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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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| Environmental Law & Policy Center, and Dakota Resource Council,<br><br>Appellants,<br><br>v.<br><br>North Dakota Public Service Commission and Meridian Energy Group, Inc.<br><br>Appellees. | ) | **Supreme Court No. 20190220**<br><br>**Burleigh County District Court Civil Case No. 08-2018-CV-02937** |

**APPEAL FROM JUDGMENT DATED MAY 15, 2019**
**BURLEIGH COUNTY, SOUTH CENTRAL JUDICIAL DISTRICT**
**HONORABLE BRUCE A. ROMANICK, PRESIDING**

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# BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION

**(ORAL ARGUMENT REQUESTED IF APPELLANTS' REQUEST GRANTED)**

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## STATEMENT ON ORAL ARGUMENT

[¶1] The Public Service Commission (PSC) does not believe oral argument is necessary because the issues are straightforward and adequately briefed. If this Court grants another party's request for oral argument, PSC respectfully requests the opportunity to argue.

## STATEMENT OF ISSUES

[¶2] The overarching issue in this case is whether PSC had subject matter jurisdiction over Meridian Energy Group, Inc. (Meridian) such that PSC had authority under the Administrative Agencies Practice Act (AAPA) (N.D.C.C. ch. 28-32) to order Environmental Appellants' ultimate requested relief of an AAPA hearing and discovery.

[¶3] The foundational issue is whether a hearing is required to determine a 12(b)(1) motion in the limited circumstance when subject matter jurisdiction is based on, rather than already established facts, future events under Meridian's sole control, or whether such a 12(b)(1) hearing would be futile.

## STATEMENT OF CASE

[¶4] PSC accepts the Environmental Law and Policy Center and Dakota Resource Council's (collectively, Environmental Appellants) case statement.

## STATEMENT OF FACTS

[¶5] PSC accepts the Environmental Appellants' recitation of facts to the extent they are cited in the record (rather than opinions).

## STANDARD OF REVIEW

[¶6] PSC disputes Environmental Appellants' contention that the standard of review is de novo. As to the overall question of subject matter jurisdiction – a question of law – this Court reviews de novo when the jurisdictional facts are undisputed. *Thompson v. Peterson*, 546 N.W.2d 856, 860 (N.D. 1996) (citing *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990)) (emphasis

added) (additional citations omitted). "When the [agency's] decision to dismiss for lack of subject matter jurisdiction is based on the complaint alone, or on the complaint supplemented by undisputed facts evidenced in the record," this Court's review is "'limited to determining whether the [agency's] application of the law is correct and, if the decision is based on undisputed facts, whether those facts are indeed undisputed.'" *Osborn*, 918 F.2d at 730 (citations omitted). "If the [agency] relied, however, on its own determination of disputed factual issues," as conceded by Environmental Appellants in the case here, "the appellate court must then review those findings under the 'clearly erroneous' standard." *Id.*; *see also, Thompson*, 546 N.W.2d at 860 ("Although not binding, federal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing our rule.").

[¶7] Therefore, this Court reviews PSC's factual determination that Meridian's refinery will have a 49,500 bpd capacity under the clearly erroneous standard.

## ARGUMENT

[¶8] The parties agree on nearly every aspect of this case – except procedure and jurisdiction. There is no dispute that Meridian previously applied for permits from Billings County and the North Dakota Department of Health (NDDH) with the intention of building a 55,000 bpd refinery. APP 021-048 (Billings Co. permit); APP 049-052 (NDDH permit). There is no dispute that PSC requires a site compatibility certificate at a 50,000 bpd threshold. N.D.C.C. §§ 49-22.1-01(6)(b), 49-22.1-04. There is no dispute that PSC based its dismissal in large part on Meridian's later affidavit stating the refinery will have a 49,500 bpd capacity. APP 073-075 (Prentice Affidavit); APP 078-088 (Recommended Decision); APP 104 (PSC's Final Order).

