in accordance with the law and the Commission's decision should be reversed.

B. Both the Commission and Dakota Valley confuse the reliability and duplication factors.

[13] Both the Commission's and Dakota Valley's response briefs demonstrate that the reliability and duplication factors are necessarily conflated together in this case. They both argue that Otter Tail's superior reliability should be ignored because it is based on the construction of a substation that wasteful and duplicative. But Otter Tail's proposal is not duplicative because it would provide Minn-Kota with more reliable service.

[14] There is no dispute that Otter Tail's proposal was, in fact, more reliable for Minn-Kota's needs. The Commission concedes that Otter Tail presented a more reliable proposal, but nevertheless argues that Minn-Kota did not need the equivalent of a "Cadillac" utility provider "when a Buick system will do nicely." (PSC Br. at ¶ 39.) This analogy is inapt. If a driver wanted to make a cross-country trip and knew that it could pay less for a smooth-running Cadillac than a Buick that was more at risk to break down,

no one would question the car buyer's decision to go with the cheaper, more reliable option.

[15] The Commission and Dakota Valley both argue that the factor that made Otter Tail more reliable—the planned substation on Minn-Kota's property—should actually be counted against Otter Tail's proposal because it was wastefully duplicative. According to both Appellees, the substation is wasteful simply because it would ultimately serve only one customer rather than a larger population. But these arguments ignore the scale of operation that Minn-Kota is running.

[16] It is certainly undisputed that, at least in the near future, Minn-Kota would be the only customer drawing on power from Otter Tail's proposed sub station, but this does not make it wasteful. Minn-Kota is not just an isolated commercial customer with nominal electricity needs; its grain-handling facility helps area farmers by providing an efficient and energy-intensive "marketplace for local producers." CR Ex. 86 (Hrg. Tr. at 177:9-10.) By providing a total capacity of 2.9 million bushels of grain for its in-bound operation, while able to load grain onto 120-car trains at a maximum load-out capacity of 80,000 bushels per hour, Minn-Kota is able to provides area grain producers with an economic advantage that would not exist with smaller local grain elevators. *See id.* (Hrg. Tr. at 176:1 – 177:10.)

[17] Because of the scale of operations at Minn-Kota's facility, access to reliable and affordable electricity are essential. With more and more customers on a transformer, large loads—like the power needed for the facility—can cause voltage drops and other types of disruptions on the system. *Id.* (Hrg. Tr. at 37:19 – 39:3.) Otter Tail's construction of a new substation on Minn-Kota's property would eliminate the concern about the amount

of power needed to start up the facility's electric motors, whereas Dakota Valley would require Minn-Kota to utilize separate soft-start motors to minimize the risk of brown outs. *See id.* (Hrg. Tr. at 39:4 – 24; 92:8 – 93:1.)

[18] Moreover, the additional cable required for Dakota Valley to provide service to the facility increases the risk and time to repair potential outages. *Id.* (Hrg. Tr. at 185:6-24.) Any service interruption at the facility would not only have a direct adverse impact on the highly scheduled operation of BNSF trains on the out-bound operation of the facility, but it could also lead to a temporary shut-down of the entire facility to clean out grain and resume operations. *Id.* (Hrg. Tr. at 186:1-23.)

[19] From this, it is clear that the Commission's analogy to Cadillac's and Buick's does not fit. The question on this $20 million project cannot be distilled down to whether a family vehicle might be reliable for around-the-town driving. Rather, the Commission should have—and this Court must—evaluate what is necessary to load 120 train cars per eight-hour shift. At one train car every four minutes, even a 30-second power failure results in a major set-back for the operation. The set-back includes shut down, clean up, and restart time that results in hours if not days of delay, which puts the facility behind and causes expensive rail delays and other associated costs. These delays and costs negatively impact not only Minn-Kota and its employees, but also the area's producers. Minn-Kota needs the most robust system available, not just something that is "good enough."

