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STATE OF NORTH DAKOTA

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

REPLY BRIEF OF DAKOTA RESOURCE COUNCIL AND ENVIRONMENTAL LAW & POLICY CENTER

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

[¶ 1] The central issue in this appeal is straightforward. When deciding a motion to dismiss a complaint, is the Public Service Commission ("PSC") required to treat the allegations in the Complaint as true and take the facts in the light most favorable to plaintiffs? Or is the PSC free at the motion to dismiss stage to do the opposite—to credit only the *defendant's* allegations without allowing plaintiffs to conduct discovery or to present evidence?

[¶ 2] The PSC position in this case is that, even when it has already ruled that a complaint states a prima facie case, it can lawfully deny complainants discovery and the opportunity to present evidence, but still "weigh" the evidence and make findings of fact supported only by a self-serving affidavit from the Defendant. The arguments that Meridian Energy Group, LLC. ("Meridian") and the PSC offer to support that extraordinary proposition are uncompelling.

[¶ 3] First, the argument that, in this procedural posture, the allegations and evidence must be taken in the light most favorable to plaintiffs, was not waived. DRC and ELPC raised it directly in the administrative proceeding, again at the district court, and in their specification of error that they were not provided a fair hearing pursuant to the Administrative Agency Practice Act (AAPA), N.D.C.C. § 28-32-01 *et seq*. Second, contrary to the argument Meridian and the PSC try to make from federal case law on subject-matter jurisdiction disputes, federal courts facing threshold issues like this provide plaintiffs with an opportunity to discover and present evidence to support their claims. They do not just rule based upon the defendant's word, as the PSC did here. Third, if taken as true, ELPC and DRC's allegations are adequate to support the proposition that Meridian

cannot lawfully construct its proposed petroleum refinery without going through the PSC siting review required by N.D.C.C. § 49-22.1-04, whether or not that core allegation in the complaint is properly described as jurisdictional or not. Meridian's and the PSC's misrepresentations of the allegations in the Complaint must be rejected.

[¶ 4] DRC and ELPC are not asking this Court to decide the ultimate issues raised by their complaint. All DRC and ELPC ask is an opportunity to conduct limited discovery and present their evidence. The initial determination on the ultimate issue belongs to the PSC. The only question is the legal question of fair and proper process—was it appropriate for the PSC to dismiss DRC and ELPC's Complaint, taking defendant Meridian's allegations as true and not allowing for discovery or an evidentiary hearing? The answer is clearly no.

ARGUMENT

I. DRC and ELPC's Argument that the PSC Was Required to Take the Complaint's Allegations as True for Purposes of the Motion to Dismiss Was Raised Below and Is an Integral Part of DRC and ELPC's Specifications of Error.

[¶ 5] Meridian is wrong when it states that DRC and ELPC are raising, for the first time in this Court, their argument that the PSC was required to take their well-pleaded allegations as true for the purposes of deciding the motion to dismiss. To the contrary, DRC and ELPC raised this issue in front of the PSC, it is a key element of their specifications of error, and it was raised again before the district court.

[¶ 6] In response to Meridian's motion to dismiss the Complaint in the PSC proceeding, DRC and ELPC explained that "when a motion to dismiss for lack of jurisdiction is based on pleadings and affidavits, the tribunal must look at the facts in the light most favorable to the plaintiff," and then provided supporting case law and further

discussion. DOC. ID 56 at 9; see also App. 111 (ALJ Recommended Decision recounting this argument). DRC and ELPC also explained their theory of the case in their opening brief to the lower court: "the issue in this appeal is whether the PSC properly followed the AAPA's formal complaint procedures when it denied discovery, denied a hearing, and simultaneously made material findings of fact *contrary to DRC's and ELPC's allegations*." District Court Opening Brief, Doc. 139, at p. 7. DRC and ELPC cited to multiple cases showing that "to defeat a motion to dismiss for lack of jurisdiction, the plaintiff simply must make a *prima facie* showing of jurisdiction" and then again explicitly explained that "under N.D.R. Civ. P. 12, a district court considering a motion to dismiss must treat all the allegations in a complaint as true, and may not dismiss a case simply because the defendant has raised an issue of material fact about jurisdiction," even citing this Court's decision to that effect in *Linberg v. Sanford Medical Center*, 2016 ND 140, 881 N.W.2d 658 (2016). District Court Opening Brief, Doc. 139, at FN 10. There is no waiver here.

