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**RE: Burleigh Co. Civil No. 08-08-C-02434/001**  
**Dakota Resource Council and Mark Trechock, Appellants**  
**vs.**  
**Public Service Commission, Otter Tail Corporation and Montana-Dakota Utilities,**  
**Co., Appellees**

To the Burleigh County Clerk of Court:

Enclosed for filing in the above-referenced matter, please find:

1. Brief on Behalf of Appellants Dakota Resource Council and Mark Trechock
2. Certificate of Service

Thank you for your attention to this matter. Please contact me if you have any questions.

Very truly yours,

Jana M. Linderman  
Staff Attorney

Enclosures

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APPEAL - Appellant's Brief

Appellants  
Plains Justice Jana M. Linderman

Appellants  
Plains Justice Jana M. Linderman

**STATE OF NORTH DAKOTA**

**IN DISTRICT COURT**

**COUNTY OF BURLEIGH**

**SOUTH CENTRAL JUDICIAL DISTRICT**

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Dakota Resource Council	)	
and	)	
Mark Trechock,	)	Civil No. 08-08-C-02434/001
	)	
Appellants	)	Agency Case Nos.
	)	PU-06-481 and PU-06-482
vs.	)	
	)	
Public Service Commission,	)	
Otter Tail Corporation,	)	
and	)	
Montana-Dakota Utilities Co.,	)	
	)	
Appellees	)	

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**BRIEF ON BEHALF OF**

**APPELLANTS**

**DAKOTA RESOURCE COUNCIL AND MARK TRECHOCK**

**January 16, 2009**

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## Statement of the Case

On November 14, 2006, Appellee Otter Tail Corporation (Otter Tail) filed an application with the North Dakota Public Service Commission (the Commission) for an advance determination of prudence of Otter Tail's ownership interest in the proposed Big Stone II electric generating facility.<sup>1</sup> On November 15, 2006, Appellee Montana-Dakota Utilities Co. (MDU) filed an application with the Commission for an advance determination of prudence of MDU's ownership interest in the proposed Big Stone II electric generating facility.<sup>2</sup> Otter Tail and MDU are both investor-owned utilities that provide electricity to customers in North Dakota.<sup>3</sup> The Big Stone II electric generating facility is a proposed pulverized-coal electric generating facility that would be located adjacent to an existing coal-fired electric generating unit in Big Stone City, South Dakota. The initial applications filed by Otter Tail and MDU proposed a 630 megawatt (MW) generating facility that would be owned jointly with five other utilities. Due to rising capital costs and the withdrawal of two co-owners, Otter Tail and MDU amended their applications in 2008 to propose a 500 MW to 580 MW generating facility that would be owned jointly with three other utilities.<sup>4</sup> In the amended applications, Otter Tail proposed to own a minimum of 121.8 MW of the Big Stone II facility, up to a maximum of 130 MW. MDU proposed to own a minimum of 121.8 MW of the Big Stone II facility, up to a maximum of 133 MW.

An application for an advance determination of prudence of an electric generating resource is adjudicated by the Commission pursuant to N.D.C.C. § 49-05-16 (the advance

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<sup>1</sup> PU-06-481 Docket Entry 2.

<sup>2</sup> PU-06-482 Docket Entry 1.

<sup>3</sup> Otter Tail also serves customers in Minnesota and South Dakota. MDU also serves customers in South Dakota, Montana and Wyoming.

<sup>4</sup> See Supplemental Direct Testimony and Exhibits filed on behalf of Otter Tail and MDU. PU-06-481 Docket Entry 277; PU-06-481 Docket Entry 282.

determination of prudence statute). The utility filing the application is required to provide the Commission with a projection of costs for the proposed resource addition.<sup>5</sup> The Commission then determines whether the resource addition is reasonable and prudent.<sup>6</sup> For the applications filed by Otter Tail and MDU, the Commission considered three questions in reaching its final determination<sup>7</sup>:

1. Whether the Big Stone II electric generating facility is a reasonable and prudent resource addition.
2. Whether Otter Tail and MDU have need for additional electric generating resources.
3. Whether more reasonable and prudent alternatives exist for meeting Otter Tail and MDU's electric generation needs.

If the Commission grants a utility's application for an advance determination of prudence, then that determination will be binding in any future ratemaking proceeding.<sup>8</sup> This guarantees that the utility will recover the costs of the resource addition in rates charged to electric customers when the resource addition has been constructed and placed into service.<sup>9</sup> Prior to the legislature enacting the advance determination of prudence statute in 2005, the prudence of a new generating resource would not be considered by the Commission until the resource was constructed and ready to be placed in service. Now a utility can receive that regulatory assurance prior to making a resource investment. An advance determination of prudence

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<sup>5</sup> N.D.C.C. § 49-05-16(1)(a).

<sup>6</sup> *Id.* at subsection (c).

<sup>7</sup> PU-06-481/PU-06-482, Findings of Fact, Conclusions of Law and Order (Aug. 27, 2008) at p. 2. PU-06-481 Docket Entry 336; PU-06-482 Docket Entry 341.

<sup>8</sup> N.D.C.C. § 49-05-16(4).

<sup>9</sup> Otter Tail and MDU each have defined service territories in North Dakota, and each utility has an exclusive franchise to provide electricity to customers within its service territory. The rates each utility may charge to its customers (ratepayers) and what may be included in those rates, is determined by the Commission in ratemaking proceedings pursuant to N.D.C.C. Chapter 49-05.

provides the benefit of a guaranteed return for utilities investing in capital-intensive resources such as Big Stone II.<sup>10</sup> Without an advanced determination of prudence, Otter Tail and MDU shareholders would be investing in the construction of Big Stone II without any prior guarantee of cost recovery.

The drawback for North Dakota's electric ratepayers is that a utility's investments can be deemed reasonable and prudent for the purpose of rate recovery years before the generating resource is actually constructed and placed into operation. What appears reasonable and prudent now may not be reasonable and prudent 5 years from now.<sup>11</sup> The most recent in-service date for Big Stone II provided to the Commission, based on information available at the time of hearing in June 2008, was mid-2013. Circumstances can alter the timing and the costs of a generating resource like Big Stone II. For example, construction costs for coal-fired generating facilities have been rising and could continue to rise; a worsening economy could make investment capital more expensive and harder to come by; and regulatory delays in other jurisdictions could further delay the in-service date and raise capital costs. This places a high burden on the Commission to proceed cautiously in making an advance determination that a proposed generating resource is a reasonable and prudent investment for both utilities and for North Dakota ratepayers. The Commission's determination of what is reasonable and prudent now is necessarily based on cost projections that will not be certain for another half decade or more until the generating resource is actually constructed and placed into operation.

