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April 20, 2007

Attorney Illona Jeffcoat-Sacco  
Executive Secretary  
North Dakota Public Service Commission  
Bismarck, ND 58505

Re Advance Determination of Prudence PU 06-481 PU 06-482

Dear Ms. Jeffcoat-Sacco,

Intervenors submit a supplemental memorandum in opposition to Motion in Limine to Exclude Testimony under NDCC 49-02-23.

The original and copies were filed on April 16, 2007. This supplemental corrects typographical errors and adds a separation of powers argument.

A copy of the supplemental memorandum is forwarded as a digital document to Attorney Dan Kuntz, Attorney Bruce Gerhardson and Attorney Al Wahl, Administrative Law Judge this 20<sup>th</sup> day of April 2007.

Bruce Gerhardson  
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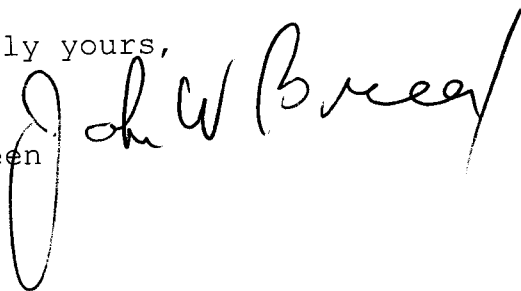
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Please acknowledge receipt.

Very truly yours,

Jack Breen

A handwritten signature in black ink, appearing to read "John W. Breen". The signature is written in a cursive style with a large, looping initial "J".

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Otter Tail Corporation  
Advance Determination of Prudence  
Application

MEMORANDUM IN  
OPPOSITION TO  
MOTION IN LIMINE TO  
EXCLUDE TESTIMONY

Montana-Dakota Utilities Co.,  
a Division Of MDU Resources Group,  
Inc.

Advance Determination of Prudence  
Application

Case No PU-06-481  
Case No PU 06-482

INTERVENORS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION  
TO MOTION IN LIMINE TO EXCLUDE TESTIMONY UNDER  
NDCC 49-02-23.

SUMMARY OF ARGUMENT

The Public Service Commission should deny the relief requested in the Motion in Limine filed by Otter Tail Power ("OTP") and Montana Dakota Utilities ("MDU") (together "Applicants") on the following grounds:

1. The environmental externalities statute at NDCC 49-02-23 does not apply to Advance Determination of Prudence proceedings under NDCC 49-05-16;
2. Costs related to CO<sub>2</sub> regulation are no longer externalities but a pollutant, regulated by the EPA under the Clean Air Act, subsequent to a recent U.S. Supreme Court ruling; and

**3. NDCC 49-02-23 must be stricken upon judicial review. Accordingly evidence relating to environmental externalities must be admitted to prevent a reversal for error of the PSC's eventual ruling in this prudence proceeding.**

The PSC will further the stated goals of the North Dakota legislature and the interests of all North Dakota citizens in reaching this determination of the two statutes at issue.

Intervenors submit the following:

1. NDCC 49-02-23 applies only to proceedings that existed at the time of its enactment and does not apply to an Advance Determination of Prudence proceeding under NDCC 49-05-16, a separate proceeding created by the Legislature ten years after enactment of NDCC 49-02-23.
2. Even if NDCC 49-02-23 did apply to Advance Determination of Prudence proceedings, the U.S. Supreme Court has declared CO<sub>2</sub> a pollutant and ordered its regulation by U.S. E.P.A. under the Clean Air Act. Massachusetts v. EPA, No 05-1120 (published April 2, 2007). Because the U.S. Supreme Court has classified CO<sub>2</sub> as a regulated pollutant, CO<sub>2</sub> no longer constitutes an environmental externality under the definition created by NDCC 49-02-23(2) ("The alleged costs of complying with future environmental laws or regulations that have not yet been enacted") and the associated costs of regulation must be considered by the PSC.
3. NDCC 49-02-23, the Environmental Externalities statute, must be stricken upon judicial review for the reasons stated below. Therefore evidence in support of an externality theory must be preserved in the evidentiary record and considered by the PSC to avoid reversal of agency decisions upon judicial review.

A prompt decision on Applicants' motion and this responsive brief will assist the parties and the panel by resolving pending discovery objections and trial issues.

## **Discussion of Legislative History**

To assist the panel and all counsel in the matter copies of the legislative history of 49-02-23 and 49-05-16 are attached.

The U.S. Supreme Court has repeatedly explained that the canon of statutory interpretation is triggered only by uncertain statutory text, e. g., Garcia v. United States, 469 U. S. 70, 74-75 (1984); Gooch v. United States, 297 U. S. 124, 128 (1936), and that it can be overcome by, inter alia, contrary legislative history, e. g., Watt v. Western Nuclear, Inc., 462 U. S. 36, 44, n. 5 (1983).

The Motion in Limine argues that a 1995 statute (NDCC 49-02-23) should be applied to proceedings conducted pursuant to a 2005 statute (NDCC 49-05-16) that makes no reference to incorporating the requirements of the older statute. In such a situation the legislative history provides insight into proper interpretation of the statute.

