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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Environmental Law and Policy Center, and Dakota Resource Council	)	
Appellants,	)	Supreme Court No. 20190220
vs.	)	Burleigh County District Court Case No.: 08-2018-CV-02937
North Dakota Public Service Commission, and Meridian Energy Group, Inc.,	)	
Appellees.	)	

Appeal from Judgment Entered on May 15, 2019
Case No. 08-2018-CV-02937
County of Burleigh, South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

APPELLANTS' PRINCIPAL BRIEF

(ORAL ARGUMENT REQUESTED)

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Did the Public Service Commission violate the "fair hearing" and other requirements of the Administrative Agency Practice Act (AAPA) when it summarily dismissed a complaint it had already found stated a prima facie case:

A. Without allowing complainants any opportunity for discovery;

B. Without conducting an evidentiary hearing; and

C. Without considering any evidence other than a single affidavit proffered by the defendant, which contradicted the defendant's previous statements?

II. STATEMENT IN SUPPORT OF ORAL ARGUMENT

[¶ 2] This is an important case involving the procedural requirements of the AAPA and due process, and involves an underlying dispute that has drawn considerable public attention. Oral argument would help define and clarify the issues.

III. STATEMENT OF THE CASE

[¶ 3] The issues in this case arise out of a dispute over the proposed siting of a new oil refinery in Billings County near Theodore Roosevelt National Park. Under North Dakota's Energy Conversion and Transmission Facility Siting Act, N.D.C.C. § 49-22.1, a company intending to build on oil refinery "designed to or capable of … [m]anufacture or refinement of" 50,000 or more barrels per day ("bpd") of "liquid hydrocarbons" must first obtain a "certificate of site compatibility" from the Public Service Commission (PSC). N.D.C.C. §§ 49-22.1-01(6); 49-22.1-04. The purpose of that statute is to ensure that any such facility "will produce minimal adverse effects on the environment and the welfare of the citizens of this state." N.D.C.C. § 49-22.1-02.

[¶ 4] Defendant Meridian Energy Group, Inc. ("Meridian") announced and began seeking permits for what it represented was going to be a 55,000 bpd oil refinery.

Meridian did not, however, seek a siting certificate from the PSC. Dakota Resource Council ("DRC") and Environmental Law & Policy Center ("ELPC") then filed a formal Complaint with the PSC, which the PSC served on Meridian after determining that the Complaint stated a prima facie case. APP 003. Defendant Meridian did not answer, but instead moved to dismiss for lack of subject matter jurisdiction, alleging that now it only planned a 49,500 bpd facility. APP 060. Without allowing DRC and ELPC to conduct any discovery or to present evidence, the PSC made findings of fact and granted the defendant's motion. APP 104, 114, 116. The Burleigh County District Court affirmed that decision, and now DRC and ELPC appeal to this Court. APP 120, 125, 131.

IV. STATEMENT OF THE FACTS

[¶ 5] In 2015, defendant Meridian announced its intention to construct a 55,000 bpd crude oil refinery approximately three miles from Theodore Roosevelt National Park, and began seeking investors and applying for permits. In all of those statements and applications, Meridian stated its intention to build a 55,000 bpd refinery. *E.g.* Application for Billings County Building and Zoning Certificate and Conditional Use Permit, APP 021; Stock Placement Memorandum, Doc. ID 36; Compiled URLs with Cross-References to Archived Links, Doc. ID 37. In its application to the North Dakota Department of Health (NDDH)[1] for a Permit to Construct under the Clean Air Act, Meridian referred to the proposed refinery's 55,000 bpd capacity in at least twenty-one separate places. Application for Permit to Construct, at pp. 1, 2, 7, 8, 22, 27, Doc. ID 31.

[1] NDDH is now the Department of Environmental Quality. For simplicity, this brief will refer to NDDH by its former name, which was the name used during the earlier proceedings in this case.

[¶ 6] That led the PSC on March 1, 2017 to send a letter to Meridian's attorney suggesting that Meridian would need a siting certificate:

> Since Meridian is filing applications with other state agencies for permits based on a facility that can refine up to 55,000 barrels per day of oil, and since an oil refinery of that capacity is jurisdictional to the Commission for siting under North Dakota Century Code chapter 49-22, it appears that the proposed refinery is jurisdictional under the siting law.