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<sup>10</sup> The most recent capital cost estimate provided to the Commission for constructing the Big Stone II facility was \$1.272 billion for 500 MW of generating capacity (approximately \$2,544 million per kilowatt) and \$1.411 billion for 580 MW of generating capacity (approximately \$2,433 million per kilowatt), assuming an in-service date of mid-2013.

<sup>11</sup> If the Commission, after issuing an advance determination of prudence, determines that a generating resource is no longer reasonable and prudent, the utility can still recover from ratepayers any amounts already expended, incurred, or obligated on the project, including interest and a return on investment equity. N.D.C.C. § 49-05-16(5).

The Appellants Dakota Resource Council and Mark Trechock (collectively, the Intervenor) filed a petition to intervene in the advance determination of prudence proceedings for Big Stone II on February 17, 2007.<sup>12</sup> That petition was granted on February 23, 2007.<sup>13</sup> Contested hearings were conducted before the Commission on June 26-28, 2007 and April 28-30, 2008. Prior to the hearings, the Intervenor filed written direct testimony from Mark Trechock and expert witness Michael Drunsic, written direct testimony and exhibits from expert witness David Schlissel and supplemental written direct testimony and exhibits from expert witness David Schlissel.<sup>14</sup> Mr. Schlissel also testified in person on behalf of the Intervenor at hearing on June 27, 2007 and April 29, 2008.<sup>15</sup> On August 27, 2008, the Commission issued its Findings of Fact, Conclusions of Law, and Order (Commission Order) granting an advance determination of prudence to Otter Tail and MDU's ownership interests in the proposed Big Stone II generating facility.<sup>16</sup>

This appeal is based on the Commission's failure to admit into evidence and properly consider portions of the testimony and exhibits of Intervenor expert witness David Schlissel. The Commission excluded and failed to consider portions of Mr. Schlissel's expert testimony and exhibits regarding the reasonably anticipated costs of carbon dioxide (CO<sub>2</sub>) emissions from the proposed Big Stone II facility. The excluded testimony and exhibits demonstrated that when the reasonably anticipated costs of CO<sub>2</sub> emissions from Big Stone II are taken into account, Big Stone II is not a reasonable and prudent resource investment for North Dakota ratepayers. The excluded testimony and exhibits further demonstrated that other resource alternatives would be

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<sup>12</sup> PU-06-481 Docket Entry 51; PU-06-482 Docket Entry 56.

<sup>13</sup> PU-06-481 Docket Entry 57; PU-06-482 Docket Entry 62.

<sup>14</sup> PU-06-481 Docket Entries 128-131, 163, 191, 300; PU-06-482 Docket Entries 132-135, 167, 195, 305.

<sup>15</sup> Transcript at pp. 407-532, 1160-1283.

<sup>16</sup> *Supra* note 7.

more reasonable and prudent than Big Stone II to meet the generation needs of Otter Tail, MDU and their electric customers. The Commission excluded this evidence and failed to consider it in the final Commission Order based on its interpretation of the requirements of N.D.C.C. § 49-02-23 (the environmental externalities statute). This statute provides that the Commission may not

use, require the use of, or allow electric utilities to use environmental externality values in the planning, selection, or acquisition of electric resources or the setting of rates for providing electric service.

The following is a procedural timeline of the evidence submitted by the Intervenors, and the exclusion of portions of that evidence related to the reasonably anticipated costs of CO<sub>2</sub> emissions from Big Stone II:

- On April 10, 2007 Otter Tail and MDU filed a joint motion *in limine* to exclude evidence on “environmental externality values” including costs associated with CO<sub>2</sub> emissions.<sup>17</sup>
- On April 16, 2007 Intervenors filed an opposition to the Otter Tail-MDU motion *in limine*; this opposition was supplemented by additional filings from the Intervenors on April 20, 2007 and April 23, 2007.<sup>18</sup>
- On April 25, 2007 the joint motion *in limine* filed by Otter Tail and MDU was granted.<sup>19</sup>
- On May 31, 2007 the direct testimony and exhibits of expert witness David Schlissel was filed on behalf of the Intervenors.<sup>20</sup>
- On June 13, 2007 Otter Tail and MDU filed a joint motion to strike portions of the direct testimony and exhibits of David Schlissel.<sup>21</sup>

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<sup>17</sup> PU-06-481 Docket Entry 80; PU-06-482 Docket Entry 85.

<sup>18</sup> PU-06-481 Docket Entries 82, 103, 111; PU-06-482 Docket Entries 87,108, 116.

<sup>19</sup> PU-06-481 Docket Entry 107; PU-06-482 Docket Entry 112.

<sup>20</sup> *Supra* note 14.

<sup>21</sup> PU-06-481 Docket Entry 152; PU-06-482 Docket Entry 156.

- On June 18, 2007 the Intervenors filed an opposition to the Otter Tail-MDU motion to strike<sup>22</sup>
- On June 22, 2007 an order was entered striking portions of the direct testimony and exhibits of David Schlissel.<sup>23</sup>
- On April 9, 2008 the supplemental direct testimony and exhibits of expert witness David Schlissel was filed on behalf of the Intervenors.<sup>24</sup>
- On April 15, 2008 Otter Tail and MDU filed a joint motion to strike portions of the supplemental direct testimony and exhibits of David Schlissel.<sup>25</sup>
- On April 18, 2008 Intervenors filed an opposition to the Otter Tail-MDU motion to strike.<sup>26</sup>
- On April 23, 2008 an order was entered striking portions of the supplemental direct testimony and exhibits of David Schlissel.<sup>27</sup>

The specific portions of the Schlissel testimony and exhibits excluded by the Commission are set forth in the motions to strike filed by Otter Tail and MDU and the related orders. In addition to information struck from pre-filed testimony and exhibits, witnesses testifying in person at hearing were constrained from offering any statements related to the reasonably anticipated costs of CO<sub>2</sub> emissions from Big Stone II.<sup>28</sup> As a result of the objections from Otter Tail and MDU, and the application of the environmental externalities statute by the Commission, relevant

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<sup>22</sup> PU-06-481 Docket Entry 155; PU-06-482 Docket Entry 159.

<sup>23</sup> PU-06-481 Docket Entry 172; PU-06-482 Docket Entry 176.

<sup>24</sup> *Supra* note 14.

<sup>25</sup> PU-06-481 Docket Entry 295; PU-06-482 Docket Entry 300.

<sup>26</sup> PU-06-481 Docket Entry 299; PU-06-482 Docket Entry 304.

<sup>27</sup> PU-06-481 Docket Entry 303; PU-06-482 Docket Entry 308.

<sup>28</sup> *See, e.g.*, Transcript at p. 492, lines 5-9.

evidence relating to the reasonably anticipated costs of CO<sub>2</sub> emissions from the Big Stone II facility was excluded and not considered in the final Commission Order.