[20] Otter Tail's proposal is not wasteful because the expenditure of capital provides more reliable service for a large commercial operation that reverberates through the local economy. Moreover, over time the economic impact of Otter Tail's up front capital

investment is offset by the lower rates, resulting in less economic waste in the long term. The factual record demonstrates that both of these factors—reliability and wasteful duplication—should have weighed in favor of Otter Tail's application, and the Commission's decision should therefore be reversed.

III. The Commission's failure to allow Minn-Kota to intervene was based on a legally erroneous application of the good cause standard.

[21] Both the Commission and Dakota Valley try to support the denial of Minn-Kota's attempt to intervene by simply repeating the error of the district court—assuming that the "good cause" requirement is limited only to an explanation of why the motion was not timely filed. The Commission's rules do not state this, and the Commission's prior decisions demonstrate it is not the case. *See* A-64-72 (*TransCanada Keystone Pipeline, LP*, Case PU-06-421, Order on Motions to Intervene and Reopen Case (Nov. 7 2007).)

[22] The Commission attempts to distinguish *TransCanada* by arguing that it was a separate case with distinguishable facts. (PSC Br. at ¶ 23.) But this misses the point. The *TransCanada* example shows that the district court applied an erroneous *standard* by assuming that timing was the only relevant consideration. Dakota Valley, for its part, attempts to whitewash the untimely nature of the intervention request in *TransCanada* by claiming—with no more than a *see generally* citation—that the City of Fargo's petition was untimely because it did not receive direct notice of the proceedings. (DVEC Br. at ¶ 49.) Yet, the order in that case indicates that "the City of Fargo was legally provided notice of the hearings pursuant to N.D.C.C. § 49-22-13" and "[i]n addition to the legal notice, the news media covered the hearings." *See* A-65. In any event, the Commission allowed Fargo to intervene well after the hearings because there was good cause to do so, not because the City allegedly did not have notice of the original hearing.

[23] In *TransCanada*, the Commission allowed Fargo's late intervention despite arguments in opposition that it had simply ignored the earlier hearing. Here, by contrast, Minn-Kota did not ignore the hearing, but instead participated to the extent it deemed proper for an interested customer until it became clear to Minn-Kota that its interests were no longer sufficiently aligned or adequately represented by Otter Tail's involvement before the Commission. The Commission attempts to criticize Minn-Kota for what it alleges is a "wait and see attitude," as if there is an unfair advantage to an interested party by submitting argument or evidence to the Commission after seeing the other arguments. If that were the case, the Commission rules would not, as they do, provide a mechanism for reopening hearings after the fact. Neither the Commission nor Dakota Valley have identified any prejudice that would have been caused by Minn-Kota's intervention. Indeed, Minn-Kota was the only customer impacted by the decision, and Minn-Kota prioritized making sure that the record was complete so that the Commission could make a fully-informed decision even if it risked a delay in proceedings that would primarily impact itself.

[24] Because the district court erroneously focused on only the timing of the petition, its decision regarding Minn-Kota's intervention should be reversed.

Conclusion

[25] Minn-Kota has standing to appeal the Commission's denial of that application because of Minn-Kota's participation in the proceedings below. The Commission's decision must be reversed and the certificate of public convenience and necessity should be issued. In the alternative, the Commission's denial of Minn-Kota's intervention should be reversed and remanded for further proceedings with Minn-Kota as an intervenor.

Dated: August 30, 2019

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Certificate of Compliance

The undersigned, as attorney for Appellant Minn-Kota Ag Products, Inc. and as the author of the above brief, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the brief was prepared with size 12 proportional typeface (Times New Roman) and the reply brief, including cover, table of contents, and table of authorities is a total of 12 pages.

Dated: August 30, 2019

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CERTIFICATE OF SERVICE

State of Minnesota)
)ss.
County of Hennepin)

I, Sarah E. Bagwell, being duly sworn deposes and says that I am over the age of 18 years and not a party to this action and that on the 30th day of August 2019 in portable document format, the following document:

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Sarah E. Bagwell

Subscribed and sworn to before me
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