Letter from Patrick Fahn to Lawrence Bender, March 1, 2017, APP 053. Several months later, the PSC asked for a meeting with Meridian representatives, again based on Meridian's continued efforts to obtain other permits for a 55,000 bpd refinery. Transcript of Information Exchange Meeting, Doc. ID 117.

[¶ 7] On March 26, 2016, Meridian submitted an application for a building permit and conditional use permit to the Billings County Planning and Zoning Department, which was subsequently granted. The application cover letter describes the Davis Refinery as "an approximately 55,000 barrel per day petroleum refinery." APP 021.

[¶ 8] On June 12, 2018, NDDH granted Meridian its air quality permit to construct. APP 049. At no point in that permitting process had Meridian backed away from its intention to build a 55,000 bpd refinery. The permit defines the project as a "Petroleum Refinery with a rated capacity up to approximately 55,000 barrels of crude oil per day," APP 050, and it specifically gives Meridian construction permission to build two "crude desalting and distillation units," each of which would be capable of desalting and distilling "27,500 bpd" of crude oil apiece for a total of "55,000 bpd." APP 051.[2]

[2] As is the norm, the permit requires Meridian to provide information to NDDH whenever it intends to deviate from the permitted construction and operation. Air Pollution Control Permit to Construct, at pp. 43-44, Doc. ID 35. To date, according to

[¶ 9] Seventeen days after NDDH granted Meridian this construction permit for a "55,000 bpd" oil refinery, DRC and ELPC filed a formal Complaint with the PSC, alleging that Meridian had begun construction of the Davis Refinery without the siting certificate required by N.D.C.C. § 49-22 and PSC regulations. APP 003. The Complaint included Meridian's recently-issued permit to construct a "55,000 bpd" refinery as an exhibit. APP 049. It also included Meridian's application for its conditional use permit (along with the application's numerous references to using the land for a 55,000 bpd refinery) as an exhibit. APP 021. The Complaint also included other support as exhibits, such as Meridian's representations to the public and Meridian's own investors that Meridian was constructing a 55,000 bpd oil refinery. *See, e.g.,* Stock Placement Memorandum, Doc ID 36, p. 1. The Complaint did not seek a ruling that the proposed site was unlawful; rather, it sought a declaration that Meridian's refinery is subject to the Siting Act and would be subject to the statutory siting process. The PSC determined that the Complaint "states a prima facie case" under PSC rule N.D.A.C. § 69-02-02-02, and the PSC formally served the Complaint on Meridian. APP 059.

[¶ 10] After the PSC served the Complaint, instead of filing an answer, Meridian filed a "Motion to Dismiss for Lack of Subject Matter Jurisdiction." APP 060. Attached to the motion was an affidavit from William Prentice, Meridian's CEO, saying that Meridian "has no current plans for any addition or expansion of the Davis Refinery beyond the capacity of 49,500 bpd." APP 073. That of course contradicted the explicit terms of the construction permit that Meridian had just been issued from NDDH. APP

NDDH, "[t]he Division of Air Quality has not received any communication nor applications from Meridian since the Permit to Construct (No. PTC17020) was issued." E-mail from Rheanna Kautzman to JJ England, Sept. 14, 2018, Doc. ID 70 at p. 16.

049. It also contradicted Meridian's representations to Billings County (APP 021), potential investors (Stock Placement Memorandum, Doc ID 36), and the public (Compiled URLs, Doc ID 37). Notably, the affidavit hedged by saying that Meridian had no "current plans" to expand. APP 073. Nor did the affidavit provide any updated engineering plans to counter those in Meridian's own application for the Permit to Construct that NDDH had *just* issued. April 5, 2017 Application to Department of Health for Permit to Construct, Doc IDs. 31-34; Final Permit to Construct, APP 049.

[¶ 11] DRC and ELPC explained that, at most, Mr. Prentice's self-serving affidavit created an issue of material fact on the ultimate issue raised by the complaint—was Meridian planning a refinery with a capacity of over 50,000 bpd or not? DRC and ELPC requested discovery of materials such as "statements to . . . potential investors in presentations, prospectuses, pro forma financials," internal engineering, technical, and financial documents, and information about the financial viability of a refinery with a capacity of less than 50,000 bpd in today's market, all of which is relevant information for the PSC to ascertain Meridian's true intentions and plans and for DRC and ELPC to adequately present their case to the PSC. Response to Motion to Dismiss, Doc. ID 59 at 10-11.