### Standard of Review

The standard by which a district court may review an agency determination on appeal is set forth in N.D.C.C. § 28-32-46. This code section provides that:

A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
- ...
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
- ...

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

In reviewing factual findings from administrative agencies, courts do not make independent findings of fact or substitute the court's judgment for that of the agency. *See Power Fuels, Inc., v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979). The court determines only whether "a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence." *Id.* An agency's decisions on questions of law are fully reviewable by a court on appeal. *State Bd. of Med. Exam.-Invest. V. Hsu*, 726 N.W.2d 216 (ND 2007). The issues raised in this appeal are questions of law and therefore fully reviewable by this court.

### Summary of Argument

Two essential facts are not disputed by the any of the parties or by the Commission in this case:

(1) Federal CO<sub>2</sub> regulation can be reasonably anticipated within the timeframe necessary to construct the Big Stone II electric generating facility and place it into service.<sup>29</sup>

(2) North Dakota's electric ratepayers will bear the responsibility for any costs associated with federal regulation of CO<sub>2</sub> emissions from the Big Stone II facility through higher electric rates.<sup>30</sup>

Because federal CO<sub>2</sub> regulation can be reasonably anticipated within the timeframe necessary to construct the Big Stone II electric generating facility and place it into service, the reasonably anticipated costs of that regulation cannot legitimately be considered “external” to the cost of energy that would be produced by Big Stone II and included in North Dakota's electric rates. By excluding evidence of an entire category of costs that can be reasonably anticipated to attach to the Big Stone II facility and the energy produced by that facility, the Commission precludes the possibility of making a legitimate and rational determination that the facility constitutes a “reasonable and prudent” investment for North Dakota ratepayers. The exclusion of evidence regarding CO<sub>2</sub> costs from Big Stone II undermines the fundamental purpose of the advance determination of prudence statute: to give advance regulatory approval to utilities, if and only if the utility can demonstrate that a resource investment is reasonable and prudent compared to

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<sup>29</sup> See, e.g., Transcript at p. 56.

<sup>30</sup> See, e.g., Transcript at pp. 58, 86-87. House Bill 1221, referred to in the comments of Commissioner Cramer at p. 87 of the transcript, was enacted into law in the 2007 legislative session and is now codified at N.D.C.C. § 49-05-04.2. This provision of the Century Code allows utilities to recover the “jurisdictional capital costs and associated operating expenses incurred by a public utility to comply with federal environmental mandates on existing generating stations” in rates charged to electric customers.

available alternatives and therefore reasonable and prudent to pass on to ratepayers in electric rates. By making a determination that the costs of Big Stone II are reasonable and prudent to pass on to North Dakota ratepayers, without considering all relevant evidence offered on that issue, the Commission violated the basic due process rights of the Intervenor to demonstrate the potential harm that would result to ratepayers from including Big Stone II in the rate base for Otter Tail and MDU. The Commission's exclusion of evidence that is not only relevant but fundamental to its central determination undermines the integrity of that determination and violates basic rules of procedure set forth by the judicial branch for contested evidentiary proceedings.

Once the Commission issues an advance determination of prudence, that determination is binding on all future ratemaking proceedings.<sup>31</sup> Intervenor was precluded from having the Commission consider and weigh relevant expert testimony demonstrating that Big Stone II is not a reasonable and prudent resource option and that other alternatives to meet electric generation needs would be more reasonable and prudent for North Dakota ratepayers. Intervenor and ratepayers will suffer if Big Stone II is included in the rate base for Otter Tail and MDU, thereby displacing more reasonable and prudent resource options. The only possible redress for that harm is for this Court to reverse the Commission's Order for the reasons set forth in this brief and remand this case to the Commission with a clear instruction to consider *all* reasonably anticipated costs associated with a given generating resources prior to making a determination about which resource is reasonable and prudent for North Dakota ratepayers.

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<sup>31</sup> Although the Commission could hypothetically later reverse its advance prudence determination upon a finding that Big Stone II is no longer a reasonable and prudent option for electric generation, Otter Tail and MDU would still be able to recover costs incurred prior to any such reversal, including interest and a return on investment equity – meaning that North Dakota ratepayers will be on the hook financially regardless of whether Big Stone II remains “reasonable and prudent” or is ever placed into operation.

## ARGUMENT

### I. THE COMMISSION ORDER DOES NOT PROPERLY INTERPRET AND APPLY THE ENVIRONMENTAL EXTERNALITIES STATUTE AT N.D.C.C. § 49-02-23.

The Administrative Agencies Practice Act provides for appeal of an agency order if that order is not in accordance with the law. N.D.C.C. § 28-32-46(1). The Commission Order fails to give a reasonable interpretation to the environmental externalities statute and errs in relying on the statute to exclude evidence of the reasonably anticipated costs of CO<sub>2</sub> emissions from the proposed Big Stone II electric generating facility. The reasonably anticipated costs of CO<sub>2</sub> emissions from Big Stone II cannot be legitimately classified an “externality” under the environment externalities statute. The current regulatory status of CO<sub>2</sub> at the federal level means that CO<sub>2</sub> emissions are reasonably likely to be an internalized cost of energy from Big Stone II by the time it is constructed and placed into operation. Even Otter Tail and MDU recognize this likelihood.<sup>32</sup> The environmental externalities statute, by definition, applies only to *external* costs. Furthermore, the environmental externalities statute cannot be reasonably interpreted to exclude evidence of the reasonably anticipated costs of CO<sub>2</sub> emissions from an advance determination of prudence proceeding. By its nature, an advance determination of prudence proceeding relies on price forecasts and estimates of future costs for virtually every aspect of the proposed generating resource. Price forecasts for CO<sub>2</sub> emissions are qualitatively no different from the other price forecasts and cost estimates that the Commission chose to rely on in the final Commission Order. Excluding evidence of price forecasts for CO<sub>2</sub> emissions from Big Stone II is arbitrary and capricious and undermines the purpose of the advance determination of prudence statute.

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<sup>32</sup> See, e.g. Transcript at p. 56.

**A. The reasonably anticipated costs of CO<sub>2</sub> emissions from the proposed Big Stone II generating facility are not “externalities” pursuant to the environmental externalities statute at N.D.C.C. § 49-02-23.**

It is not reasonable for the Commission to continue to define the costs associated with CO<sub>2</sub> emissions from Big Stone II as an “externality” under the environmental externalities statute. N.D.C.C. § 49-02-23 states in pertinent part that

Environmental externality values are 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.

