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February 12, 2009



**VIA OVERNIGHT FEDERAL EXPRESS DELIVERY**

Clerk of District Court
PO Box 1055
Bismarck, ND 58502

**Re: Dakota Resource Council v. Public Service Commission**
**Burleigh County Civil No. 08-08-C-02434/001**

To Clerk of District Court:

Enclosed for filing in the above matter please find the following:

1. Response Brief of Appellees Otter Tail Corporation and Montana-Dakota Utilities Co.; and

2. Affidavit of Service.

Should Judge Anderson wish to entertain oral argument from the parties, Appellees Otter Tail Corporation and Montana-Dakota Utilities Co. will of course make themselves available.

Please direct any questions to the undersigned. Thank you for your consideration.

Very truly yours,

Todd J. Guerrero

TJG/kas

c: Honorable Sonna Anderson (w/encl.)
Attached Service List (w/encl., by regular mail and email)

| STATE OF NORTH DAKOTA | IN DISTRICT COURT |
|---|---|
| COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT |

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| Dakota Resource Council and Mark Trechock,<br><br>Appellants,<br><br>v.<br><br>Public Service Commission, Otter Tail Corporation, and Montana-Dakota Utilities Co.,<br><br>Appellees. | Court File No. 08-08-C-02434/001<br><br>Agency Case Nos.<br>PU-06-481 and PU-06-482 |

# RESPONSE BRIEF OF APPELLEES

# OTTER TAIL CORPORATION AND MONTANA-DAKOTA UTILITIES CO.

**FEBRUARY 12, 2009**

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**



**STATE CASES**

**STATUTES**



**OTHER AUTHORITIES**

## INTRODUCTION

This case involves properly interpreting N.D.C.C. § 49-02-23. The Public Service Commission determined that the "environmental externalities" statute precluded consideration of Appellants' proffered speculation regarding the alleged costs of potential carbon dioxide ("$CO_2$") emissions regulation. It therefore properly completed its advance determination of prudence for Respondents' participation in the proposed Big Stone II power plant project without considering such quantitative evidence.

On appeal, Appellants ask this Court to give the environmental externalities statute a tortured construction that is irreconcilable with its plain meaning. They muster due process and separation of power arguments that fall far short. Last, they attack the sufficiency of the Commission's treatment of the evidence because the Commission failed to consider evidence it was statutorily prohibited from considering.

In short, the Commission did not err in declining, pursuant to N.D.C.C. § 49-02-23, to admit Appellants' proffered evidence of numerical costs or quantified values assigned to represent the alleged costs of future $CO_2$ regulation. The Commission's application of the statute violates neither the Appellants' due process rights, nor the separation of powers doctrine of the North Dakota or U.S. constitutions.

## STATEMENT OF THE ISSUES

In the planning, selection, or acquisition of a utility's investment in a proposed power plant project, which includes a determination of the prudence of the utility's selection and acquisition of that resource, N.D.C.C. § 49-02-23 prohibits the Commission from considering either (1) the environmental costs that are not internalized in the cost of production or the market price of electricity from a particular electric generation source, or (2) the alleged costs of future environmental laws or regulations that have not yet been enacted. Here, the Commission's

exclusion of portions of the testimony and exhibits of Appellants' expert regarding the possible costs required to comply with future regulation of greenhouse gas emissions complied with the substantive law, as well as the due process and separation of powers doctrines. Should this Court affirm the Commission's nondiscretionary exclusion of quantitative evidence Appellants proffered regarding the alleged costs of complying with future $CO_2$ emissions regulation?

## STATEMENT OF THE CASE

Appellees Otter Tail Corporation ("Otter Tail") and Montana-Dakota Utilities Co. ("MDU") are public utilities. Both utilities provide electricity to North Dakota consumers, the rates and service of which are regulated by the Commission. In November of 2006, Otter Tail and MDU, pursuant to N.D.C.C. § 49-05-16, filed applications with the Commission seeking advance determinations of prudence for their respective participation in the proposed Big Stone II power plant, a proposed, jointly owned,[1] 500 – 580 megawatt supercritical pulverized coal electric generation facility and associated high voltage transmission lines. The applications were consolidated in the interest of efficiency.

Under traditional rate-making principles, public utilities have historically been entitled to recover prudent investments only after they become "used and useful" in providing utility service to consumers. This *de facto* prudence review traditionally employed by public service commissions has always carried risk to the utility that after the investment was made, some or all of the investment could later be deemed imprudent, and therefore recovery on the investment, plus a reasonable return, denied. Considering the significant investment necessary for public utility service, states have sought ways to more appropriately minimize this risk.