[¶9] The parties diverge regarding the case's procedural posture. The Environmental Appellants miss the mark by asserting the issue is whether PSC violated the AAPA's fair

hearing and other requirements. Before the case can fall within the AAPA purview, PSC must first have subject matter jurisdiction. Thus, this case must be analyzed under the context of a 12(b)(1) motion rather than as an AAPA case.

**[¶10]** As to jurisdiction, the parties disagree on the sole jurisdictional fact of whether Meridian's future intent is to build a refinery with a capacity greater or less than the 50,000 bpd jurisdictional threshold. The parties don't disagree on the actual facts that have already occurred; they disagree on future intent. Short of consulting a crystal ball, nobody can determine Meridian's future intent except Meridian. And because jurisdiction in this case hinges on that future intent, a hearing and discovery would be futile. Though PSC can take after-the-fact enforcement action for statutory violations, it cannot force its jurisdiction on a party based on a crystal ball's foretelling of potential future events that may never occur.

## I. Subject Matter Jurisdiction

[¶11] The overarching issue in this case is whether PSC has subject matter jurisdiction over Meridian such that PSC has authority under the AAPA to order Environmental Appellants' ultimate requested relief of an AAPA hearing and discovery. It does not.

[¶12] Subject matter jurisdiction is a court's legal authority to hear and decide the case's subject matter. *Cont'l Res., Inc. v. Counce Energy BC #1, LLC*, 2018 ND 10, ¶ 6, 905 N.W.2d 768 (citations omitted). An administrative agency must also have subject matter jurisdiction. *See* N.D.C.C. § 28-32-21(a) (administrative complaints must be filed "with the agency having subject matter jurisdiction of the proceeding"). Subject matter jurisdiction cannot be waived, and actions taken without subject matter jurisdiction are void. *Cont'l Res., Inc.*, 2018 ND 10, ¶¶ 6, 11, 905 N.W.2d 768.

[¶13] This case is solely about subject matter jurisdiction, which Meridian challenged with a 12(b)(1) motion.

## II. 12(b)(1) Motions – Factual Subject Matter Jurisdiction Challenges

[¶14] Rule 12(b)(1) governs motions attacking the court's subject matter jurisdiction. N.D.R.Civ. P. 12(b)(1). There are two types of subject matter jurisdiction challenges: facial and factual. *Precision Press, Inc. v. MLP U.S.A., Inc.*, 620 F. Supp. 2d 981, 986 (N.D. Iowa 2009) (citing *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993)).

[¶15] In this case, there has not been a facial jurisdictional challenge, but rather a factual jurisdictional challenge – that is, does Meridian have a future intent to exceed the 50,000 bpd threshold such that PSC would have subject matter jurisdiction. "If the [defendant] wants to make a *factual* attack on the jurisdictional allegations of the complaint, the court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute." *Titus,* 4 F.3d at 593 (emphasis in original). Further, when the "very power to hear the case" is at issue, "there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of [that] power." *Osborn*, 918 F.2d at 730 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). "In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Id.*

[¶16] In this case, PSC (through the Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ)) took into account "competent evidence" of an affidavit from Meridian's CEO (William Prentice) stating it does not plan to exceed the jurisdictional threshold. APP 073-075 (Prentice Affidavit); APP 086-087 (Recommended Decision). Also, contrary to Environmental Appellants' claim, PSC's findings were not "based solely on the one sentence in Mr. Prentice's affidavit." Environmental Appellants' Principal Brief, ¶ 15.

