

In the District Court of Finney County, Kansas

Sunflower Electric Power Corporation, )  
Plaintiff, )  
vs. ) Case No. 07 CV 245  
Kansas Department of Health and Environment, et al )  
Defendants. )  
Tri-state Generation and Transmission Association, Inc., )  
Plaintiff, )  
vs. ) Case No. 07 CV 246  
Kansas Department of Health and Environment, et al )  
Defendants. )

The following is a partial transcript of the hearing before the district court on the 15<sup>th</sup> day of July, 2008, pursuant to a show cause order issued by Philip C. Vieux, District Judge, to determine if the district court had jurisdiction to hear an appeal from the Secretary of Health and Environment's denial of an Air Quality Permit.

1 NOTE: Court = Philip C. Vieux, District  
2 Judge. Mr. Wehrum = Counsel for Sunflower Electric  
3 speaking on behalf of all Plaintiffs. Ms. Anderson =  
4 Counsel for Kansas Department of Health and Environment  
5 and speaking for all Defendants.

6

7 THE COURT: ... I send out this order to show  
8 cause ... Then I get the answers, and the State is still  
9 wanting the case to be dismissed, but it looks like also  
10 now the Plaintiffs are wanting the case to be dismissed.  
11 Is that where I am thinking that we are?

12 MR. WEHRUM: Yes, Your Honor.

13 THE COURT: Okay. Is there any reason why we  
14 just didn't sign a dismissal?

15 MS. ANDERSON: Your Honor, I did approach  
16 Mr. Blanton, who is the counsel for the Petitioners,  
17 asking that he waive and that we agree to this, and he  
18 indicated his client did not want to waive the oral  
19 argument, and so --

20 MR. WEHRUM: Your Honor, as you know, our  
21 concern from the beginning of this case has been what we  
22 perceived to be ambiguity as to the legal authority that  
23 the State relied upon in denying Sunflower's application  
24 for a permit to construct two new coal fired power units  
25 in Holcomb.

1           On the one hand the denial order cited to, as  
2 you just pointed out, K.S.A. 65-3008a(b) as an authority  
3 for denying the application, but on the other hand also  
4 cited to K.S.A. 65-3012 as part of the authority for  
5 issuing the denial. Out of concern that the face of the  
6 denial order was ambiguous, we filed, as you pointed out,  
7 in two courts. We filed a Petition for Review in the  
8 Court of Appeals, which was subsequently taken up by the  
9 Supreme Court. We also filed a Petition for Review in  
10 this Court.

11           And the case in this Court was based on the  
12 possibility that the State would assert that 65-3012 was,  
13 in fact, the basis, the mechanism by which the denial  
14 order was issued.

15           In their most recent pleadings, the State to  
16 our mind has made abundantly clear, that they believe the  
17 authority and the mechanism by which they granted the  
18 denied or issued the denial was 65-3008a(b). We concur  
19 in that determination. We have believed from the  
20 beginning that the law requires any denial to be issued  
21 under the authority of that statute.

22           But, Your Honor, we believed it was very  
23 important to come before you today, because ultimately  
24 you must decide the jurisdiction of your Court, and we  
25 believe it is very important to have available to you all

1 of our best thinking and arguments to assist in the  
2 judgment you have to make.

3 THE COURT: Well, you do realize, though, that  
4 I cannot decide jurisdictional issues for the Court of  
5 Appeals or the Supreme Court?

6 MR. WEHRUM: Yes, Your Honor, I realize that.  
7 And as you have pointed out, the Supreme Court after  
8 taking consideration of the case, did issue an order  
9 indicating that the matters below, that being a Petition  
10 that Sunflower has filed before the KDHE and since  
11 transferred to the Office of Administrative Hearings, as  
12 well as the Petition for Review that we filed in this  
13 Court, the Supreme Court indicated that -- a desire for  
14 both of those proceedings to be resolved before the case  
15 would be considered again before that Court.

16 So we believe that it's wholly appropriate and  
17 well within your authority to be deciding jurisdiction.  
18 And again, the key question to our mind is, is there any  
19 basis whatsoever for 65-3012 to be used as a mechanism  
20 for granting the denial? We firmly believe, as you have  
21 seen in our papers, that it provides no basis for the  
22 denial, and that any petition for review of the denial of  
23 the application should go to the Court of Appeals, and in  
24 this case, therefore, the Supreme Court.

25 THE COURT: Okay. Anything further?

1 MR. WEHRUM: No, Your Honor.

2 THE COURT: Okay. Thank you.

3 Ms. Anderson, are you going to argue?

4 MS. ANDERSON: Your Honor, it is the Kansas  
5 Department of Health and Environment's position that  
6 there is no jurisdiction with the district court in this  
7 matter, and that the sole ruling of the district court in  
8 this matter should be the dismissed for lack of  
9 jurisdiction. It is not the -- within the authority of  
10 the district court to make other jurisdictional rulings  
11 in this matter, other than that the district court does  
12 not have jurisdiction.

13 THE COURT: What about this issue of 65-3012?

14 MS. ANDERSON: It doesn't -- it doesn't, Your  
15 Honor, provide a source of jurisdiction for the district  
16 court. It still requires administrative exhaustion.  
17 There is no -- if they arguing that 65-3012 provides  
18 jurisdiction within this Court, it does not.

19 THE COURT: Okay. Anything further, Counsel?

20 MR. WEHRUM: Your Honor, to be --

21 THE COURT: It's your motion, so you have the  
22 last word.

23 MR. WEHRUM: Thank you, Your Honor. To be  
24 clear, we are not arguing that 65-3012 provides  
25 jurisdiction to this Court. Again, we firmly believe

1 that the only basis, the only legal authority upon which  
2 the denial order could have been issued is 65-3008a(b),  
3 and as a result we believe jurisdiction lies in the Court  
4 of Appeals, or in this case, the Supreme Court.

5 THE COURT: Okay.

6 MR. WEHRUM: Thank you, Your Honor.

7 THE COURT: Well, Counsel, I have had a lot of  
8 time in the past couple of weeks to -- and weekends to go  
9 through this matter. And I don't believe that 65-3012  
10 gives this Court any extra jurisdiction or another  
11 pathway to jurisdiction. It's all part and parcel of the  
12 issue of denial or granting of the air quality permit,  
13 and that decidedly -- that issue is decidedly within the  
14 hands of the Court of Appeals or the Supreme Court, the  
15 Appellate Courts of Kansas as per the statutes, I believe  
16 that's, what, 60-3008A(b).

17 With that, this Court simply has no  
18 jurisdiction to hear this matter. And so the Court is  
19 going to order these cases dismissed. They will be, of  
20 course, dismissed without prejudice, because I'm not in  
21 the situation where I can dismiss it with prejudice.

22 So who will be drawing my order?

23 MR. WEHRUM: We will do that, Your Honor.

24 THE COURT: Okay. Anything further?

25 MS. ANDERSON: No.

1 MR. WEHRUM: Thank you, Your Honor.

2 THE COURT: Okay. Thank you.

3 (End of proceedings.)

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