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1 In addition to Otter Tail and MDU, participants in the project include Missouri River Energy Services, Sioux Falls, South Dakota; Heartland Consumers Power District, Madison, South Dakota; and Central Minnesota Municipal Power Agency, Blue Earth, Minnesota.

North Dakota's advance determination of prudence statute, N.D.C.C. § 49-05-16, is one such method. The law sets forth the statutory scheme by which public utilities may apply to the Commission for advance approval of a utility's proposed investment in public utility infrastructure, such as the proposed Big Stone II power plant and related transmission lines project at issue here. In relevant part, the statute provides:

> **49-05-16. Advance determination of prudence.** A public utility proposing to construct, lease, or make improvements to an energy conversion facility, ... transmission facility, ... for the purpose of ensuring reliable electric service to its customers may file an application with the commission for an advance determination of prudence regarding the proposal.
>
> 1. The Commission may issue an order approving the prudence of an electric resource addition if:
>
> a. The public utility files with its application a projection of costs to the date of the anticipated commercial operation of the electric resource addition;
>
> b. The commission provides notice and holds a hearing, if appropriate, in accordance with section 49-02-02; and
>
> c. The commission determines that the resource addition is reasonable and prudent.

Once the Commission determines the proposed resource addition is reasonable and prudent, as the Commission has determined here, public utilities will be entitled to recover the costs associated with the resource addition, provided, however, the expenditures are prudently incurred.

Over the course of approximately two years, Otter Tail and MDU pursued an advance determination of prudence with the Commission. In the course of those administrative proceedings, the Commission permitted Appellants Dakota Resource Council ("DRC") and DRC Staff Director Mark Trechock to intervene and be heard. This appeal centers around the Commission's treatment of evidence that Appellants attempted to introduce into the record. That evidence concerned Appellants' expert's forecast of the numerical cost of $CO_2$ emissions, on a

dollar-per-ton of $CO_2$ basis, resulting from not-yet-enacted regulation aimed at reducing greenhouse gas emissions.[2]

Otter Tail and MDU timely moved to exclude this evidence based on N.D.C.C. § 49-02-23, which imposes limitations on the type of information that the Commission may consider in the planning, selection, or acquisition of electric resources. Relying on this statute, the Commission, through its Hearing Examiner, granted Otter Tail and MDU's motion and excluded the evidence. Appellants were undeterred. Twice thereafter Appellants disregarded the Commission's ruling and proffered evidence of the forecasted cost of $CO_2$ emissions. The Commission again ruled the evidence inadmissible.

On August 27, 2008, the Commission granted Appellees Otter Tail's and MDU's applications by determining their participation and investment in the Big Stone II power plant and related transmission lines project was reasonable and prudent. This appeal follows.

## STANDARD OF REVIEW

The North Dakota Administrative Agencies Practice Act sets forth the applicable standards of review in an appeal of the Commission's decision to the district court. These standards, and the deference owed to the agency's decision making, "are anchored in the separation of powers doctrine." People to Save the Sheyenne River, Inc. v. N.D. Dept. of Health, 697 N.W.2d 319, 328 (N.D. 2005). Under N.D.C.C. § 28-32-46, the district court "*must affirm* the order of the agency" unless the agency's order "is not in accordance with the law" or "is in violation of the constitutional rights of the appellant." (Emphasis added.)

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2 At present, neither Congress nor the North Dakota Legislature has enacted any laws intended to specifically regulate either public or private companies' emissions of greenhouse gases, such as $CO_2$. Congress continues to debate many different proposals for regulating greenhouse gas emissions, including the timing and magnitude of emission reductions sought, the sectors of the economy covered, and the mechanisms employed to achieve the reductions.

## SUMMARY OF THE ARGUMENT

This Court must affirm the Commission's Order because the Commission was without discretion to consider the quantitative, forecasts of $CO_2$ emission regulation costs. The Commission correctly applied the plain language of Section 49-02-23, which expressly precludes the Commission from considering (1) environmental costs that are not internalized in the cost of production or the market price of electricity, or (2) the alleged costs of complying with future environmental laws or regulations that have not yet been enacted. Anticipated, but not-yet-internalized projected costs of greenhouse gas emissions regulation falls squarely within this prohibition. Indeed, this was the very type of information that the law was enacted to preclude.