[¶17] PSC had additional reason to accept the ALJ's finding that there was no subject matter jurisdiction based on its own correspondence and meetings with Meridian. Prior to the Environmental Appellants' Complaint, PSC had an information exchange meeting with Meridian to discuss Meridian's plans. *See generally*, District Court Docket #117. The meeting specifically addressed the jurisdictional issue, with Commissioner Kroshus noting Meridian's plans and press releases had scaled back the capacity, "and now it's at 49,500 barrels, just under the threshold, which would mean it's not jurisdictional to the [PSC]." *Id.*, p. 7: 9-17. Later in the meeting, Commissioner Fedorchak "implore[d]" Meridian to "just go through the siting process" even though Meridian's current plans are "well within the law." *Id.*, p. 75: 21-25 through 76: 1-12. Mr. Prentice responded:

> that for the plant that we intend to build now, we believe we have complied with the applicable siting process. I understand that you would like to take a formal look at this project, and you may have an opportunity to, but, you know, in the private sector we very seldom look for excuses to have another regulatory layer on what we're trying to do. That's not something we contemplated just because it would be of interest to you to look at it.

*Id.*, p. 76: 14-22. When pushed further, Prentice stated "[w]e are going to comply with the law." *Id.*, p. 76: 25 through 77: 1.

[¶18] And ultimately, despite Environmental Appellants' continued claims that PSC did not accept Environmental Appellants' factual assertions as true (Environmental Appellants' Principal Brief, ¶¶ 12, 21, 22, 24), PSC's order adopted the ALJ's specific language to the contrary: "Taking the facts in the light most favorable to Petitioners [Environmental Appellants] and considering both parties' affidavits, I accept the assertions that the plan being finalized for construction at 49,500 bpd is not within the jurisdictional authority of [PSC] at this time." APP 086-087 (Recommended Decision).

[¶19] Again, this case involves a factual challenge to subject matter jurisdiction, and the Environmental Appellants bear the burden of proof to establish PSC's jurisdiction. Especially

given the situation's magnitude and public scrutiny, along with PSC's ability to seek an injunction if there is a future violation, when the CEO unequivocally states the refinery will not exceed 49,500 bpd and they "are going to comply with the law," it is reasonable to conclude this is Meridian's true intent. Further, without a crystal ball, it would be nearly impossible for the Environmental Appellants to overcome their burden of proving it is untrue.

**III. 12(b)(1) Hearings**

[¶20] PSC concedes the standard set forth in *Osborn* goes on to state that "[i]f the defendant thinks the court lacks jurisdiction, the proper course is to request an evidentiary hearing on the issue." *Osborn*, 918 F.2d at 730 (citing *Crawford v. U.S.,* 796 F.2d 924, 928 (7th Cir. 1986)). Here, Meridian did not request a 12(b)(1) evidentiary hearing, but in fact, such a hearing request would play right into the Environmental Appellants' hands, as an AAPA hearing is the relief they request from this Court. Environmental Appellants' Principal Brief, ¶ 41. However, *Osborn* continues: "The motion may be supported with affidavits or other documents. If necessary, the district court can hold a hearing at which witnesses may testify." *Id.,* (citing *Crawford,* 796 F.2d at 928) (emphasis added).

[¶21] The fact that the court only needs to hold a hearing "if necessary" implies the court has the discretion whether to grant a 12(b)(1) hearing to determine its subject matter jurisdiction. Additionally, although the AAPA does not apply to this case because PSC lacks subject matter jurisdiction, OAH may dispose of an adjudicative proceeding informally and without a hearing. N.D.C.C. § 28-32-22 ("Unless otherwise prohibited by specific statute or rule, informal disposition may be made of any adjudicative proceeding").

[¶22] Further, in the limited circumstance when subject matter jurisdiction is based on future events under the defendant's sole control (such as in the permitting context), a hearing would

be futile. "The law does not require futile acts." *State v. Langer*, 46 N.D. 462, 177 N.W. 408, 413 (1919); *see also*, N.D.C.C. § 31-11-05(23) ("The law neither does nor requires idle acts.").

