STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Otter Tail Corporation **Advance Determination of Prudence** **Application**	**Case No. PU-06-481**
Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. **Advance Determination of Prudence** **Application**	**Case No. PU-06-482**

ADVOCACY STAFF RESPONSE TO INTERVENORS' OPPOSITION TO MOTION *IN LIMINE*

On April 16, 2007, Intervenors Mark Trechock and Dakota Resource Council (collectively "Intervenors") filed a Memorandum of Law in Opposition to the Motion *In Limine* filed by Otter Tail Corporation ("Otter Tail") and Montana-Dakota Utilities Co. ("collectively "Applicants") to prohibit the Dakota Resource Council ("DRC") from presenting any evidence on environmental externality values at the hearing on this matter. Intervenors argue that:

1. The environmental externalities statute at N.D.C.C. §49-02-23 does not apply the Advance Determination of Prudence proceedings under N.D.C.C. §49-05-16;
2. Costs related to CO_2 regulation are no longer externalities, but a pollutant regulated by the EPA under the Clean Air Act, subsequent to a recent U.S. Supreme Court ruling; and
3. N.D.C.C. §49-02-23 must be stricken upon judicial review. Accordingly evidence relating to environmental externalities must be admitted to prevent a reversal for error of the PSC's eventual ruling in this prudence proceeding.

The Intervenors begin with a discussion of the legislative history of N.D.C.C. §§49-02-23 and 49-05-16 to support their position that N.D.C.C. §49-02-23 applies only

to proceedings that existed at the time of its enactment and does not apply to N.D.C.C. §49-05-16 which was enacted ten years later.

Under N.D.C.C. §1-02-39, legislative history can be considered in determining the intention of the legislature if a statute is ambiguous. N.D.C.C. §1-02-02 provides that the words used in any statute are to be understood in their ordinary sense. The language contained in N.D.C.C. §§49-02-23 and 49-05-16 is clear and unambiguous. N.D.C.C. §1-02-05 states that "[w]hen the wording of a statute is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." The North Dakota Supreme Court has determined that when statutory language is clear and unambiguous, it cannot be disregarded under the pretext of pursuing the legislative intent as intent is presumed clear from the face of the statute. *Adams County Record v. GNDA,* 529 N.W.2d 830 (N.D. 1995); *District One Republican Committee v. District One Democratic Committee,* 466 N.W.2d 820 (N.D. 1991); *County of Stutsman v. State Historical Society,* 371 N.W.2d 321 (N.D. 1985).

Advocacy Staff's Response to Intervenors' Arguments

Intervenors' first argument is that N.D.C.C. §49-02-23 does not apply to an advance determination of prudence proceeding under N.D.C.C. §49-05-16. Intervenors' position is based on the theory that because the environmental externalities statute, N.D.C.C. §49-02-23, was enacted in 1995 and the advance determination of prudence statute, N.D.C.C. §49-05-16, was enacted ten years later in 2005, the environmental externalities prohibitions in N.D.C.C. §49-02-23 should not apply to advance determination of prudence under N.D.C.C. §49-05-16. Intervenors argue that N.D.C.C.

§49-02-23 could not have encompassed an advance determination of prudence because that procedure did not exist when N.D.C.C. §49-02-23 was enacted.

Intervenors argue that N.D.C.C. §49-02-23 was intended to apply to the type of comprehensive ratemaking proceeding that existed when that statute was enacted, and that N.D.C.C. §49-05-16 was intended to create a separate proceeding independent of the ratemaking and rate determining authority of the Commission to determine prudence.

There is no basis in law for Intervenors' position. Statutes are intended to apply prospectively. The fact that N.D.C.C. §49-05-16 did not exist in 1995 does not preclude the application of N.D.C.C. §49-02-23 to advance determination of prudence under N.D.C.C. §49-05-16. Had the legislature intended that N.D.C.C. §49-02-23 not apply in the advance determination of prudence, it could have stated so in the language of N.D.C.C. §49-05-16.

Intervenor's second argument is that costs related to CO_2 regulation are no longer externalities but a pollutant, regulated by the Environmental Protection Agency (EPA) under the Clean Air Act, subsequent to the decision of the United States Supreme Court issued on April 2, 2007 in *Massachusetts v. Environmental Protection Agency,* No. 05-1120, slip op at 26-30 (2007). That case involved a rulemaking petition to the EPA asking the EPA to regulate greenhouse gas emissions from new motor vehicles under section 202 of the Clean Air Act. Following EPA's denial of the petition, the petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit which affirmed the EPA's decision. The Supreme Court reversed the

judgment of the Court of Appeals and remanded the case to the EPA for further proceedings consistent with the Court's opinion.

Whether CO_2 is treated as a pollutant or an externality at the federal level is not controlling on whether or not the North Dakota Public Service Commission should exclude evidence relating to environmental externality values in this proceeding. N.D.C.C. §49-02-23 defines environmental externality values as "numerical costs or quantified values that are assigned to represent *either*: 1. Environmental costs that are not internalized in the cost of production or the market price of electricity from a particular electric resource; or 2. *The alleged costs of complying with future environmental laws or regulations that have not yet been enacted.*" (Emphasis added)

The Applicant's motion is to exclude evidence related to a monetized CO_2 value based on the prohibition contained in N.D.C.C. §49-02-23(2). The *Massachusetts v. Environmental Protection Agency* case resulted in a remand to the EPA. Presumably the EPA will initiate a rulemaking which may or may not include CO_2 emissions from power plants, and may or may not establish values on CO_2 emissions. Any action that might be taken by the EPA in its rulemaking relating to CO_2 penalties is a future cost of complying with environmental regulations that have not yet been enacted. The Commission is prohibited from using evidence relating to estimates of such penalties or values under N.D.C.C. §49-02-23(2), and therefore Applicant's motion is appropriate.

Intervenors' third argument is that N.D.C.C. §49-02-23 must be stricken upon judicial review, and accordingly evidence relating to environmental externalities must be admitted to prevent a reversal for error of the Commission's eventual ruling in this prudence proceeding.

The Commission is not a court and therefore has no authority to declare a statute unconstitutional. The Commission is an administrative agency. Administrative agencies are required to comply with state statutes. Therefore, the Commission must comply with N.D.C.C. §49-02-23.

Dated: April 19, 2007.

Respectfully submitted,

William W. Binek
North Dakota Public Service Commission
600 E. Boulevard Ave. Dept 408
Bismarck, ND 58505-0480
(701) 328-4088

Counsel for Advocacy Staff