The Commission's correct application of Section 49-02-23, and exclusion of Appellants' $CO_2$ cost forecasts from its advance determination of prudence analysis does not violate Appellants' due process rights. Appellants identify no recognizable property or liberty interest that they have been denied. In any event, the Commission afforded Appellants ample opportunity to be heard and present evidence at every stage of the Commission's proceedings.

Likewise, the Commission's interpretation and application of N.D.C.C. § 49-02-23 does not violate the separation of powers doctrine. The Judiciary's constitutional authority to promulgate procedural rules, including rules of evidence, extends only to the creation of rules governing the courts in civil and criminal actions. This authority does not extend to quasi-judicial administrative proceedings, which are strictly creatures of statute. Even if the Judiciary's procedural rulemaking authority did extend as far as Appellants contend, Section 49-02-23 would not unconstitutionally infringe on that authority. The statute is a valid and workable exercise of power, consistent with the North Dakota Supreme Court's interpretation of the scope of its authority, as expressed in caselaw and North Dakota Rule of Evidence 402.

Appellants' final argument regarding the sufficiency of the Commission's consideration of the evidence is not meaningfully distinguishable from its other arguments. In short, the Commission properly excluded Appellants' proffered evidence with respect to the alleged cost of potential future $CO_2$ regulation.

Because the Commission correctly interpreted N.D.C.C. § 49-02-23 in accordance with its unambiguous plain language, and because the Commission's decisions excluding the proffered evidence do not infringe upon the United States or North Dakota constitutions in any way, this Court should affirm the Commission.

## ARGUMENT

### I. THE COMMISSION DID NOT ERR IN DECLINING, PURSUANT TO N.D.C.C. § 49-02-23, TO ADMIT APPELLANTS' PROFFERED EVIDENCE OF NUMERICAL COSTS OR QUANTIFIED VALUES ASSIGNED TO REPRESENT THE COSTS OF FUTURE CARBON DIOXIDE REGULATION.

#### A. N.D.C.C. § 49-02-23 clearly and unambiguously forecloses the Commission from using, or allowing electric utilities to use, environmental externality values representing the alleged cost of future environmental laws or regulations pertaining to carbon dioxide in the planning, selection, or acquisition of electric resources.

The primary issue on appeal is whether the Commission correctly concluded that the North Dakota environmental externality statute, Section 49-02-23, prohibits it from considering quantitative evidence of the costs associated with future regulation of $CO_2$ emissions in the planning, selection, or acquisition of electric resources. The Commission's interpretation was correct. The Legislature enacted Section 49-02-23 to preclude the Commission from considering precisely this kind of evidence.

The plain text of Section 49-02-23 controls its meaning. The statute's plain language is of the utmost importance here, where no North Dakota appellate court has interpreted Section 49-02-23. Agencies and courts interpreting North Dakota statutes "look first to the language of the statute and give it its plain, ordinary, and commonly understood meaning." Hamich, Inc. v.

State By and Through Clayburgh, 564 N.W.2d 640, 644 (N.D. 1997); see N.D.C.C. § 1-02-02. "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05; Jones v. Pringle & Herigstad, P.C., 546 N.W.2d 837, 840 (N.D. 1996); see also, Public Service Commission v. Minnesota Grain, 756 N.W.2d 763 ("Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention appears."). Critically, extrinsic canons of construction, including the statute's purpose, spirit, legislative history, and consequences, may not be considered unless the statute is reasonably susceptible to more than one rational meaning. N.D.C.C. § 1-02-39; see Cass Water Res. Dist. v. Burlington N. R.R. Co., 527 N.W.2d 884, 888 (N.D. 1995). ("*Only* if the language of a statute is ambiguous will extrinsic aids be used to ascertain the statute's meaning.") (Emphasis added.) Tellingly, Appellants do not recognize these controlling standards, and their analysis fails to start where North Dakota law requires all statutory interpretation to begin -- with the words of the statute.

The text of Section 49-02-23 provides:

> 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.

An advance determination of prudence proceeding in which a utility is proposing to construct a power plant ("energy conversion facility") is a very important part of the planning, selection, or acquisition of an electric resource by a public utility. The Legislature did not leave the meaning of "environmental externality values" open for speculation. Section 49-02-23 goes on to define that category of excluded information:

> 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.

See N.D.C.C. § 1-02-03 (requiring words and phrases to be construed as defined by statute).