[¶23] The purpose of a 12(b)(1) hearing would be to determine whether under a given set of facts the court has subject matter jurisdiction. However, the facts that will determine whether a permit is necessary have not yet occurred. In this case, if Meridian says it does not have the intent to build a refinery with a capacity greater than 50,000 bpd, the only way to determine the crystal ball's prediction accuracy about Meridian's truthfulness is to wait for the refinery construction to occur. If Meridian violates the law by building a refinery with a capacity greater than 50,000 bpd, it is subject to civil and criminal penalties; more importantly, PSC could seek injunctive relief to stop additional plant construction or operation. N.D.C.C. § 49-22.1-20. But currently, there is no evidence that could be presented at or determined through an evidentiary hearing (under either 12(b)(1) or AAPA) that would render clairvoyance on the ALJ or this Court about Meridian's intent.

## IV. Environmental Appellants' Flawed Arguments

[¶24] Environmental Appellants make three main arguments, all of which are flawed.

### A. Factual allegations do not need to be taken as true and in a light most favorable to Environmental Appellants, and the summary judgement standard does not apply.

[¶25] First, Environmental Appellants spend a considerable portion of their brief arguing about the wrong burden and claiming clear legal error. Environmental Appellants' Principal Brief, ¶¶ 21-26. Again, this is a 12(b)(1) case, a factual subject matter jurisdiction challenge, so "no presumptive truthfulness" attaches to Environmental Appellants' allegations, and they have the burden of proving subject matter jurisdiction exists. *See Osborn*, 918 F.2d at 730. But Environmental Appellants claim their own factual allegations must be taken as true and in a light most favorable to them. To support this contention, Environmental Appellants cite to

a host of irrelevant cases. Though this is a 12(b)(1) case, *Limberg v. Sanford Medical Ctr. Fargo*, 2016 ND 140, 881 N.W.2d 658 (cited at Environmental Appellants' Principal Brief, ¶ 22) concerned a 12(b)(6) motion to dismiss for failure to state a claim. Similarly, *Northstar Founders LLC v. Hayden Capital USA, LLC*, 855 N.W.2d 614 (N.D. 2014) and *Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n*, 632 N.W.2d 407 (N.D. 2001) (cited at Environmental Appellants' Principal Brief, ¶¶ 22, 26) are both 12(b)(2) motion to dismiss for personal jurisdiction cases, as are *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704 (8th Cir. 2003) and *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991) (both cited at Environmental Appellants' Principal Brief, ¶ 26).

[¶26] In fact, the only cases Environmental Appellants cite that seem relevant upon first observation are *Allied Mut. Ins. Co. v. Dir. of N.D. Dep't of Transp.*, 1999 ND 2, 589 N.W.2d 201 and *Kautzman v. McDonald*, 2001 ND 20, 621 N.W.2d 871 (cited at Environmental Appellants' Principal Brief, ¶ 25.) These cases were cited in case PSC claimed the proper standard was the Rule 56 summary judgment standard. *Id.* However, upon deeper inspection, these cases are also inapposite. First, PSC does not claim the summary judgment standard is appropriate. Second, for the point Environmental Appellants are citing (that the summary judgment standard applies), *Kautzman* cites to *Allied Mutual*, which cites to *Thompson*, 546 N.W.2d at 860. The portion of Thompson being cited actually illustrates the different standards for 12(b)(i) and 12(b)(v)[1] motions:

> In describing our standard of review, the parties have relied upon cases involving dismissals for failure to state a claim upon which relief can be granted under NDRCivP 12(b)(v). However, the defendants' motion to dismiss cited both NDRCivP 12(b)(i) and (v), and the trial court explicitly declined to decide whether Thompson's complaint failed to state a claim under NDRCivP 12(b)(v). Instead, the court dismissed under NDRCivP 12(b)(i) for lack of jurisdiction.
> …

[1] N.D.R.Civ. P. 12(b)(i) is now 12(b)(1), and 12(b)(v) is now 12(b)(6).