[¶ 12] On September 10, 2018, the administrative law judge ("ALJ") recommended that Meridian's motion be granted. Recommended Decision Granting Meridian Energy Group, Inc.'s Motion to Dismiss Complainants/Petitioners' Complaint, APP 078. Rather than accept the DRC and ELPC's factual assertions as true for purposes of the motion to dismiss, the ALJ accepted Meridian's factual allegations as true, denied

DRC and ELPC any opportunity for discovery, and denied their request for a hearing. APP 088.

[¶ 13] On September 14, 2018, DRC and ELPC filed a motion to supplement the record with information that contradicted Meridian's new allegations, and to allow discovery to obtain additional information on the question of jurisdiction. Doc. ID. 70. Specifically, DRC and ELPC filed an open records request with NDDH to determine if Meridian had sought approval to modify its 55,000 bpd permit to reduce the capacity below the PSC's siting threshold. Notably, the permit included conditions that required Meridian to provide updated information to NDDH if Meridian deviated from the permitted construction and operation. Air Pollution Control Permit to Construct, at pp. 43-44, Doc. ID 35. In response, DRC and ELPC learned that "[t]he Division of Air Quality has not received any communication nor applications from Meridian since the permit to construct (No. PTC17020) was issued." Open Records Request and Response, APP 091. Further, the Health Department's permit to construct the Davis Refinery as a 55,000 bpd facility remained in effect.

[¶ 14] On October 10, 2018, the PSC adopted the ALJ's proposed order dismissing the complaint. Order on Recommended Decision Granting Motion to Dismiss Complainant/Petitioners' Complaint, APP 103. At the PSC meeting, Commissioner Fedorchak called the decision a "close call" and a "tough call." Partial Transcript of Commission Meeting, Oct. 10, 2018, Doc. ID 119 at p. 5 line 5. Commissioner Christmann said "there's no evidence that the developers' current plan exceeds the legal threshold," not addressing the evidence plaintiffs had included. *Id.* at p. 9 lines 10-14.

[¶ 15] Then, the PSC adopted findings of fact in its final order:

1. "The Davis Refinery currently being constructed in Billings County is a 49,500 bpd facility."

2. "Previous representations as to the company's plans in other permit application materials are not relevant to the final permitting requirements so long as the facility constructed stays below 50,000 bpd."

APP 103. Those findings were based solely on the one sentence in Mr. Prentice's affidavit.

[¶ 16] DRC and ELPC then appealed the PSC's decision to the District Court for the County of Burleigh. On May 14, 2019, the court affirmed, based on "Meridian's assurances that the capacity for the Davis Refinery would not exceed 50,000 bpd." District Order Dismissing Appeal, APP 123 at ¶ 9. The court determined that Meridian's "current stated intention is to only construct a refinery capable of 49,500 bpd," and that this "leav[es] the PSC without jurisdiction." *Id.* at ¶ 10. The court concluded that "no amount of discovery could have affected the PSC's decision." APP 124 at ¶ 13.

[¶ 17] On July 15, 2019, DRC and ELPC filed a Notice of Appeal to this Court. APP 131.

V. STANDARD OF REVIEW

[¶ 18] This appeal presents only questions of law, and this Court "reviews questions of law de novo." *E.g. Schlosser v. N.D. Dep't of Transp.,* 2009 ND 173, para. 7, 775 N.W.2d 695, 698; *Olson v. N.D. Dep't of Transp. Dir.,* 523 N.W.2d 258, 259 (N.D. 1994) (agency decisions on questions of law are "fully reviewable."). It is reversible error for an administrative agency to not provide a "fair hearing" under the AAPA. N.D.C.C. § 28-32-46(4).

[¶ 19] When an administrative agency's decision is appealed to the District Court and then to the Supreme Court, this Court reviews the decision of the agency and reverses if a fair hearing was not provided or if other requirements of the AAPA were not complied with. *Barnett v. N.D. Dep't of Human Servs.*, 551 N.W.2d 557, 559 (N.D. 1996).