The text of Section 49-02-23 makes clear that it does not preclude the Commission from considering all types of environmental externality evidence in the planning, selection, or acquisition of electric resources or the setting of electric rates. Rather, the scope of the statute's rule is limited to "numerical" or "quanti[tative]" environmental "costs" that are either not internalized in the market price of electric service, or the alleged costs of future, not-yet-enacted environmental laws or regulations.

Appellants' principal argument is that the quantitative environmental costs that the Commission excluded do not constitute "environmental externality values" as defined by Section 49-02-23, and thus should have been considered by the Commission in considering whether the Big Stone II power plant is a prudent resource selection for MDU and Otter Tail. Importantly, there is no dispute in this appeal over the proper characterization of the evidence that the Commission declined to consider. Appellants' evidence does not consist of, nor do they argue it consists of, existing, quantitative prices that are already internalized in the cost of production or the market price of electricity from a particular electric resource. Rather, by Appellants own characterization, the excluded evidence at issue is of quantitative, forecasted, potential environmental costs that may (or may not) one day be associated with the operation of the Big Stone II power plant. (Appellants' Br. at 10, 13, 17.)

Appellants do not hide the fact that all of the evidence disallowed by the Commission included anticipated regulatory costs associated with $CO_2$ emissions. Appellants nonetheless assert that the anticipated costs of complying with "*not yet promulgated*" federal $CO_2$ regulations are not "environmental externality values" under Section 49-02-23 (Appellants' Br. at 13). That statute, however, expressly defines environmental externality values to include the costs of

complying with "laws or regulations that have not yet been enacted." The evidence Appellants argue that the Commission improperly declined to consider could hardly correspond more precisely to the statute's description of the evidence that the Commission may not consider.

Appellants illogically maintain that the Environmental Protection Agency's ("EPA") mere "commence[ment]" of rulemaking proceedings on $CO_2$ regulation makes $CO_2$ mitigation a "requirement of federal law." (Id.) As a factual matter, the EPA has only issued an Advance Notice of Proposed Rulemaking,[3] which merely elicits information to assist it in evaluating potential action under the federal Clean Air Act. The EPA's posture is evaluative. Appellants cite no legal authority for the proposition that the EPA enacts binding, effective, federal regulatory requirements by merely considering or commencing rulemaking proceedings on a subject. Contrary to Appellants' argument, the text of definition 2 in Section 49-02-23 makes clear that the alleged costs of complying with future, not-yet-promulgated EPA $CO_2$ emission regulations are precisely the type of forecasted environmental regulatory costs that the Legislature precluded the Commission from considering in evaluating a utility's selection and acquisition of future electric generation resources.

The Commission correctly excluded Appellants' quantitative evidence of $CO_2$ emissions costs that might result from future, not-yet-enacted $CO_2$ emissions regulations. To warrant the Commission's consideration under the plain terms of Section 49-02-23, environmental costs must be internalized in the cost of production or the market price of electricity from a particular electric resource. But *anticipated* costs of $CO_2$ emissions are, by definition, not yet internalized in existing market prices. *Anticipated* $CO_2$ emissions costs are costs that may at some future time be reflected and accounted for in the costs of production or electricity market prices; they

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3 EPA-HQ-OAR-2008-0318, July 11, 2008; http://www.epa.gov/climatechange/emissions/downloads;ANPRPreamble.pdf

are not realized costs. Appellants implicitly recognize so much by characterizing the costs of $CO_2$ emissions as costs that "are *reasonably likely to be internalized*" by the time of construction, and as costs that "Big Stone II *will have to internalize*" by the time the facility becomes operational. (Appellants' Br. at 10, 14.) Even assuming Appellants were able to predict the future with respect to a politically controversial regulatory issue, the excluded evidence nonetheless falls clearly within the statutory exclusion of Section 49-02-23.

Nowhere does the statute's text give the Commission the authority to predict which quantitative environmental costs will be internalized years in the future. To the contrary, the statute draws a bright line and expressly circumscribes the Commission's utilization of such speculative information.

Ultimately, Appellants' argument fails because no market participant pays for not-yet-existing environmental costs that Appellants merely anticipate to be accounted for in future market prices. The Commission properly excluded Appellants' evidence of quantitative costs resulting from not-yet-enacted $CO_2$ emissions regulations, because that evidence falls squarely within the ambit of the statute's preclusion. This Court should therefore affirm the Commission's interpretation and application of the environmental externality statute on the basis of its plain and unambiguous language.