N.D.C.C. § 49-02-23 was introduced in the 1995 North Dakota legislative session as House Bill 1312. Testimony offered in support of HB 1312 clarifies the intended target of the environmental externalities statute, as well as the commonly understood meaning of “externality” codified in N.D.C.C. § 49-02-23. Lignite Energy Council President John Dwyer testified in support of the legislation as follows:

Externalities are generally defined as those costs or benefits resulting from an economic activity that are *not directly reflected* in market prices for the goods or services produced by the activity. Such costs or benefits are thus “*external*” to the market transaction.<sup>33</sup> (emphasis in original)

Air pollution control equipment is internalized in the price of energy so it is *not* an externality cost.<sup>34</sup> (emphasis in original)

HB 1312 was a response to legislative and regulatory action in the state of Minnesota. Specifically, in 1993 the Minnesota legislature passed a law requiring the Minnesota Public

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<sup>33</sup> Testimony of John W. Dwyer, President of the Lignite Energy Council, regarding House Bill 1312 (January 16, 1995) at p. 1. This testimony is attached to Intervenor’s April 16, 2007 opposition to Otter Tail and MDU’s motion *in limine*.

<sup>34</sup> *Id.* at p. 2.

Utilities Commission (PUC) to quantify environmental costs associated with electric generation and to use those values when evaluating electric generation resource options.<sup>35</sup> In 1994 the Minnesota PUC established a numeric value for CO<sub>2</sub> emissions from coal-fired electric generation and began requiring the use of that numeric value in the evaluation and selection of electric generation resource options.<sup>36</sup> Mr. Dwyer's testimony outlines the basic statutory purpose of House Bill 1312:

- Prevent the North Dakota Public Service Commission from passing on to North Dakota consumers externality costs imposed by other states.
- Send a strong message to Minnesota and other states that State of North Dakota is not going to let other states strangle our lignite industry.
- Protect North Dakota consumers from unreasonable, speculative, and artificial externality costs imposed by other states.<sup>37</sup>

William Binek, chief legal counsel for the Public Service Commission, provided similar testimony:

“Environmental externality” is a term used to define the assessment of an artificial cost that is arbitrarily assessed as a cost against different types of electric generating facilities.<sup>38</sup>

The proposed legislation provides an important tool in the fight against the imposition of environmental externality costs targeted against North Dakota's lignite industry. Furthermore, this legislation protects North Dakota's electric ratepayers from artificially increased costs of electricity caused by self-serving and arbitrary actions of other states in the application of externality costs. The Commission realizes that passage of this legislation may adversely affect some utilities, *but the interests of North Dakota ratepayers and taxpayers must be protected.* (emphasis added)<sup>39</sup>

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<sup>35</sup> *Id.* at p. 1.

<sup>36</sup> *Id.* at p. 2.

<sup>37</sup> *Id.* at p. 4.

<sup>38</sup> Testimony of William W. Binek, Chief Counsel for the Public Service Commission, regarding House Bill 1312 (January 16, 1995) at p. 1. This testimony is attached to Intervenor's April 16, 2007 opposition to Otter Tail and MDU's motion *in limine*.

<sup>39</sup> *Id.* at pp. 1-2.

Regulated pollutants under the federal Clean Air Act of 1970 represent internalized costs of business for utilities.<sup>40</sup> The primary legal effect of the Supreme Court's decision *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438 (2007) is to place CO<sub>2</sub> within the jurisdiction of the federal Clean Air Act and remove any doubt that CO<sub>2</sub> mitigation will be a business cost internalized in the operation of Big Stone II. The question is not whether CO<sub>2</sub> emissions represent an internal cost for Big Stone II, but rather how much that cost will be. Although U.S. Environmental Protection Agency (EPA) has not yet promulgated final regulations in response to the U.S. Supreme Court decision characterizing CO<sub>2</sub> as a regulated pollutant under the Clean Air Act, EPA has in fact commenced the rulemaking proceeding to promulgate regulations for CO<sub>2</sub> and other greenhouse gas emissions under the Clean Air Act.<sup>41</sup> CO<sub>2</sub> mitigation is therefore no longer an environmental externality, but a requirement of federal law. This interpretation of federal law is reinforced by a recent decision of the EPA's Environmental Appeals Board.<sup>42</sup> The *Deseret* decision by the Environmental Appeals Board further supports the conclusion that CO<sub>2</sub> regulations could be enacted at the sole discretion of the federal executive branch, without additional legislation passing through Congress. *Massachusetts v. EPA*, the EPA's Advanced Notice of Proposed Rulemaking for Greenhouse Gas Emissions, and the *Deseret* decision all reinforce the already strong likelihood that Big

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<sup>40</sup> The Clean Air Act defines "air pollutant" as "any air pollution agent ... including any physical, chemical ... substance ... emitted into ... the ambient air." 42 U.S.C. § 7408(a)(1). So-called "criteria" air pollutants on the EPA Administrator's list are the subject of complex regulations that change on an on-going 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 criteria air pollutants represent costs that are "internalized in the cost of production or the market price of electricity from a particular electric resource."

<sup>41</sup> In response to *Massachusetts v. EPA*, the EPA has issued an Advance Notice of Proposed Rulemaking for Regulating Greenhouse Gas Emissions under the Clean Air Act. Federal Register, Volume 73, Number 147 (July

<sup>42</sup> *In re: Deseret Power Electric Cooperative*, U.S. EPA Environmental Appeals Board, PSD Appeal No. 07-03, Docket No. OU-002-04.00 (decided Nov. 13, 2008), slip opinion available at [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/Statutes](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Statutes). The *Deseret* decision revokes an air quality permit for a coal-fired power plant under the federal Clean Air Act and remands the case to the permitting authority to determine whether CO<sub>2</sub> limits and mandatory control technology for CO<sub>2</sub> emissions should be included in the permit.

Stone II will have to internalize costs for CO<sub>2</sub> emissions by time the facility is ready to be placed in operation. Simply stated, CO<sub>2</sub> emissions are *not* an external cost for the energy that will be produced by the Big Stone II facility and paid for by North Dakota ratepayers. The interests of North Dakota ratepayers therefore would best be protected if price forecasts for CO<sub>2</sub> emissions are allowed as evidence to compare alternate sources of electric generation and determine which resources are most reasonable prudent to charge to ratepayers.

**B. The Commission Order does not properly interpret and apply the environmental externalities statute at N.D.C.C. § 49-02-03 in light of the plain purpose and meaning of the advance determination of prudence statute at N.D.C.C. § 49-05-16.**

It is not reasonable for the PSC to construe the environmental externalities statute in a way that directly contradicts and undermines the plain statutory purpose of N.D.C.C. § 49-05-16 (the advance determination of prudence statute) and excludes relevant evidence of the reasonably anticipated costs of CO<sub>2</sub> emissions. As discussed above, the environmental externalities statute was enacted in 1995 to “protect North Dakota lignite coal from adverse effects of a decision of the [Minnesota] PUC assigning an interim value to carbon dioxide ... for coal fired plants”<sup>43</sup> and to “protect North Dakota consumers from unreasonable, speculative, and artificial externality costs imposed by other states.”<sup>44</sup> The environmental externalities statute should be understood in the context of the rate proceedings that existed at the time the statute was enacted.