VI. ARGUMENT

[¶ 20] DRC and ELPC filed a Complaint with the PSC that included NDDH's just-issued permit to construct Meridian's refinery as a "55,000 bpd" refinery,[3] applications to government agencies for approval to construct and operate a 55,000 bpd refinery, as well as numerous public statements by Meridian demonstrating that Meridian plans to build a 55,000 bpd refinery. APP 003. The PSC determined that the Complaint stated a "prima facie case." PSC Motion Finding Prima Face Case, APP 059. Meridian then filed a motion to dismiss, claiming based on a 1-page affidavit from its own CEO that it was now only building a 49,500 bpd refinery, and that this stripped the PSC of subject matter jurisdiction. Meridian Motion to Dismiss, APP 060. The PSC took Meridian's new allegation as fact and dismissed the Complaint without allowing discovery or a hearing. This was clear legal error and violates core principles of fairness and due process.

[3] This permit is still in effect at the time of filing this brief, and can be found online in NDDH's database of issued air quality construction permits at https://deq.nd.gov/FOIA/AQPermits/AQPermitConstruction.aspx. The Court may take judicial notice of this fact. N.D.R.Ev. 201.

A. The PSC's Decision to Grant a Motion to Dismiss a Complaint Before Discovery Based Only on a *Defendant's* Factual Allegation Was Clear Legal Error.

[¶ 21] The PSC failed to follow basic procedural requirements when considering Meridian's motion to dismiss. First, the PSC failed to view the facts in the light most favorable to DRC and ELPC, and instead accepted as fact the *defendant's* allegations. Second, the PSC dismissed the complaint for lack of subject matter jurisdiction without allowing discovery even on the limited question of jurisdiction.

1. The PSC's Decision Violates the Basic Rules Governing Motions to Dismiss and Motions for Summary Judgment: that a Complaint's Allegations and Evidence Submitted by the Non-Moving Party Must Be Accepted as True.

[¶ 22] The rules that apply to motions to dismiss are well-established.[4] In determining whether to dismiss a complaint at the pleading stage, a court, or any agency acting in a quasi-judicial capacity, must take the well-pleaded factual allegations in the complaint as true. *Limberg v. Sanford Medical Ctr.*, 2016 ND 140, 881 N.W.2d 658, 660 (2016) ("we construe the complaint in the light most favorable to plaintiff, taking as true the well-pleaded allegations in the complaint."); *Northstar Founders LLC v. Hayden Capital USA, LLC*, 855 N.W.2d 614, 624-25 (N.D. 2014); *Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n*, 632 N.W.2d 407 (N.D. 2001). Indeed, the ALJ's Order adopted by the PSC acknowledged that the PSC was obligated to "tak[e] the facts in the light most favorable to Petitioners." Order at 9, APP 086. If the allegations in

[4] Neither the AAPA nor the Public Service Commission's rules expressly contemplate motions to dismiss at all. Once a complaint is filed and the agency determines that the pleading is sufficient to state a claim, then the agency serves the complaint, and the next step is a notice of hearing, with the hearing required to afford the parties "opportunity to present evidence and to examine and cross-examine witnesses." N.D.C.C. § 28-32-21 (1) & (2); PSC rules § 69-02-02-02.5. That of course did not happen in this case.

the complaint are assumed to be true, and they state facts sufficient to establish jurisdiction and a claim for relief, a motion to dismiss must be denied.

[¶ 23] The Complaint in this case was based on North Dakota's Energy Conversion and Transmission Facility Siting Act, N.D.C.C § 49-22.1 ("Siting Act"). The Siting Act requires petroleum refineries "designed for or capable of" refining 50,000 or more barrels per day to seek and obtain a siting permit prior to construction. The objectives of the Siting Act are to ensure that a new facility will have minimum impacts on the environment, will not encroach on property rights, and will be in the best interests of the public. *Id.* The Siting Act requires the PSC to analyze everything from environmental impacts to whether adequate housing and schools exist for workers at the facility. *Id.*; *see also* N.D.A.C. ch. 69-06-08. One of the elements of a complaint under the Siting Act therefore is to establish that a proposed facility will be "designed to or capable of" refining 50,000 bpd. N.D.D.C. § 49-22.1-01(6). Defendants characterize this as a jurisdictional issue, but it is in fact the ultimate merits issue raised by DRC and ELPC's Complaint. DRC and ELPC did not seek denial of a siting certificate, only the initiation of the siting review process required by the statute. Complaint, APP 003.

