STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Otter Tail Corporation, Advance Determination of Prudence Application

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., Advance Determination of Prudence Application

SUPPLEMENTAL BRIEF IN SUPPORT OF OPPOSITION TO APPLICANTS' MOTION IN LIMINE TO EXCLUDE EVIDENCE ON ENVIRONMENTAL EXTERNALITY VALUES

Case Nos. PU-06-481, PU-06-482

ARGUMENT

Intervenors Dakota Resource Council and Mark Trechock respectfully submit the following supplemental arguments and authorities in support of their opposition to the Motion in Limine by Otter Tail Corporation and Montana-Dakota Utilities Corporation (together "Applicants"):

1. Applicants' Motion Is Inappropriate to an Administrative Proceeding.

"A motion in limine is a procedural tool to ensure that potentially prejudicial evidentiary matters are not discussed in the presence of the jury." *Williston Farm Equipment, Inc. v. Steiger Tractor, Inc.*, 504 N.W.2d 545 (N.D. 1993), citing *Shark v. Thompson*, 373 N.W.2d 859 (N.D. 1985); *Twyford v. Weber*, 220 N.W.2d 919 (Iowa 1974); and Annot, 63 A.L.R.3d 311, *Modern Status of Rules as to Use of Motion in Limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters* (1975). The Advance Determination of Prudence Application will not be tried before a jury, therefore the motion should be denied.

Applicants would have the court accept *Williston Farm Equipment Inc. v. Steiger Tractor, Inc.* as authority for Applicants' paraphrased principle: "A motion in limine is a procedural tool to determine in advance of the hearing (or trial) that certain evidence will not be allowed in the record." *Williston* in fact states plainly that a motion in limine is for the purpose of excluding potentially prejudicial evidence from a jury. Even where evidence is excluded from a jury's consideration, that evidence may be admitted into the record:

> [T]he exclusion of evidence by a motion in limine does not dispense with the need for the proponent of evidence to make an offer of proof so the trial court can consider the proffered evidence in the context of other evidence presented during trial.

Williston at 550 (citing *Twyford v. Weber*, 220 N.W.2d 919 (Iowa 1974); *Gorsuch v. Gorsuch*, 392 N.W.2d 392 (N.D. 1986); and Rule 103(a)(2), N.D.R.Ev. The role of the Commission in this prudence proceeding is comparable to that of the trial court in a bench trial. A motion in limine to exclude evidence from the court itself – in the absence of a jury – should be denied. The Commission is competent to consider all evidence presented according to the Rules of Evidence.

2. A Motion in Limine Should Only Be Granted Where the Evidence Is Inadmissible for Any Purpose.

Where a motion in limine is appropriate, most federal courts have adopted the principle that the motion should only be granted where the evidence is inadmissible for any purpose. *See, e.g., Command Cinema Corp. v. VCA Labs, Inc.*, 464 F.Supp.2d 191 (S.D.N.Y. 2006); *Indiana Ins. Co. v. General Elec. Co.*, 326 F.Supp.2d 844 (N.D. Ohio 2004); and *Noble v Sheahan*, 116 F.Supp.2d 966 (N.D. Ill. 2000). The decision of what weight to attach to Intervenors' testimony, which has not yet been filed, should lie with

the Commission, according to its statutory authority to hold hearings. NDCC § 49-02-02(5). Applicants have made assumptions about the content of Intervenors' testimony without having seen it. Intervenors respond that their testimony is admissible for multiple reasons. If this court is to apply the common federal standard for granting a motion in limine, Applicants must show that Intervenors' testimony is inadmissible for any purpose. Applicants have not attempted to make such a showing.

3. Applicants Wrongly Characterize Intervenors' Testimony As Irrelevant.

Applicants make an unjustified leap in declaring that NDCC § 49-02-23 renders evidence on the projected costs of carbon regulation irrelevant. Such language does not appear in NDCC 49-02-23. Rather, the statute identifies evidence that may in fact be relevant and excludes it for policy reasons. Such a policy decision, where it privileges one state's industries over another's, faces serious constitutional challenges (see ## 5, 6, and 7 *infra*). Where the Legislature attempts to restrict an executive agency's powers by barring relevant evidence, the Legislature also violates the separation of powers doctrine (see #5, *infra*).

4. Regulated Pollutants Under the Clean Air Act of 1970 Represent Internalized Costs of Business for Utilities.

Although EPA has not yet promulgated regulations in response to the U.S. Supreme Court's characterization of CO_2 as a regulated pollutant under the Clean Air Act, the legal effect of *Massachusetts v. EPA,* 127 S.Ct. 1438 (2007), is to render CO_2 subject to the Clean Air Act of 1970. CO_2 mitigation is therefore no longer an environmental externality but a requirement of federal law. NDCC § 49-02-23 defines environmental externalities in part as "the alleged costs of complying with future environmental laws or regulations that have not yet been enacted."

The Clean Air Act is an environmental law enacted in 1970. Section 202(a)(1) of the Clean Air Act requires that the EPA Administrator:

> publish, and … from time to time thereafter revise, a list which includes each air pollutant--
>
> **(A)** emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
> **(B)** the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
> **(C)** for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408(a)(1). The Act defines "air pollutant" to include "any air pollution agent ..., including any physical, chemical ... substance ... emitted into ... the ambient air." § 7602(g). So-called "criteria" air pollutants on the Administrator's list are the subject of complex regulations that change on an ongoing basis from state to state. From the time any air pollutant is added to the Administrator's list, it is no longer an environmental externality. Mitigation of EPA criteria air pollutants represents costs that *are* "internalized in the cost of production or the market price of electricity from a particular electric resource", in the language of NDCC § 49-02-23. Intervenors' testimony regarding CO_2 mitigation is now therefore admissible even under the terms of the statute.