The advance determination of prudence statute was introduced in the 2005 legislative session, at MDU’s request, as House Bill 1324. The statute was enacted to provide greater

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<sup>43</sup> *Supra* note 33 at p. 2.

<sup>44</sup> *Id.* at p. 4.

economic certainty to investors in new energy generation facilities. Dennis Boyd testified on behalf of MDU in support of HB 1324<sup>45</sup>:

Currently and in general terms, after a company has determined it needs additional generation or transmission facilities and after it has obtained all of the various permits needed ... it proceeds to build the facility. Usually those facilities take several years to complete and expenses run into the hundreds of millions of dollars. After the facility is completed, the utility then files a rate case with the [Public Service Commission (PSC)] to recover the costs. After the PSC determines the facility was needed and the expenditures were prudent, the costs are then added to the utilities rate base and the rates are adjusted accordingly. HB 1324 seeks to place the approval of the prudence of the expenditures at the front end of the process, rather than at the end of the process. We are seeking advance determination of the prudence because there is always the risk that the Commission might determine after the expenses have been incurred that there might have been a better option. That makes investors nervous and could lead to higher costs for the consumer.

To show that a generation resource addition is “reasonable and prudent” for these purposes, the utility must show that new generation is needed, that alternative sources of new generation have been considered, and that the proposed resource addition is reasonable and prudent compared to the available alternatives. A major component of this analysis is a cost comparison of resource alternatives. All things being equal, if two generating resources are capable of meeting the peak demand and energy needs of a utility, the lower cost resource likely would be the reasonable and prudent choice for ratepayers. As the Boyd testimony suggests, the advanced determination of prudence statute functions to insulate investors from some of the financial risk associated with constructing a new electric generating resource. That risk in turn, is passed on to ratepayers, who will absorb the costs of the generating resource in the form of electric rates charged.

The advance determination of prudence proceeding was not available when the environmental externalities statute was enacted in 1995. The 1995 legislature faced a situation

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<sup>45</sup> Testimony of Dennis Boyd, MDU Resources Group, Inc., regarding House Bill 1324 (January 26, 2005) at p. 1. This testimony is attached to Intervenor’s April 16, 2007 opposition to Otter Tail and MDU’s motion *in limine*.

where costs from an electric generating facility would be deemed prudent (or not) and placed in the utility's rate base (or not) only after the facility had actually been constructed - after the facility had become used and useful to ratepayers. In this context, the Commission would only consider the prudence of an electric generating facility when the costs of that facility were established and known, because the facility was constructed and ready to be placed in service. The environmental externality values enacted in Minnesota in 1993 and 1994 were seen as placeholders for costs not internalized in the actual construction and operation of the plant, in contrast to the known construction and operating costs of an existing facility. Supporters of the environmental externalities statute argued that it was not fair to ratepayers to pay a higher cost for electricity based on external values not included in the actual cost of producing a kilowatt hour of energy. In contrast, an advance determination of prudence proceeding relies solely on price forecasts and estimates of future costs for facilities that will not be constructed and placed in service for years after the Commission has granted its approval and prudence determination. Including placeholder CO<sub>2</sub> values in a pre-2005 ratemaking proceeding involving only current costs and the current rate base of the utility is very different from including reasonable CO<sub>2</sub> price forecasts along with all other future cost estimates in a post-2005 finding of reasonableness and prudence for a generating facility that will not be built and included in the rate base for years.

Intervenors do not seek to assign a mere placeholder value to CO<sub>2</sub> emissions from Big Stone II. Rather, the testimony submitted by Intervenors goes to the question of what the actual costs of CO<sub>2</sub> emissions will be when Big Stone II is constructed and in operation and placed in the rate base for North Dakota ratepayers. Because an advance determination of prudence proceeding takes place years before a generating resource is constructed and placed in service, all costs relied upon in the proceeding are derived from forecasts and estimates of one kind or

another. The Commission's reliance on the environmental externalities statute to exclude Intervenor's evidence regarding the reasonably anticipated costs of CO<sub>2</sub> emissions from Big Stone II is therefore inappropriate in an advance determination of prudence proceeding. The Intervenor's submitted evidence alleging what the cost of CO<sub>2</sub> emissions from Big Stone II *will* be, just as all parties submitted evidence of price forecasts and cost estimates for construction, fuel procurement, fuel transportation, and alternative generation resources.<sup>46</sup> As with all evidence, the Commission has a right to weigh evidence from the parties and make a reasonable determination of what evidence is credible in their findings of fact. However, the Commission did not, because of their interpretation of the environmental externalities statute, give *any* consideration or weight to the CO<sub>2</sub> numbers offered into evidence by the Intervenor's. All numerical values and reference to numerical values for CO<sub>2</sub> emissions were excluded from evidence and not considered at all in the Commission's final determination. Given the status of CO<sub>2</sub> regulation at the federal level and the presence of CO<sub>2</sub> price forecasts in virtually every price forecast and cost estimate associated with Big Stone II and other coal-fired generating facilities, it is nothing short of a fairy tale to pretend that the energy from Big Stone II will not have an internalized cost from CO<sub>2</sub> emissions that needs to be considered when comparing Big Stone II to alternate sources of electric generation. Playing along with this pretense undermines the plain statutory purpose of the advanced determination of prudence statute and does a grave disservice to North Dakota ratepayers.

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<sup>46</sup> It is worth noting that a significant number of these price forecasts and cost estimates incorporate price forecasts for CO<sub>2</sub> emissions. *See, e.g.* Commission Order (*supra* note 7) at p. 16. Finding of Fact No. 83 states "The forecast considers future demand for coal as well as the impact on demand for PRB coal vis a vis anticipated Clean Air Act, mercury and likely carbon dioxide regulation. (emphasis added) *See also* Greig Supplemental Direct Testimony at p. 3; Otter Tail-MUD Exhibit 327 at pp. 4-8; Crowley Supplemental Direct Testimony at p. 15; and Uggerud Supplemental Direct Testimony at p. 5.