[¶ 7] Meridian's claim that this argument was not explicitly spelled out in detail in DRC and ELPC's specifications of error is also unavailing. DRC and ELPC explained in their specifications of error that the appeal was based on the lack of process and fairness surrounding the PSC's adoption of defendant Meridian's allegations into its own findings of fact. App. 138. The PSC's decision to assume that Meridian's allegations were true at the motion to dismiss stage is a key element of DRC and ELPC's specification of error that they were not afforded a fair hearing.

[¶ 8] DRC and ELPC's argument that the PSC was required to treat their allegations as fact in deciding the motion to dismiss was adequately raised below, the

parties were fully on notice, and it is a clear and inherent element in their specification of error.

II. The Federal Case Law on which Meridian and the PSC Rely Does Not Support their Position.

[¶ 9] Meridian and the PSC assert that, at the motion to dismiss stage, the PSC was free to make credibility determinations, take defendant Meridian's statements as fact, and reject and discredit the allegations made by DRC and ELPC in their complaint. As support for that proposition, they cite federal court opinions involving dismissals for lack of subject-matter jurisdiction where courts have "weighed the evidence." Critically, even federal court opinions discussing motions to dismiss for lack of subject matter jurisdiction[1] demonstrate that if a court weighs the evidence instead of taking the plaintiffs' allegations as true*, there must be an opportunity for the plaintiff to develop and present evidence*. Otherwise, of course, there can be no fair weighing of the evidence. The PSC even *admits* that under Eighth Circuit precedent, on a motion to dismiss based on a factual attack on subject matter jurisdiction, the proper course is for the defendant to request an evidentiary hearing. PSC Resp. Br. at ¶ 21 (citing *Osborn v. United States,* 918 F.2d 724 (8th Cir. 1990). The requirement of allowing a plaintiff an opportunity to develop and present evidence is emphasized in another Eighth Circuit case, *Pudlowski v. The St. Louis Rams,*

[1] It is not at all clear that the 50,000 barrels per day capacity requirement in N.D.C.C. § 49-22.1-01 and -04 is properly characterized as "jurisdictional." In *Arbaugh v. Y & H Corp.,* 546 U.S. 500 (2011), the U.S. Supreme Court determined that the requirement that an establishment have fifteen employees to be an "employer" under Title VII of the Civil Rights Act of 1964, was *not* jurisdictional, but was rather simply one of several elements of plaintiff's proof. The 50,000 barrels per day requirement is exactly analogous. If this dispute had gone all the way through the PSC's siting review process, and Meridian lost on the merits, it seems unlikely that an allegation that Meridian no longer planned to have a 50,000 bpd refinery would force the PSC to vacate its decision, as the lower courts thought they had to do in *Arbaugh.*

LLC, 829 F.3d 963 (8th Cir. 2016). In *Pudlowski*, 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. The Eighth Circuit reversed, noting that discovery on jurisdictional issues "is often necessary." *Id.* at 964. The Second Circuit case *Kamen v. American Telephone & Telephone Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986) elaborates on the required process for a challenge to subject matter jurisdiction: "in resolving claims that they lack jurisdiction, courts have acted in a fashion suggestive of 56(f): they have required that the party asserting jurisdiction be permitted discovery of facts demonstrating jurisdiction, at least where the facts are peculiarly within the knowledge of the opposing party." The court rejected the lower court's approach in denying jurisdiction:

> "In accord with principles of fundamental fairness and by analogy to Rule 56(e) and (f), it was improper for the district court, in ruling on the 12(b)(1) motion, to have considered the conclusory and hearsay statements contained in the affidavits submitted by defendants, and to deny plaintiff limited discovery on the jurisdictional question." *Id.*

[¶ 10] Furthermore, even the case cited by the PSC explains that a motion to dismiss for lack of subject matter jurisdiction cannot be granted "when the jurisdictional issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.'" *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (citing *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir.1986)). Here, the capacity of the refinery is the ultimate factual question on the merits.

[¶ 11] The PSC bizarrely claims that an evidentiary hearing would "play right into [DRC and ELPC's] hands" because they requested an evidentiary hearing. PSC Resp. Br. at ¶ 21. It is preposterous to suggest that *because DRC and ELPC requested the procedurally correct process* that following that process would "play right into [their] hands."

[¶ 12] Relatedly, the PSC's claim that a "crystal ball" would be required to produce evidence that would support DRC and ELPC's position is wrong. DRC and ELPC filed their Complaint just a few weeks after Meridian received an air permit from the North Dakota Department of Health to build a refinery with a capacity of 55,000 bpd. App. 047-050. The PSC admits in its brief that "[t]here is no dispute" that Meridian then had "the intention of building a 55,000 bpd refinery." PSC Resp. Br. at ¶ 9. The PSC, therefore, clearly understands that intent can be determined without resorting to a "crystal ball."

[¶ 13] If provided an opportunity to conduct discovery on remand, DRC and ELPC might find current engineering plans for the Meridian refinery that demonstrate that its refinery will be capable of refining at least 50,000 bpd, or communications suggesting the same. It is entirely appropriate, and indeed expected, that the PSC must make decisions based on evidence about what will happen in the future. When the PSC, for example, must decide whether a new facility is justified by projected future demand for energy, it does not throw up its hands, bemoan its lack of a "crystal ball," and refuse to decide. What it does in those cases is give the parties an opportunity for discovery and to present their evidence, and then makes the best assessment it can based on that evidence. That is what should happen here.

[¶ 14] Contrary to the PSC's assertion, the affidavit from Meridian's CEO did *not* "unequivocally state[] the refinery will not exceed 49,500 bpd." PSC Resp. Br. at ¶ 20. Rather, the affidavit explicitly *hedges* by saying that "Meridian has *no current plans* for any addition to or expansion of the Davis Refinery beyond the capacity of 49,500 bpd." App. 71 (emphasis added). It is not even clear from the affidavit what the CEO means by "capacity"—would the refinery be physically incapable of refining more than 49,500 bpd,

or would the company implement some limitation to restrict the capacity? The equivocal language of course leaves the door open for Meridian to expand. Despite Meridian's claim that it has "develop[ed]" and "finaliz[ed]" plans for a 49,500 bpd refinery, App. 71, no such plans were filed to support the affidavit. Meridian seemingly acknowledges that it is possible for a company to provide "an appropriate showing of a . . . design limitation," PSC Resp. Br. at ¶ 18, but has not provided any actual evidence that its refinery contains such a design limitation. Meridian and the PSC's claims that the PSC was permitted to dismiss the Complaint on the basis of Meridian's affidavit must be rejected.

III. If Taken as True, DRC and ELPC's Allegations that Meridian Is Currently Building a Refinery with a Capacity of at Least 50,000 bpd Are Sufficient to Support the PSC's Authority to Conduct a Siting Review.

[¶ 15] Certainly, DRC and ELPC's allegations, if accepted as true, are adequate to support the authority and responsibility of the PSC to conduct the siting review required by the statute. DRC and ELPC have consistently alleged that Meridian was planning to construct, and has now begun to construct, a refinery that will be capable of refining at least 50,000 bpd.