### B. N.D.C.C. § 49-05-16 and § 49-02-23 are reconcilable, and Appellants have not overcome the presumption against statutory repeal by implication.

Again relying on extrinsic aids that go beyond the unambiguous text of the Section 49-02-23, Appellants contend that the statute, enacted in 1995, must be construed in light of the advance determination of prudence statute, enacted in 2005. According to Appellants, because the Commission considered estimated costs of construction, fuel forecasts, and other estimated costs in making its advance determination of prudence under Section 49-05-16, Section 49-02-23

should be construed to permit the consideration of speculative costs associated with future $CO_2$ emission regulation.

In effect, Appellants' argument is that the North Dakota Legislature effectively amended or repealed the environmental externality statute by passing the advance determination of prudence statute. But the Legislature is properly presumed to pass all laws with knowledge of existing statutes — a presumption that is particularly appropriate here, where the two statutes are part of the same administrative regulatory scheme. Theraldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39, 45 (N.D. 1974). Amendments and repeals by implication are disfavored under North Dakota law; there is a presumption that the Legislature does not intend to amend or repeal a statute without expressly stating so. Brist v. Sanstead, 493 N.W.2d 690, 695 (N.D. 1992); Theraldson, 225 N.W.2d at 45. This presumption may only be overcome by demonstrating that there is an irreconcilable conflict between the two statutes. Id.

Appellants' contention that the nature of forecasting internalized economic costs and forecasting regulatory, not-yet-enacted, compliance costs of $CO_2$ emissions are no different, even if true, is immaterial. There is no conflict between the two statutes, Section 49-02-23 and Section 49-05-16, both of which may be given full effect simultaneously. The advance determination of prudence statute nowhere expressly amends or repeals the environmental externality statute.

The plain language of Section 49-02-23 does not preclude all forward-looking, quantitative considerations. Rather, that statute selects a narrow category of quantitative externalized costs and prevents the Commission's consideration of those costs. The plain text makes clear that in the Legislature's judgment there is a meaningful distinction between forecasting quantitative, externalized, future, environmental costs, such as the cost of future $CO_2$ regulation, versus the forecasting of information which the Commission has traditionally

employed in the selection of future electric resources, and in setting rates for service. The Appellants' alleged unjustified inconsistency must be raised with the Legislature, not the Court. There is no conflict between the two statutes, both of which can be simultaneously given full effect.

## II. THE COMMISSION'S INTERPRETATION AND APPLICATION OF N.D.C.C. § 49-02-23 VIOLATES NEITHER THE APPELLANTS' DUE PROCESS RIGHTS NOR THE SEPARATION OF POWERS DOCTRINE OF THE UNITED STATES OR NORTH DAKOTA CONSTITUTIONS.

### A. The Commission's interpretation and application of N.D.C.C. § 49-02-23 does not violate the Appellants' due process rights.

Appellants assert that the Commission's decision to exclude evidence of the reasonably anticipated costs of $CO_2$ emissions under Section 49-02-23 violates their due process rights.[4] This assertion also lacks merit.

Courts consider two questions in resolving a due process claim: "whether a constitutionally protected property or liberty interest is at stake and, if so, whether minimum procedural due process requirements were met." Ennis v. Williams County Bd. of Comm'rs, 493 N.W.2d 675, 678 (N.D. 1992). "If no constitutionally protected interest is involved, the due process requirements do not apply." Id.

Protected property interests are created and their scope is defined "by existing rules or understanding that stem from an independent source, such as state law." Rudnick v. City of Jamestown, 463 N.W.2d 632, 638 (N.D. 1990). Property interests are not created by the Constitution. Id. Likewise, cognizable liberty interests for procedural due process purposes must be derived from one of two sources: the substantive component of the Due Process Clause

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4 Although Appellants cite to the procedural due-process provisions of both the North Dakota and United States Constitutions, Appellants cite only to U.S. Supreme Court decisions and make no argument that the substantive content of the state and federal guarantees are different here. Accordingly, Otter Tail and MDU adopt the same approach to their analysis of Appellants' due process argument.

or state law. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989). No liberty interest is created and at issue "unless the state statute or regulation involved uses mandatory language and imposes substantive limits on the discretion of state officials." Snodgrass v. Robinson, 512 F.3d 999, 1003 (8th Cir. 2008).