**II. AS INTERPRETED AND APPLIED BY THE COMMISSION ORDER, THE ENVIRONMENTAL EXTERNALITIES STATUTE AT N.D.C.C. § 49-02-33 VIOLATES THE DUE PROCESS RIGHTS OF THE INTERVENORS AND THE SEPARATION OF POWERS DOCTRINE OF THE NORTH DAKOTA CONSTITUTION.**

The Administrative Procedures Act provides for an appeal of an agency order if that order is in violation of the constitutional rights of the appellant. N.D.C.C. § 28-32-46(2). The Commission Order improperly interprets and applies the environmental externalities statute in a manner that violates the due process rights of the Intervenors under the North Dakota and United States Constitutions. The Commission used the environmental externalities statute to prevent the Intervenors from presenting relevant evidence of economic harm that would accrue to North Dakota ratepayers, including the Intervenors, if the Big Stone II facility is constructed, placed into operation and eventually included in North Dakota's electric rates. In addition, the Commission Order improperly interprets and applies the environmental externalities statute in a manner that violates the separation of powers doctrine under the North Dakota Constitution. Under the Commission's interpretation, the environmental externalities statute constitutes improper legislative interference with the rules for evidentiary hearings established by the judicial branch pursuant to Article IV, Section 3 of the North Dakota Constitution. If a statute is susceptible of two constructions, one which will be compatible with constitutional provisions or one which will render the statute unconstitutional, the court must adopt the construction that will make the statute valid. *See, e.g., Paluck v. Board of County Comm'rs*, 307 N.W.2d 852, 856 (ND 1981); *State v. Howe*, 247 N.W.2d 647 (ND 1976). To the extent a statute cannot be interpreted and applied in a manner not contrary with the constitution, it should be struck down.

**A. The Commission Order interprets and applies the environmental externalities statute at N.D.C.C. § 49-02-23 in a manner that violates the due process rights of the Intervenors.**

Article I, Section 9 of the North Dakota Constitution provides that “every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay.” This right is affirmed by Amendment XIV, Section 1 of the United States Constitution (“nor shall any state deprive any person of life, liberty, or property, without due process of law”). *Whitecalfe v. N.D. DOT*, 727 N.W.2d 779, 787-88 (ND 2007) sets forth the legal standard used by North Dakota courts to define the right to procedural due process:

- Unlike some other legal rules, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).
- Due process is flexible and must be considered on a case-by-case basis. *Wahl v. Morton County Soc. Serv.*, 574 N.W.2d 859 (ND 1998).
- When deciding a due process claim, we consider whether a constitutionally protected property or liberty interest is at stake and, if so, whether minimum procedural due process requirements were met. *Morrell v. North Dakota Dept. of Transp.*, 598 N.W.2d 111 (ND 1999).
- Procedural due process is analyzed by applying a balancing test, considering three factors:
  - (1) The private interest that will be affected by the official action;
  - (2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

(3) The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *In re S.A.L.*, 652 N.W.2d 912 (ND 2002) (quoting *Mathews*, at 335).

Applying the three-part balancing test to the facts of this case indicates that the Intervenor's due process rights have not been preserved in the proceedings before the Commission:

(1) The private interest of the Intervenor in the Commission's action in this case consists of ensuring the provision of reliable electricity in a manner that is cost-effective and that adequately protects the financial interests of electric ratepayers. This interest is the underlying premise for the Intervenor's participation in the contested evidentiary hearings before the Commission. If the Intervenor cannot submit relevant evidence of the likely internalized CO<sub>2</sub> costs of electricity from the proposed Big Stone II generating facility, then the Intervenor and will have been deprived of the right to have their case fully heard and to present evidence of potential harm caused by constructing and operating Big Stone II and placing it in the rate base for North Dakota ratepayers. This harm includes, but is not limited to:

- Constructing and operating Big Stone II in lieu of resource options (including natural gas generating facilities, wind generating facilities and demand side management measures) that would be financially preferable if the reasonably anticipated monetized costs of CO<sub>2</sub> emissions were accounted for;
- Requiring ratepayers to compensate Otter Tail and MDU for the foreseeable CO<sub>2</sub> emission costs from the Big Stone II generating facility, pursuant to N.D.C.C. § 49-05-04.2, without having allowed ratepayers an opportunity to present evidence of those costs in the advanced determination of prudence proceeding where Big Stone II received initial approval as a reasonable and prudent addition to the rate base; and

- Interfering inappropriately and harmfully in the prudent planning of public utilities for the reasonably foreseeable costs of CO<sub>2</sub> regulation. Every opportunity for renewable energy, carbon-neutral energy, energy efficiency, combined heat and power, and demand side management that is imprudently bypassed because the reasonably anticipated costs of CO<sub>2</sub> regulation were not accounted for in the planning process, is one fewer measure that utilities will be able to take advantage of to mitigate and offset the cost of CO<sub>2</sub> emissions in a carbon constrained world. This undue interference with utilities' prudent resource planning will only make necessary CO<sub>2</sub> mitigation and offset measures more expensive and difficult to achieve in the future, thereby harming the utility, the utility's shareholders, the utility's ratepayers, and the state and local economies where the utility does business, particularly to the extent these increase costs are included in electric rates.

(2) The risk of an erroneous deprivation of the Intervenor's interest in cost-effective electricity is high as a result of the Commission's refusal to consider evidence of the actual cost of CO<sub>2</sub> emissions from the Big Stone II facility. The harms to the Intervenor have been outlined briefly above. The nature of the evidence excluded is outlined briefly in Section (III) below. Among other things, the excluded evidence demonstrates that the Big Stone II facility is not the most cost-effective resource option for Otter Tail or MDU when forecasted carbon prices are taken into account. In addition, the excluded evidence indicates that less carbon-intensive and carbon-neutral resource options (including natural gas, wind and demand side management) would be more reasonable and prudent options for meeting Otter Tail and MDU's need for additional generating capacity. In addition to the obvious benefit to ratepayers from selecting the most cost-effective resource capable of meeting peak demand and energy needs, these resources have CO<sub>2</sub> emission profiles that would help maximize the efforts of the utilities and their

ratepayers to mitigate the cost of CO<sub>2</sub> emissions in a carbon constrained world. The probable value of allowing the Intervenor to present evidence of the actual, monetized value of CO<sub>2</sub> emissions reasonably anticipated for the Big Stone II generating facility is clear.

(3) Finally, the Commission does not have an interest in excluding any category of actual forecasted costs for any electric generating facility from an advanced determination of prudence proceeding. An advanced determination of prudence proceeding requires the Commission to determine whether a proposed electric generating resource is reasonable and prudent. In order to achieve this goal, the Commission cannot consider the likely actual cost of CO<sub>2</sub> emissions from Big Stone II merely in a “qualitative manner.”<sup>47</sup> This language suggests that the Commission understands the larger importance of CO<sub>2</sub> emission costs, but is unwilling or unable to perform a proper analysis based on all the available evidence. The Commission must consider the likely actual costs of CO<sub>2</sub> emissions for the proposed Big Stone II generating facility, in a manner that allows for a valid, quantitative, side-by-side comparison of all reasonable alternatives for meeting the electric generation needs of Otter Tail and MDU. These costs forecasts would be considered alongside and in conjunction with other technical price forecasts and cost estimates that are relevant to an advance determination of prudence proceeding and would not add meaningfully to the Commission’s administrative burdens. On the contrary, if the Commission continues to approve electric generating facilities without considering any valid price forecasts for CO<sub>2</sub> emissions from those facilities, the Commission soon will be faced with an intimidating regulatory quagmire, trying to preserve the financial health of utilities that have not been allowed to plan realistically for a carbon constrained world and ratepayers – including local businesses – who cannot afford to suddenly shoulder the entire financial burden of necessary CO<sub>2</sub> mitigation.