[¶ 24] The Complaint detailed Meridian's multiple statements that it planned to build a 55,000 bpd refinery, including its representations to that effect to public agencies and to potential investors, and attached several documents incorporating those statements. Complaint, APP 003-058. The PSC itself reviewed the Complaint when it was filed, found that the Complaint "states a prima facie case," and, on that basis, served it on defendant Meridian. APP 059. But then, instead of taking the Complaint's allegations as true for purposes of the motion to dismiss, as the law required, the PSC flipped the

standard on its head and took as true *the defendant's* self-serving statement that it now only planned a 49,500 bpd refinery. APP 114. That was clear legal error, and it must be reversed.

[¶ 25] Defendants may contend that, because both sides submitted evidence outside the formal pleadings, the proper standard would be the Rule 56 summary judgment standard. There is precedent from this Court for doing that. *See e.g. Allied Mut. Ins. Co. v. N.D. Dep't of Tranp. Dir.*, 1999 ND 2, 589 N.W.2d 201, 203 n. 1 ("[i]f the jurisdictional issue is intertwined with the merits of the case, a Rule 12(b)(1) motion should be addressed utilizing Rule 56 standards"); *Kautzman v. McDonald*, 2001 ND 20, ¶ 12, 621 N.W.2d 871, 875 (same). But, in this case, proper application of the summary judgment standard would compel the same result. As with a Rule 12 motion to dismiss, in deciding a Rule 56 motion for summary judgment, "evidence must be viewed in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence." *Id.* at ¶ 16. Certainly the evidence DRC and ELPC provided would support a reasonable inference that Meridian planned a refinery with a capacity greater than 50,000 bpd, more than enough to defeat a summary judgment motion.

[¶ 26] Characterizing an issue as "jurisdictional" does not change the standard.[6] In this case, the jurisdictional issue—will the proposed refinery have a capacity at or

[6] Indeed, subject matter jurisdiction "refer[s] to the agency's power to hear and determine the causes of a general class of cases to which a particular case belongs." 2 Am. Jur. 2d

exceeding 50,000 bpd?—is also the ultimate issue on the merits. Whether it be called a jurisdiction issue or a merits issue, however, the black-letter law is the same. If a plaintiff presents a prima facie case on the merits of a claim, that is enough to defeat a motion for failure to state a claim upon which relief may be granted. If a plaintiff presents a prima facie case for jurisdiction, that is enough to defeat a motion to dismiss for lack of jurisdiction. *Northstar Founders*, 2014 ND 200 at ¶ 22, 855 N.W.2d 614, 625 ("To defeat a motion to dismiss for lack of personal jurisdiction, the plaintiff must make a prima facie showing of jurisdiction."); *Rodenburg*, 2001 ND 139 at ¶ 17 (same); *see also Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 707 n. 3 (8th Cir. 2003) (reversing dismissal where plaintiffs made prima facie case for general personal jurisdiction); *Dakota Indus., Inc. v. Dakota Sportswear, Inc*. 946 F.2d 1384, 1387 (8th Cir. 1991) (reversing dismissal where plaintiffs made prima facie case of personal jurisdiction). The PSC, of course, initially determined that the Complaint "states a prima facie case," APP 059, which means that, if the allegations in the Complaint were true, the PSC would have jurisdiction and DRC and ELPC would be entitled to relief. A finding that a complaint states a prima facie case necessarily includes a finding that, if the allegations are true, the agency has subject-

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Administrative Law § 272. The "general jurisdiction" of the PSC extends to "[a]ll . . . public utilities engaged in business in this state." N.D.C.C. § 49-02-01. The PSC also has authority to accept, heard, and rule on complaints, N.D.C.C. § 49-05-01 et seq., and to "[i]nvestigate all methods and practices of public utilities or other persons, subject to the provisions of this title." N.D.C.C. § 49-02-02. Under the refinery siting law, "utility" includes "any person engaged in and controlling the generation, manufacture, refinement, or transmission of gas, liquid hydrocarbons, or liquid hydrocarbon products, including . . . petroleum refinement." N.D.C.C. § 49-22.1-01. The PSC's jurisdiction is therefore not limited to refineries at or above a specific capacity.