Appellants claim that they have a protected "private interest" in "ensuring the provision of reliable electricity in a manner that is cost-effective and that adequately protects the financial interests of electric ratepayers." (Appellants' Br. at 20.) But Appellants do nothing to demonstrate that this purported right is a protected liberty or property interest for procedural due process purposes. Nor could they; the responsibility of "ensuring" consumers' protection is vested in the Legislature and derivatively in the Commission. Appellants' claimed right to "ensure" the cost-effective provision of electric service is shorthand for the right to its favored result. But Appellants have no such right. Walters v. Nat'l Assoc. of Radiation Survivors, 473 U.S. 305, 321 (1985) ("[T]he right to procedural due process is absolute in the sense that it does not depend upon the merits of a claimants' substantive assertions.") Appellants also have no constitutional right to present evidence regarding the alleged costs of complying with future greenhouse gas regulation.

Even assuming *arguendo*, however, that Appellants have a recognizable due process interest, Appellants were afforded due process throughout. Consistent with the hallmark of procedural due process, Appellants have been provided the opportunity to meaningfully participate and be heard in the Big Stone II advance determination of prudence proceedings at every stage. Appellants intervened at the earliest stage of these administrative proceedings, just months after Otter Tail and MDU filed their applications. They filed voluminous direct testimony, cross-examined Appellees' witnesses, filed briefs, and otherwise fully participated in the Commission hearings. Appellants were allowed to present all evidence permitted under

North Dakota law. Indeed, the Commission considered all but select offending portions of the Appellants' evidence, including significant amounts of qualitative evidence relating to potential $CO_2$ regulation.

Finally, insofar as it is even necessary to reach the Matthews v. Eldridge procedural due process balancing test, the balancing of private and public interests here clearly weighs in favor of the government interest. 424 U.S. 319, 335 (1976). The Legislature's consumer protection interest in preventing the selection of higher cost alternative electric generation resources based on the cost of speculative future environmental regulation is substantial. And the risk of erroneous deprivation of any protected private interest that Appellants do have is minimal considering the narrow quantitative exclusion effected by the environmental externality statute.

### B. The Commission's interpretation and application of N.D.C.C. § 49-02-23 does not violate the separation of powers doctrine of the U.S. or North Dakota Constitutions.

Appellants argue that by passing the Section 49-02-23, the Legislature has unconstitutionally intruded into the Judiciary's constitutional authority to promulgate rules of procedure. Appellants' argument fails, however, because the Judiciary's constitutional sphere of authority over the enactment of rules of procedure applies only to the courts. Even if the Judiciary's constitutional authority extended to the making of rules of procedure and evidence for administrative proceedings, however, Section 49-02-23 does not unconstitutionally infringe on that authority as interpreted by the North Dakota Supreme Court.

#### *1. The North Dakota Judiciary's Constitutional Authority to Promulgate Rules of Procedure, Including Rules of Evidence, Extends Only to the Promulgation of Such Rules for the Courts in Civil and Criminal Actions.*

Consistent with their construction of the environmental externality statute, in making their separation of powers argument, Appellants ignore the text of the controlling legal authority on which they rely. Article VI, section 3 of the North Dakota Constitution vests the North

Dakota Supreme Court with the "authority to promulgate rules of procedure, including appellate procedure, to be followed by all the *courts* of this state." (Emphasis added.)

The North Dakota Legislature codified this constitutional grant of authority in two statutes. N.D.C.C. § 27-02-08 provides:

> The supreme court of this state may make all rules of pleading, practice, and procedure which it may deem necessary for:
>
> 1. The administration of justice *in all civil and criminal actions*, remedies, and proceedings in any and all *courts* of this state; and
>
> 2. The method of taking, hearing, and deciding appeals to the courts from all decisions of public officers, boards, commissions, departments, and institutions exercising quasi-judicial functions, in any case in which an appeal from any such decision is allowed by law.

(Emphasis added.) Likewise, N.D.C.C. § 27-02-09, states that

> [a]ll statutes relating to pleadings, practice, and procedure *in civil or criminal actions*, remedies, or proceedings, enacted by the legislative assembly, have force and effect *only as rules of court* and remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court.

(Emphasis added.)