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<sup>47</sup> *Supra* note 7, Finding of Fact 88 at p. 16.

**B. The Commission Order interprets and applies the environmental externalities statute at N.D.C.C. § 49-02-23 in a manner that violates the separation of powers among the branches of state government and improperly interferes with the right of the Intervenors to offer relevant evidence in a contested evidentiary hearing.**

The North Dakota Supreme Court is constitutionally authorized to promulgate the rules of procedure and evidence followed by all courts of the state, and by administrative agencies in adjudicative proceedings, such as the proceedings at issue in this appeal. N.D.C.C. § 28-32-24; N.D.A.C. § 69-02-05-01. Article VI, Section 3 of the North Dakota Constitution provides that “The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state.” This authority includes the promulgation of rules for the receipt and admission of evidence. *See Production Credit Association of Mandan v. Olson*, 280 N.W.2d 920, 927 (N.D. 1979); *Arneson v. Olson*, 270 N.W.2d 125, 131 (N.D. 1978). In N.D.C.C. § 27-02-08, the North Dakota Legislature codified the superior power of the North Dakota Supreme Court in promulgating rules of pleading, practice and procedure. North Dakota courts have long recognized the existence of the separation of powers doctrine under the North Dakota Constitution:

Irrespective of the fact that a constitution does not contain a general distribution clause expressly providing for the division of governmental powers among the legislative, executive, and judicial branches of government . . . , the creation of those branches of government operates as an apportionment of the different classes of power. As all of the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others. *City of Carrington v. Foster County*, 166 N.W.2d 377, 382 (ND 1969).

The Supreme Court's rulemaking authority and the separate powers of the judicial branch and legislative branch regarding the admissibility of relevant evidence are reviewed in *Fargo v.*

*Ruether*, 490 N.W.2d 481, 483-84 (ND 1992):

We have tried to explain the interplay between statutory procedures and rules promulgated by this court. In *State v. Vetsch*, 368 N.W.2d 547, 552 (ND 1985), we quoted from *State v. Seidel*, 691 P.2d 678, 682 (Ariz. 1984):

“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].”

This constitutional provision places “final authority over procedural rules” with our court. *Matter of Estate of Bieber*, 256 N.W.2d 879, 881 n.1 (ND 1977). Although statutorily-enacted rules of procedure which supplement the rules we have promulgated may remain in effect until superseded or amended by this court . . . , Article VI, Section 3, mandates that a court-promulgated procedural rule prevails in a conflict with a legislatively-enacted rule of procedure. *City of Fargo v. Dawson*, 466 N.W.2d 584, 586 n.1 (ND 1991).

As interpreted and applied in the final Commission Order, the environmental externalities statute conflicts in a number of ways with the basic evidentiary principles contained in the Rules of Evidence promulgated by the North Dakota Supreme Court and therefore should not govern the admission of evidence in the manner adopted by the Commission:

- *N.D.R.Ev. 102* provides that “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.” Excluding the evidence presented by the Intervenors relating to the forecasted price of CO<sub>2</sub> emissions from Big Stone II obscures the truth of the central issue before the Commission, whether Big Stone II is reasonable and prudent when

compared with alternative generation resources. Furthermore, excluding this evidence and leads to an unfair and unjust outcome for Intervenors and North Dakota ratepayers, and set forth above in Section (II)(A).

- *N.D.R.Ev. 401* provides that “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The evidence presented by the Intervenors regarding CO<sub>2</sub> emission costs and excluded by the Commission under the guise of the environmental externalities statute is not merely “relevant” to the matter before the Commission, as that term is defined in Rule 401. The evidence presented by the Intervenors is key to the central issue of fact and law to be determined by the Commission: whether the Big Stone II generating facility is reasonable and prudent for North Dakota ratepayers when compared with reasonable alternatives. The Commission cannot properly make the required determination with having access to and fully considering *all* significant costs associated with the generation resource alternatives under consideration.
- *N.D.R.Ev. 402* provides that “All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States or the State of North Dakota, by any applicable Act of Congress, by statutes of North Dakota, by these rules, or by other rules adopted by the Supreme Court of North Dakota. Evidence which is not relevant is not admissible.”<sup>48</sup> Although this rule provides some flexibility for the legislature to enact a

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<sup>48</sup> This does not, as urged by Otter Tail and MDU in their joint motion *in limine*, mean that all evidence deemed inadmissible is therefore irrelevant. See *supra* note 17 at p. 3. Otter Tail and MDU argue in their joint motion *in limine* that the environmental externalities statute rendered portions of evidence offered by Intervenors inadmissible. The joint motion then appears to argue that this renders the evidence irrelevant for the purpose of hearing and therefore inadmissible under *N.D.R.Ev. 402*. This odd, circular logic is not supported by the plain text of either *N.D.R.Ev. 401* or *N.D.R.Ev. 402*. While Otter Tail and MDU may argue that the evidence is inadmissible, it is certainly relevant to the central question of fact considered by the Commission.

statute governing the admissibility of evidence, the courts have inherent power to overrule the legislative determination “when a conflict arises, or a statutory rule tends to engulf a general rule of admissibility” because “[t]he legislature cannot repeal the Rules of Evidence or the Rules of Civil Procedure” made pursuant to the North Dakota Supreme Court’s constitutional power. *See supra, Fargo v. Ruether*, 490 N.W.2d at 483. The Commission’s interpretation of the environmental externalities statute *does* engulf a general rule of admissibility that would otherwise allow for the consideration of CO<sub>2</sub> price forecasts in an advance determination of prudence proceeding. CO<sub>2</sub> price forecasts are equally probative – and equally speculative – as every other price forecast and cost estimate that the Commission did consider and allow for the submission into evidence. There is no rational basis for differentiating between a price forecast for coal or natural gas (which itself is likely impacted by CO<sub>2</sub> price forecasts) and a price forecast for CO<sub>2</sub> emissions. The Commission may choose not to find a particular price forecast credible, but that goes to the weight and not the admissibility of the evidence. The Commission’s interpretation of the environmental externalities statute subverts the admission of relevant evidence that would inform the Commission’s ultimate determinations of law and fact without a rational basis for doing so.