matter jurisdiction. The PSC's final order amounts to an unacknowledged and unjustified reversal of its earlier ruling.[7]

[¶ 27] Contrary to PSC Commissioner Fedorchak's statement at the PSC's meeting, this is not a "tough call" or a "close call." Partial Transcript of Commission Meeting, Oct. 10, 2018, Doc. ID 119 at p. 5 line 5. This is a simple case where this Court must correct a clear legal error in the tribunal below. Granting a motion to dismiss a complaint that states a prima facie case and includes extensive attached evidence, based only on a single factual assertion from the defendant, is a clear legal mistake this Court can fix. Not only does this precedent deny DRC and ELPC their opportunity to be heard, but it gives regulated parties at the PSC too easy an escape from legitimate PSC inquiries and investigations.

[¶ 28] DRC and ELPC are not asking for this Court to rule on whether Meridian's preferred site for its refinery satisfies the requirements of the Siting Act. DRC and ELPC are not even asking this Court to rule that the PSC must complete a siting review of Meridian's proposed project. DRC and ELPC are only asking this Court to vacate the dismissal order, and to direct the PSC to permit discovery and to conduct an evidentiary hearing on whether Meridian's proposed refinery will be capable of refining more than 50,000 bpd. The only request here is to correct the legal error, not to wade into

[7] Administrative agencies can change their minds and reverse earlier positions, but fundamental fairness and basic administrative law principles require that they acknowledge their previous position, state that they are consciously changing it, and then articulate a reasonable rationale for doing so. *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009), *McGree Corp. v. Montana Public Service Comm'n*, 395 Mont. 229,244, 438 P.2d 326, 344 (Mont. 2019).

the facts or in any way prejudge the outcome. DRC and ELPC only ask that they get a chance to develop and present their case.

2. The PSC's Decision Not to Allow DRC and ELPC Any Discovery Before Dismissing Their Complaint Was Also Legal Error.

[¶ 29] The evidence appellants submitted with their complaint was sufficient to overcome either a motion to dismiss or a motion for summary judgment. That evidence was also more than enough to justify allowing DRC and ELPC discovery. The evidence that defines Meridian's analysis and intentions is in its possession, and DRC and ELPC should be allowed to obtain the documents that are relevant or likely to lead to the discovery of relevant evidence, and, if necessary, to question Meridian's witnesses in depositions.

[¶ 30] DRC and ELPC's Complaint was filed pursuant to N.D.C.C. § 28-32-21(1)(a) and initiated a formal adjudicatory proceeding. Developing a factual record through discovery and an evidentiary hearing are the hallmarks of the formal hearing process. The PSC was required to hold a hearing, at which "the parties shall be afforded opportunity to present evidence and cross-examine witnesses." N.D.C.C. § 28-32-21(2); see also *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 2005 ND 104, ¶ 14, 697 N.W.2d 319 ("procedures for an adjudicative proceeding, includ[e] the right to present evidence and cross-examine witnesses"). The PSC was at least required to hold a hearing on the jurisdictional question at issue.

[¶ 31] The AAPA also states "[i]n an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure." N.D.C.C. § 28-32-33(1). Thus, discovery rules under the AAPA's formal hearing process are nearly identical to those in state court and are an important part of the formal hearing process.

Aalund v. N.D. Workers Comp. Bureau, 2001 ND 32, ¶ 7, 622 N.W.2d 210 ("Section 28–32–09(1), N.D.C.C., contemplates discovery for administrative hearings in accordance with the North Dakota Rules of Civil Procedure").

[¶ 32] A "fair hearing" requires a fair and reasonable opportunity for a party to present its case, including access to the necessary information to put on that case. *See, e.g., Estate of Robertson by Robertson v. Cass Cty. Soc. Servs.*, 492 N.W.2d 599, 603 (N.D. 1992) (reversing and remanding agency decision when individual was not given a "meaningful opportunity to present evidence" on the relevant issues). DRC and ELPC were not just denied a "fair hearing"—they were denied any hearing, and were denied any opportunity to conduct discovery. N.D.C.C. § 28-32-46(4).