All three of the foregoing legal authorities limit the Judiciary's constitutional authority to procedural rules applied by the "courts" in "civil or criminal actions." Nowhere does Article VI, section 3 or the two statutes codifying that clause purport to extend the Judiciary's procedural rulemaking authority to the administrative agency context. In fact, N.D.C.C. § 27-02-08, part 2, expressly includes the quasi-judicial decision-making context as one for which the Supreme Court may make rules governing the method of taking, hearing, and deciding appeals. This express inclusion of appeals from quasi-judicial proceedings in the same statute that defines the scope of the Judiciary's procedural rulemaking authority and omits its extension to quasi-judicial proceedings themselves makes clear that the Judiciary's procedural rulemaking authority is limited to civil or criminal actions in court. Ernst v. Burdick, 687 N.W.2d 473, 478 (N.D. 2004) (recognizing and applying the *expressio unius* intrinsic canon of construction).

Furthermore, in the very case relied on by Appellants, the North Dakota Supreme Court recognized the limit of its own constitutional rulemaking authority: "[t]his court is constitutionally authorized to promulgate *rules of procedure to be followed by all courts* of this state." City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992) (emphasis added). Appellants cite no legal authority for the proposition that the Judiciary has constitutional authority to promulgate rules of procedure for Legislatively created administrative proceedings. In fact, any such argument creates separation of powers problems of its own, leading to a scenario in which the Judiciary interprets its constitutional authority beyond its proper scope and thereby infringes on the Legislature's scope of authority.

The Commission's advance determination of prudence proceedings are not court or judicial proceedings. The Commission "has only such powers . . . as have been conferred upon it by the Legislature." Williams v. Montana-Dakota Utils. Co., 79 N.W.2d 508, 517 (N.D. 1956). The Legislature establishes the procedural structure of agency proceedings. See N.D.C.C. § 28-32-24 (making the North Dakota Rules of Evidence generally applicable in administrative adjudicative proceedings). Because the Judiciary's constitutional authority to promulgate rules of procedure does not extend to rules that govern administrative agency proceedings, and because the environmental externality statute sets forth a rule that applies exclusively to the Commission's proceedings, that statute does not infringe on the Judiciary's sphere of constitutional authority. Appellants' separation of powers argument is without merit.

2. *Even if the Judiciary's Procedural Rulemaking Authority Extended to the Commission's Quasi-Judicial Administrative Proceedings, the Environmental Externality Statute Does Not Impermissibly Infringe on That Constitutional Authority.*

Even if the Judiciary's procedural rulemaking authority were implicated by the Commission's administrative decision-making, the environmental externality statute would not infringe on that Judicial authority. First, North Dakota Rule of Evidence 402, which was

promulgated *by the Judiciary*, expressly contemplates the North Dakota Legislature's modification of the relevance standards: "[a]ll relevant evidence is admissible, *except as otherwise provided . . . by statutes of North Dakota* . . . . Evidence which is not relevant is not admissible." (Emphsasis added.) On this basis alone, the environmental externality statute's codification of what is relevant evidence in the context of electric resource selection and acquisition proceedings is a constitutional exercise of power, fully consistent with the Judiciary's procedural rulemaking power. "[Rule 402] specifically says that even relevant evidence may be made inadmissible by the Legislature." Ruether, 490 N.W.2d at 484.

The environmental externality statute is also fully consistent with the North Dakota courts' interpretation of the scope of its constitutional procedural rulemaking authority. There is no clear divide under North Dakota law between procedural rules constitutionally left to the Judiciary and rules properly enacted by the Legislature. Rejecting a black-and-white distinction, the North Dakota Supreme Court observed that its "possess[ion of] the rulemaking power does not imply that [it] will never recognize a statutory rule." Id. at 483 (internal quotation omitted). Rather, North Dakota courts recognize "statutory arrangements which seem reasonable and workable and which supplement the rules [it] has promulgated." Id. Only where the statutory rule "tends to engulf a general rule of admissibility" will the statutory rule be declared unconstitutional. Id.

Here, Appellants' contention that the environmental externality statute engulfs basic North Dakota rules of relevancy is a fallacy. The statute does no such thing and is reasonable and workable. If Appellants' position were correct, no statute imposing any type of evidentiary limitation would ever be constitutional because any such statute would always improperly conflict with basic relevancy rules. Categorical exclusionary rules of the most minimal nature

would be held unconstitutional. But such a result is not consistent with Rule 402 or North Dakota caselaw.

The Legislature has the power to make substantive law. If the Legislature passes a law that precludes certain kinds of evidence from being considered, that is not an infringement on the Judiciary's rulemaking authority. It merely defines the playing field upon which those rules will be applied. Here, the Legislature's enactment of Section 49-02-23 removes certain evidence from the scope of relevance considerations as a matter of substantive law.