The U.S. Supreme Court's decision removes any doubt that CO_2 mitigation will be a business cost internalized in the operation of Big Stone II. The question is not whether this cost will be internalized, but how much the cost will be. This cost is, firstly, not subject to the definition of environmental externalities at NDCC § 49-02-23, and secondly, very relevant to North Dakota consumers, who will pay the price of CO_2 mitigation during the half century that Big Stone II is likely to operate. Intervenors' testimony goes directly to this highly relevant internalized cost of business.

5. NDCC § 49-02-23 Violates North Dakota's Separation of Powers Doctrine.

The North Dakota Constitution refers directly to the Commission at Art. V, § 2, which delineates the powers and duties of the executive branch. The N.D. Supreme Court has clarified its rule-making authority and the significance of the separation of powers among the three branches of state government where admission of relevant evidence is concerned:

> That we possess the rule-making power does not imply that we will never recognize a statutory rule. We will recognize "statutory arrangements which seem reasonable and workable" and which supplement the rules we have promulgated.... However, when a conflict arises, or a statutory rule tends to engulf a general rule of admissibility, we must draw the line. The legislature cannot repeal the Rules of Evidence or the Rules of Civil Procedure made pursuant to the power provided us in [the Constitution].

City of Fargo v. Ruether, 490 N.W.2d 481, 482 (N.D. 1992). Under NDCC 69-02-05-01, the Commission operates its hearings according to the North Dakota Rules of Evidence, which are established by the North Dakota Supreme Court. The Legislature has attempted to exclude a broad set of relevant evidence from Commission proceedings by defining it as "environmental externality" evidence and barring such evidence. This statute overreaches the Legislature's authority and violates the separation of powers doctrine in two ways: (1) the statute bars relevant evidence, substantially altering the basic principles of the North Dakota Rules of Evidence without reference to the exclusionary principles defined at Rule 403; and (2) the statute usurps the authority of the Commission to make executive decisions as to what evidence is relevant to a given proceeding.

The Supreme Court further specifies the limits of the legislative prerogative to bar admissible evidence:

> We give special deference to the Legislature when a statute governing admissibility of evidence is part of a legislative design that essentially authorizes and creates the item of disputed evidence. Without the potential penalty of losing an operator's license for refusing the screening test, it may be doubtful whether a police officer would have the power to compel a driver to submit to a roadside screening test for alcohol. *Cf. State v. Fasching*, 453 N.W.2d 761 (N.D.1990). This implied-consent feature of NDCC 39-20-14 generates the evidence disputed here and makes it admissible for only a limited purpose. Under these circumstances, we will give great latitude to the Legislature in framing the boundaries for admissibility of the evidence generated by the legislative design.

Ruether at 484. The evidence at issue in this proceeding is not, however, authorized or created by the Legislature. On the contrary, it is relevant economic data that is already being used by other state Commissions, regional state government coalitions for the reduction of greenhouse gas emissions, and major international corporations in their long-term business planning. The statute does not fall under any established precedent for deference to legislative interference with the Rules of Evidence.

6. NDCC § 49-02-23 Violates the Dormant Commerce Clause

Application of NDCC § 49-02-23 to the Advance Determination of Prudence proceeding raises dormant commerce clause issues that the canon of statutory construction would have this tribunal avoid by allowing the Commission to consider Intervenors' testimony. The dormant commerce clause prohibits states from enacting laws that "discriminate against or unduly burden interstate commerce." *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006). Such discrimination has been defined as "differential treatment of in-state and out-of state economic interests that benefits the former and burdens the latter." *Id.* (quoting *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003), *cert. denied*, 541 U.S. 1037, 124 S.Ct. 2095, 158 L.Ed.2d 723 (2004)).

When initially enacted, NDCC § 49-02-23 was apparently intended to protect the lignite industry from a competitive disadvantage associated with early carbon regulation in Minnesota. Twelve years later, when the U.S. Supreme Court has declared CO_2 an air pollutant, the statute creates an advantage for the North Dakota power industry in violation of the dormant commerce clause. This tribunal must avoid an interpretation that would result in the unconstitutionality of NDCC § 49-02-23.

7. NDCC § 49-02-23 Denies Carbon-Neutral Technologies Equal Protection.

To the extent that NDCC § 49-02-23 creates a false advantage for high carbon-emitting technologies in the ND regulatory environment, it creates a discriminatory environment for carbon-neutral technologies like wind-generated energy. Such a policy-based bias for one industry (here, lignite) over another (primarily wind) must survive a rational basis test. *Hall GMC, Inc. v. Crane Carrier Co.*, 332 N.W.2d 54 (N.D. 1983). In an environment where carbon regulation has become a certainty, the rational basis for privileging lignite over wind power – also the source of significant economic development – has become difficult to perceive. By persisting in enforcing this discriminatory evidence standard, the state may be opening itself to litigation from carbon neutral power manufacturers, not to mention negative publicity. With each passing year it becomes harder to show that the state of North Dakota has a significant and legitimate interest in protecting its coal industry against a viable domestic wind industry with far smaller environmental impacts and many economic benefits.

CONCLUSION

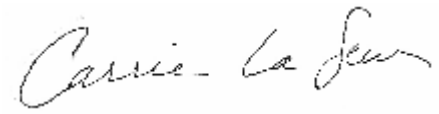
For the above reasons, the Intervenors respectfully request that the Hearing Examiner refuse the Applicant's Motion in Limine and direct that Intervenors be allowed

to introduce all relevant evidence in the Application for Advance Determination of Prudence proceeding before the Commission.

Dated: April 23, 2007

Respectfully submitted,

Intervenors Dakota Resource Council and Mark Trechock

By: 

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