[¶ 33] A similar situation was presented in *Shark v. Northern States Power Co.*, 477 N.W.2d 251 (N.D. 1991). Shark, an intervenor in a PSC proceeding on a utility's cost recovery, appealed from the decision, arguing denial of a fair hearing in part due to the lack of an opportunity to carry out discovery:

> Shark contends that he was denied due process and a fair hearing because the time period between the notice of hearing and the hearing was not reasonable in view of the nature, scope, and importance of the hearing. He asserts that that time period did not give him sufficient advance notice of the issues to permit reasonable time for discovery and preparation of his case. He argues that the PSC abused its discretion in denying his request for a continuance.

Id. at 254. This Court agreed that Shark was denied a meaningful opportunity to participate in the hearing process and remanded the case. *Id.* at 255. Like in *Shark*, Appellants in the current case were similarly denied "an opportunity to fairly prepare [their] case" because they were not given an opportunity to conduct discovery and to present evidence at a hearing before the PSC made factual determinations. *Id.* Indeed, it

is patently unfair for the PSC to enter findings of fact, and corresponding conclusions of law that rely on those findings, without an opportunity for exploration of relevant facts.

[¶ 34] The PSC's decision to dismiss the Complaint without allowing any discovery was a legal error and a clear abuse of discretion. The Eighth Circuit has repeatedly reversed lower courts that have summarily disposed of cases without allowing discovery. In *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704 (8th Cir. 2003), for example, the district court dismissed a case for lack of personal jurisdiction after denying the plaintiffs' motion for discovery. The Eighth Circuit reversed, finding the denial of the discovery motion to be an abuse of discretion and that the plaintiff was entitled to discover facts that could support sufficient contacts with the forum state to establish personal jurisdiction.[8] Similarly, in *Pudlowski v. The St. Louis Rams, LLC*, 829 F.3d 963 (8th Cir. 2016), the defendants had removed a case to federal court on diversity grounds, but the district court remanded it to state court without allowing the defendants to conduct jurisdictional discovery. Again, the Eighth Circuit reversed, noting that discovery on jurisdictional issues "is often necessary." *Id.* at 964. *See also Radaszewski by Radaszewski v. Contrux, Inc.*, 891 F.2d 672, 675 (8th Cir. 1989) (reversing dismissal for lack of personal jurisdiction and remanding for jurisdictional discovery); *HomeRun Prod., LLC v. Twin Towers Trading, Inc.*, 2017 WL 4293145 (D.N.D. Sept. 27, 2017)

[8] Similarly, if a complaint filed in North Dakota state court alleged that a defendant did business in North Dakota, and attached, say, an advertisement placed in a North Dakota publication, the defendant could not just deny that it did business in North Dakota and expect an immediate dismissal. The plaintiff would get an opportunity to conduct discovery into the question and present its case if there was a genuine factual dispute. *See generally Rodenburg v. Fargo-Moorhead YMCA*, 2001 ND 139, ¶ 17, 632 N.W.2d 407, 414 (ND. 2001), *Dakota Indus., Inc. v. Dakota Sportswear, Inc.,* 946 F.2d 1384, 1387 (8th Cir. 1991).

(denying motion to dismiss or to transfer venue and granting leave to conduct jurisdictional discovery).

[¶ 35] Consequently, this Court should not only vacate the PSC's dismissal order, but it should clarify that, on remand, the PSC should allow appellants a reasonable opportunity for discovery on the question of whether the proposed refinery will be capable of 50,000 bpd or not, with an evidentiary hearing to follow. Only then can the PSC process meet the AAPA's standard of a "fair hearing." *See Barnett v. N.D. Dep't of Human Servs.*, 551 N.W.2d 557, 559 (N.D. 1996).

B. The PSC's Decision to Dismiss DRC and ELPC's Complaint without Allowing Discovery or Conducting an Evidentiary Hearing Is Not Only Legal Error, But Violates Core Principles of Fairness and Due Process.