The North Dakota Supreme Court's decision in Ruether makes this clear. There, the North Dakota Supreme Court considered the constitutionality of a statute that precludes the use of roadside alcohol-screening test results for any evidentiary purpose other than evaluating probable cause to arrest. 490 N.W.2d at 484. As Appellants argue here, in Ruether, the appellant argued that the exclusionary statute unconstitutionally infringed on the Judiciary's authority to promulgate rules of procedure, and specifically conflicted with North Dakota Rules of Evidence 401 and 402, which make all relevant evidence admissible evidence. The North Dakota Supreme Court expressly rejected the appellant's separation of powers challenge to the statute, relying in particular on the text of Rule 402, which contemplates the Legislature's reasonable modification of the general rules of relevancy. On the same basis, the environmental externality statute was clearly a constitutional exercise of power. Accordingly, Appellant's separation of powers argument is without merit.

## III. THE COMMISSION PROPERLY ADMITTED ONLY EVIDENCE NORTH DAKOTA LAW DOES NOT FORECLOSE THE COMMISSION FROM CONSIDERING, AND PROPERLY DID NOT ADMIT PROFFERED EVIDENCE N.D.C.C § 49-02-23 FORECLOSES THE COMMISSION FROM ADMITTING.

Appellants' final argument that the Commission's order approving Appellees' investment in Big Stone II, subject to certain conditions, does not sufficiently address their evidence because the Commission declined to consider the reasonably anticipated costs of $CO_2$ emission regulation

is simply a reiteration of its prior argument that the Commission incorrectly interpreted the environmental externality statute. But as discussed above, the Commission properly interpreted and applied the plain, unambiguous language of Section 49-02-23. Because the Commission properly excluded evidence relating to the quantitative cost of future regulation of $CO_2$ emissions, the Commission sufficiently addressed all of Appellants' evidence that it was permitted to consider.

## CONCLUSION

In the advance determination of prudence proceeding regarding Appellees MDU's and Otter Tail's participation in the Big Stone II energy conversion facility, Appellants sought to have admitted into the record evidence regarding the alleged numerical cost associated with potential but not yet enacted $CO_2$ emissions regulations. Section 49-02-23 of the North Dakota Century Code bars from Commission consideration in the planning, selection, and acquisition of electric resources and the setting of rates (1) environmental costs 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 not yet enacted. Because Appellants' proffered evidence falls squarely into both categories of the statute, the Commission rightly excluded from the record the proffered evidence.

The Commission's correct interpretation and application of Section 49-02-23 violates neither Appellants' due process rights nor the separation of powers doctrine.

Because the Commission properly applied the unambiguous plain language of Section 49-02-23, this Court should affirm the Commission's advance determination of prudence for both MDU's and Otter Tail's participation in the Big Stone II power plant and transmission project.

Dated: February 12, 2009

Respectfully submitted,

**Montana-Dakota Utilities Co.**

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**STATE OF NORTH DAKOTA**
**COUNTY OF BURLEIGH**

**IN DISCTICT COURT**
**SOUTH CENTRAL JUDICIAL DISTRICT**

| | |
|---|---|
| Dakota Resource Council and Mark Trechock, Appellants | Civil No. 08-08-C-02434/0001 |
| | Agency Case Nos. PU-06-481 and PU-06-482 |
| vs. | |
| Public Service Commission, Otter Tail Corporation, and Montana-Dakota Utilities Co., Appellees | **AFFIDAVIT OF SERVICE** |

Kristen Swenson, of Minneapolis Minnesota, Hennepin County being sworn, says that on February 12, 2009, a copy of the following documents:

1. Response Brief of Appellees Otter Tail Corporation and Montana-Dakota Utilities Co.; and

2. Affidavit of Service

have been served upon the Clerk of District Court via Federal Express and the attached service list via United States Mail.

Kristen Swenson

Subscribed and sworn to before me
this 12th day of February, 2009.

Notary Public

TINA M. PRUITT
Notary Public
Minnesota
My Commission Expires January 31, 2010

Doc# 2863031\1

Civil No. 08-08-C-02434/0001
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**In the Matter of Dakota Resource Council and Mark Trechock v. Public Service Commission, Otter Tail Corporation, and Montana-Dakota Utilities Co.**

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