> **In deciding jurisdiction under FRCivP 12(b)(1), a trial court may consider matters outside the pleadings without converting the proceedings to summary judgment.** *Osborn v. United States,* 918 F.2d 724 (8th Cir.1990); *Crawford v. United States,* 796 F.2d 924 (7th Cir.1986); 2A Moore's Federal Practice ¶ 12.07 [2.–1] (1995); 5A Wright and Miller, Federal Practice and Procedure § 1350 (1990). *Compare* NDRCivP 12(b) ("[i]f ... matters outside the pleading are presented to and not excluded by the court, [a 12(b)(v) ] motion must be treated as one for summary judgment and disposed of as provided in Rule 56").

*Thompson*, 546 N.W.2d at 860 (some citations omitted) (emphasis added).

### B. Because PSC did not have AAPA jurisdiction, it also did not have jurisdiction to order discovery.

[¶27] Environmental Appellants also spend a considerable portion of their brief arguing they should have been allowed to conduct discovery. Environmental Appellants' Principal Brief, ¶¶ 29-35. Again, however, because PSC does not have subject matter jurisdiction, this case does not fall within the AAPA's confines, and so PSC lacks the authority to order discovery. Further, most of the cases Environmental Appellants cite are AAPA cases that have nothing to do with jurisdiction. *See generally*, Environmental Appellants' Principal Brief, ¶¶ 30-33. The few jurisdictional cases discussed are all personal jurisdiction cases (and one diversity jurisdiction case) inapposite to this subject matter jurisdiction case. Finally, to reiterate, no amount of discovery will foretell Meridian's future actions.

### C. Judicial estoppel does not apply because there hasn't been another "same" or "previous proceeding."

[¶28] Environmental Appellants' final argument is that the rationale behind judicial estoppel applies because Meridian has been allowed to "change its story from forum to forum." Environmental Appellants' Principal Brief, ¶ 37. Judicial estoppel prevents litigants from asserting contrary positions "in the same or in a previous proceeding," thus, the only relevant "forum" is the legal forum. *Ingebretson v. Ingebretson*, 2005 ND 41, ¶ 17, 693 N.W.2d 1. It "is intended to protect the courts from being manipulated by chameleonic litigants who seek to

prevail, twice, on opposite theories." *Id.* Meridian does not seek to prevail twice on opposite theories, and its position in this litigation has not changed. Throughout this case, Meridian has always and continues to assert the refinery capacity will not exceed 49,500 bpd. Representations to the contrary to investors or other agencies are of little relevance in this proceeding, particularly when they are outdated statements.

## CONCLUSION

[¶29] This is a case where subject matter jurisdiction is dependent on future events under the sole control of a defendant (Meridian). In this case, Meridian's assertion that it will not exceed 50,000 bpd capacity must be accepted as true without a 12(b)(1) hearing or discovery because no hearing will be able to tell the future. A hearing or discovery under such circumstances would be futile. PSC retains enforcement mechanisms and would gain subject matter jurisdiction if the law is violated. But unless Meridian violates the law, PSC does not have subject matter jurisdiction.

[¶30] PSC asks this Court to uphold its decision to dismiss the case based on lack of subject matter jurisdiction.

Dated this 25th day of September, 2019.

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IN THE SUPREME COURT

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| Environmental Law and Policy Center, et al., )<br>)<br>Plaintiff and Appellant, )<br>)<br>v. )<br>)<br>North Dakota Department of )<br>Public Service Commission, et al., )<br>)<br>Defendant and Appellee. ) | **Supreme Court No. 20190220**<br><br>**CERTIFICATE OF COMPLIANCE**<br><br>**Burleigh County District Court**<br>**Civil Case No. 08-2018-CV-02937** |

[¶1] The undersigned certifies pursuant to N.D.R.App. P. § 32(a)(8)(A) that the Brief of Appellee Public Service Commission contains 14 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface, Garamond 12-point font, using Microsoft Office Word 2016 word processing software.

Dated this 25th day of September, 2019.

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[¶1] I hereby certify that on October 1, 2019, the **BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION and CERTIFICATE OF COMPLIANCE** were re-filed electronically with the Supreme Court and served on the following:

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