[¶ 36] The PSC's decision was legally erroneous for all the reasons stated above. But more than that, the decision flies in the face of this Court's insistence that litigants not be permitted to change their stories from one proceeding to another to suit their purposes, and this Court's commitment to due process principles. The decision conflicts with two core principles of fundamental fairness. The first is this Court's strong determination not to reward litigants for taking inconsistent or contradictory positions in different proceedings. While this Court does not appear to have formally adopted the doctrine of judicial estoppel, it has spoken favorably of its underlying rationale:

> The fundamental concept of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting sworn statements made therein. Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position [that is] inconsistent, conflicts with, or is contrary to one that she has previously asserted in the same or in a previous proceeding. It is designed to prevent litigants and their counsel from playing fast and loose with the courts, and to protect the integrity of the judicial process. Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of

> the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.

Ingebretson v. Ingebritson, 2005 ND 41, ¶ 17, 693 N.W.2d 1, 6-7 (citing *State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999), quoting 28 Am.Jur.2d Estoppel and Waiver § 74).

[¶ 37] That rationale fully applies here. When Meridian's objective has been to attract investors or to secure permits for a larger proposed facility, Meridian says its facility will be capable of 55,000 bpd and may expand further. But when Meridian's objective is to avoid what may be a contentious siting review process at the PSC, Meridian says it has no plans to expand beyond 49,500 bpd. By allowing Meridian to change its story from forum to forum, whenever it suits Meridian's interests, the PSC dismissal only encourages litigants to do exactly what this Court condemned in *Ingebretson* and other cases.

[¶ 38] DRC and ELPC are not asking the Court to adopt and then apply the judicial estoppel doctrine to these facts. But if Meridian is allowed to make its case to the PSC, the rationale behind judicial estoppel should, at minimum, mean that appellants should be allowed to make their case too.

[¶ 39] The PSC's interpretation of the law also conflicts with basic notions of procedural due process. The rule in North Dakota is, as it is in all U.S. jurisdictions, to "construe statutes to avoid constitutional infirmities." *See e.g., Seiler v. State Dep't of Human Svcs.*, 2010 ND 55, ¶ 7, 780 N.W.2d 653, 656. To the extent the PSC is interpreting the Siting Act to create an irrebuttable presumption that a defendant's

statements have to be accepted as true, that interpretation denies anyone who has a property interest[9] in the siting of an energy facility their due process rights.

[¶ 40] If the language of the Siting Act or the AAPA (or of any statute or rule, for that matter) truly required that a defendant's statements be accepted as indisputable fact in adjudicative proceedings, then those statutes would be constitutionally infirm. Fortunately, neither the Siting Act nor the AAPA say any such thing. Their plain language, plus the canon that statutes must be construed to avoid constitutional infirmities, compel the conclusion that these statutes guarantee plaintiffs who state a prima facie case in a complaint a hearing and an opportunity to present their case. The PSC's interpretation clearly contradicts those fundamental standards.

VII. CONCLUSION AND RELIEF SOUGHT

[¶ 41] For the reasons stated above, DRC and ELPC request that this Court vacate the order of the Public Service Commission dismissing DRC and ELPC's Complaint, and remand this case to the PSC with direction to afford DRC and ELPC an opportunity for discovery and an evidentiary hearing on the claims in their Complaint.

[9] Appellant's Complaint stated, "Both DRC and ELPC have members that live, work, and recreate near the proposed refinery site, and would be denied the benefit of PSC's review. . . ." APP 006.

DATED this 26th day of August, 2019.

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CERTIFICATE OF COMPLIANCE WITH PAGE LIMITATION

I hereby certify that this principal brief is 24 pages in length and that this brief therefore complies with the page limitations for a principal brief set forth in N.D.R.App. 32(a)(8)(A).

/s/ Derrick Braaten
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Environmental Law and Policy Center, and Dakota Resource Council	)	
Appellants,	)	Supreme Court No. 20190220
vs.	)	Burleigh County District Court Case No.: 08-2018-CV-02937
North Dakota Public Service Commission, and Meridian Energy Group, Inc.,	)	**CERTIFICATE OF SERVICE**
Appellees.	)	

I hereby certify that on August 26th, 2019, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. APPELLANTS' PRINCIPAL BRIEF; and

2. APPELLANTS' APPENDIX

and served the same electronically upon the following:

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IN THE SUPREME COURT
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Appellees.	)	

I hereby certify that on August 29th, 2019, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. APPELLANTS' PRINCIPAL BRIEF [corrected]; and

2. APPELLANTS' APPENDIX [corrected]

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