[¶ 16] Meridian erroneously claims that even if DRC and ELPC's allegations are taken as true, the PSC would not have subject matter jurisdiction over Meridian's refinery. Meridian seems to suggest that DRC and ELPC agree that Meridian is planning to build a refinery with a capacity of less than 50,000 bpd, and are concerned that someday, in subsequent years, Meridian may change its mind about the refinery and expand it beyond 50,000 bpd. To be clear, DRC and ELPC are asserting that Meridian *already has plans to build its refinery such that its capacity would be above 50,000 bpd*. DOC. ID 29 at ¶ 3 ("Meridian plans to construct an oil refinery with a capacity of more than 50,000 bpd").

[¶ 17] The PSC's understanding of DRC and ELPC's allegations is similarly confused. The PSC argues that "subject matter jurisdiction is based on future events under the defendant's sole control." PSC Resp. Br. at ¶ 23. However, the relevant law states that a company "*may not begin construction"* of a refinery with a capacity of 50,000 bpd or more "without first having obtained a certificate of site compatibility." N.D.C.C. § 49-22.1-04. Meridian has acknowledged that it has started ground-moving activities, Meridian Resp. Br. at ¶ 7, which constitute "construction" under the statute. DRC and ELPC are alleging that Meridian is *currently* in violation of state law. The PSC's "wait and see" approach is neither consistent with the law, nor with good policy.

[¶ 18] Of course, if this case is remanded to the PSC, Meridian will be free to assert that it really has changed its plans and now only intends to build a smaller refinery than it has told every other agency and potential investors. DRC and ELPC will get a chance to conduct discovery to see what the evidence shows about Meridian's actual plans, and argue that Meridian does in fact plan to build a larger refinery, and needs a siting review. The PSC will have to weigh that evidence and make its determination after the "fair hearing" required by the AAPA. N.D.C.C. § 28-32-01 *et seq.* What it cannot lawfully do is abdicate its responsibility when it receives a complaint that states a prima facie case, rely entirely on the defendant's say-so, and deny the plaintiffs any opportunity to gather evidence and present their evidence.

[¶ 19] North Dakota's siting review law provides important protections for private property owners, for local governments struggling to provide safe drinking water, fire and police protection, housing, and educational services, and for citizens in the vicinity trying to preserve what they have. N.D.A.C. § 69-06-08(5). The legislature has seen fit to require

the PSC to evaluate the appropriateness of facility siting in terms of the interests of the public. To allow a project proponent to avoid that review, just by telling the PSC a different story than it has told every other agency and potential investors,[2] frustrates the intent of the law and the credibility of the process.

CONCLUSION

[¶ 20] For the reasons stated above, Dakota Resource Council and Environmental Law & Policy Center respectfully request that this Court vacate the decisions below, and remand this case to the Public Service Commission with directions to allow plaintiffs discovery and an evidentiary hearing before deciding whether the Meridian's proposed refinery must proceed with review under North Dakota's siting law.

Dated this 9th day of October.

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[2] As explained in their opening brief, DRC and ELPC are not asking this Court to decide whether to adopt the judicial estoppel rules adopted in other jurisdictions. DRC and ELPC do ask that this Court acknowledge that the practice of telling different stories to different decision-makers (including private investors) needs to be strongly discouraged. The PSC's decision here only offers a road map for parties that want to have it both ways.

CERTIFICATE OF COMPLIANCE WITH PAGE LIMITATION

I hereby certify that this principal brief is 12 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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Environmental Law and Policy Center, and Dakota Resource Council Appellants, vs. North Dakota Public Service Commission, and Meridian Energy Group, Inc., Appellees.	Supreme Court No. 20190220 Burleigh County District Court Case No.: 08-2018-CV-02937 **CERTIFICATE OF SERVICE**

I hereby certify that on October 9th, 2019, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. REPLY BRIEF OF DAKOTA RESOURCE COUNCIL AND ENVIRONMENTAL LAW & POLICY CENTER

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