- *N.D.R.Ev. 403* provides that “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” The joint motion *in limine* filed by Otter Tail and MDU also urges that evidence regarding CO<sub>2</sub> price forecasts for Big Stone II should be excluded anyway pursuant to Rule 403, because such evidence would “only confuse the issue of costs and unnecessarily extend the time necessary to adequately adjudicate the pending

applications.” Neither the parties nor the Commission have made a credible argument that evidence regarding CO<sub>2</sub> price forecasts for Big Stone II is irrelevant to the Commission’s advance determination of prudence. As such, what “confuses” the issue of cost is the exclusion of such evidence relating to cost from the utility’s planning process and the Commission’s prudence determination. The environmental externalities statute functions as its own special exclusionary rule designed 15 years ago for the sole benefit of North Dakota lignite. The statute has more than outlived its usefulness in light of the current regulatory status of CO<sub>2</sub> emissions. The overly broad interpretation and application of the statute by this Commission has brought its outmoded calculus even into proceedings such as this one that do not implicate lignite and where CO<sub>2</sub> costs are not the much dreaded “externalities” that prompted the statute in the first place. Nevertheless, all parties, pursuant to the Commission’s interpretation of the environmental externalities statute, are essentially required to close their eyes and dream of a world where carbon prices don’t exist and CO<sub>2</sub> emissions from Big Stone II will have no impact on the cost of electricity that gets passed to North Dakota ratepayers. The hard truth is that CO<sub>2</sub> costs are a reality that will impact electric prices for North Dakota ratepayers. Using the environmental externalities statute to preclude consideration of such an important evidentiary matter not only subverts and preempts the Rules of Evidence promulgated by the Supreme Court, it undermines the integrity of any decision reached by the Commission and poses significant harm to the interests of all the parties involved.

- Using Synapse mid and high CO<sub>2</sub> price forecasts, a wind-plus-natural gas scenario analyzed by Otter Tail and MDU results in cheaper energy costs than Big Stone II.<sup>60</sup>

All of the data above was excluded from consideration by the Commission, relying on its interpretation of the environmental externalities statute to exclude evidence of the reasonably anticipated costs of CO<sub>2</sub> emissions from Big Stone II. As a result, the Commission could not perform a valid side-by-side cost-benefit analysis of the resource alternatives available to meet the peak demand and energy needs of Otter Tail and MDU. For example, when the Commission finds that “[demand side management (DSM)] and conservation must be important parts of a resource plan” for Otter Tail and MDU, it is impossible to make a valid determination of how much DSM and conservation is cost-effective based on the record considered by the Commission. If a carbon-intensive resource such as coal is assumed to have no carbon costs – including those reasonably likely to be incurred within the lifetime of the proposed facility – then it is not possible to accurately determine how much carbon-neutral DSM and conservation can be cost-effectively achieved prior to investing in new coal. The analysis of what is and is not cost-effective and how resources compare to each other is skewed for every resource considered by the utilities and the Commission. As the disallowed portions of the Schlissel testimony demonstrate, this very likely resulted in what is actually a lower cost resource plan being rejected in favor of a higher cost plan including Big Stone II. The Commission has chosen to live in a fairy land where Big Stone II is assumed to have zero actual carbon costs, and no direct numerical price comparison is done to determine which resource alternatives are actually cheaper. Pursuant to the Commission’s advance determination of prudence, the cost of a higher cost resource plan that includes Big Stone II will be passed directly to North Dakota ratepayers.

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<sup>60</sup> *Id.* at p. 81.

## CONCLUSION

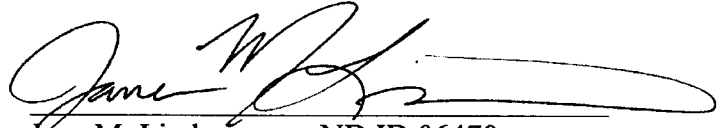
The Big Stone II electric generating facility proposed by Otter Tail and MDU is not the most cost-effective or the most reasonable and prudent resource to meet the needs of the utilities' electric customers. Other resource options, including wind, natural gas and demand side management present more cost-effective and more reasonable and prudent alternatives to meet the peak demand and energy needs of Otter Tail and MDU's ratepayers. However, expert testimony and exhibits offered by the Intervenors to support these conclusions was excluded by the Commission and given no weight in the final Commission Order. This exclusion and the failure to consider relevant evidence presented by the Intervenors regarding the reasonably anticipated costs of CO<sub>2</sub> emissions from Big Stone II resulted from an erroneous interpretation of North Dakota's environmental externalities statute. The Commission's interpretation and application of that statute undermines the integrity and purpose of an advance determination of prudence proceeding, violates the due process rights of the Intervenors and runs counter to the separation of powers doctrine of the North Dakota Constitution. In addition, the Commission's interpretation and application of the environmental externalities statute creates a scenario where ratepayers are forced to accept and pay for a less than optimal electric generation mix that carries with it millions of tons of CO<sub>2</sub> emissions that ratepayers will also have to pay for in the years and decades to come. For these reasons, and those already set forth above in this brief, the Intervenors respectfully request that this Court reverse the final Commission Order in this matter, return this matter to the Commission for further consideration in accordance with the law, and as necessary to guarantee the rights of the Intervenors and achieve a constitutionally valid result, strike down the environmental externalities statute at N.D.C.C. § 49-02-23.

Dated this 16<sup>th</sup> day of January 2009.

Respectfully submitted,

PLAINS JUSTICE

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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Dakota Resource Council	)	
and	)	
Mark Trechock,	)	Civil No. 08-08-C-02434/001
	)	
Appellants	)	Agency Case Nos.
	)	PU-06-481 and PU-06-482
vs.	)	
	)	<b>CERTIFICATE OF SERVICE</b>
Public Service Commission,	)	<b>BY MAIL</b>
Otter Tail Corporation,	)	
and	)	
Montana-Dakota Utilities Co.,	)	
	)	
Appellees	)	

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The undersigned hereby certifies that on the 16<sup>th</sup> day of January, 2009, the undersigned deposited in the United States Post Office at Cedar Rapids, Iowa, a true and correct copy of the following document(s) in the above-captioned action:

1. Brief on Behalf of Appellants Dakota Resource Council and Mark Trechock

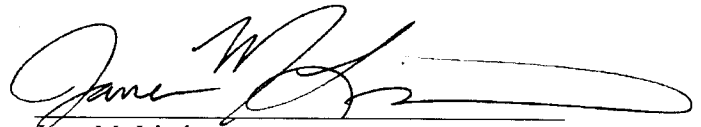
That a copy of the above document(s) was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

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