### **The Partnership**

The legislative history of NDCC 49-02-23 reminds the reader that North Dakota has a special relationship with the lignite coal industry. The North Dakota government website describes the partnership between the North Dakota Industrial Commission and the Lignite Research Council. The Legislature enacts legislation and appropriates funding for the program. The Lignite Research Council recommends policies for the funding of projects to the Industrial Commission, which approves policies and funding for projects. The web page describing the partnership is attached with the exhibits. The governor, attorney general and the agriculture commissioner of North Dakota are the three members of the Industrial Commission. An example of the Industrial Commission's work is found in a document available at the Lignite Energy Council Website. The Industrial Council authorized the expenditure of \$250,000 in state monies in 1995-96 to support lobbying and legal effort of the Lignite Energy Council in defeating the effort of Minnesota to apply externality costs on carbon to

North Dakota Lignite Coal. (Document is attached to this memorandum and is available on the Lignite Energy Council Website.)

The Legislature has repeatedly taken measures intended to protect the lignite industry from competition and from costs imposed by other states' regulation. The statutes at issue in this Motion in Limine, however, came about for unrelated reasons and have very different effects on the North Dakota lignite industry.

The Environmental Externalities statute was intended to protect the lignite industry from internalizing the cost of CO<sub>2</sub> emissions. The Advance Determination of Prudence statute was not intended to protect the lignite industry, but to ease access to financing and lower the cost of capital for utilities, regardless of their source of power or whether there was any discernible benefit to North Dakota.

Taken in this light, the Motion in Limine raises simple questions of what the Legislature truly intended to achieve in enacting these two separate statutes 10 years apart. The legislative history plainly shows that the Advance Determination of Prudence statute privileges North Dakota projects (not just lignite projects) by assigning them a presumption of prudence. The Legislature discussed allowing the proceeding only to North Dakota projects, but decided to allow it for any project that would provide power in North Dakota. At no point in the legislative history of NDCC 49-05-16 is there any discussion of the cost of CO<sub>2</sub> emissions, environmental externalities, or even of the lignite industry.

#### **NDCC 49-02-23 Environmental Externalities**

According to the testimony filed in support of HB 1312, this statute was proposed by members of the lignite industry in response to Minnesota legislation assigning a value to carbon emissions. Mr. John Dwyer of the Lignite Energy Council says as much:

**[T]his statute is brought to protect North Dakota Lignite Coal from adverse effects of a decision of the MNPUC assigning an interim value to carbon dioxide of \$5.99 to \$13.60 per ton for coal fired plants.**

Dwyer 1/16/95 testimony ("Dwyer") at 2. Minnesota requires these values to be used in evaluating the selection of resource options in generating electricity. Dwyer 2. Mr. Dwyer continues

**Carbon dioxide emissions which occur when you burn any fossil fuel ... [The emissions] are not controlled because they are not classified as a pollutant.... Each ton of lignite generates about 1.4 tons of CO<sub>2</sub> carbon when burned.**

Dwyer at 2,3.

See also **Dwyer Exhibits 1, "Comparison of Lignite Energy & Wind Energy Without Externality Cost" and 2, "Comparison of Lignite Energy & Wind Energy With CO<sub>2</sub> Externality Cost", concluding that "with externalities, lignite loses."**

The legislative history and Mr. Dwyer's testimony reveal that the Legislature, in enacting NDCC 49-02-23,

A. protected a North Dakota industry in competition across state lines and

B. protected a North Dakota Industry with an alternative source of power, wind generated electricity.

The Legislature's explicit intent, fervently supported by Mr. Dwyer and the Lignite Energy Council, was to protect lignite from the competition created by another state's decision to attach a cost to CO<sub>2</sub> emissions. The language of the statute reflects this plain intent:

**49-02-23. Consideration of environmental externality values prohibited.**

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. 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.

The language of NDCC 49-02-23 that Applicants would have the PSC apply in this Prudence proceeding is the reference to "planning, selection, or acquisition of electric resources".

The most basic rule of statutory construction is that courts and agencies should look at a statute's plain language. This rule raises the question of how the PSC should read NDCC 49-02-23, which bars consideration of externalities. Yet the 1995-1996 legislature could not have contemplated the Advance Determination of Prudence proceeding, which would not come into existence for another ten years.

Another accepted principle of statutory construction is that an ambiguous statute should be construed in light of the statutory purpose. See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431-432 (1984); see also United States v. Bacto-Unidisk, 394 U.S. 784, 799 (1969) ("[W]here the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose'") (quoting SEC v. Ralston Purina Co., 346 U.S. 119, 124-125 (1953)).

The Legislature that passed NDCC 49-02-23 could not have contemplated the Advance Determination of Prudence procedure that another Legislature would create a decade later. The later Legislature (2005) does not reference NDCC 49-02-23 in enacting the Advance Determination of Prudence statute. The PSC must therefore attempt to ascertain the Legislature's purpose in enacting both statutes.

Nothing in the legislative history suggests that NDCC 49-02-23 anticipated or was intended to apply to NDCC 49-05-16, the Advance Determination of Prudence statute, which came into existence 10 years later for reasons unrelated to the enactment of NDCC 49-02-23.

Intervenors shall demonstrate, the Advance Determination of Prudence legislation had an entirely different goal, one that would be undermined - perhaps to the detriment of the lignite industry - if NDCC 49-02-23 were applied to this proceeding.

## **NDCC 49-05-16 Advance Determination of Prudence**

This statute was introduced to the Legislature as HB 1324, a measure intended to provide greater economic certainty to investors in new energy generation facilities. The Advance Determination of Prudence gives investors reassurance that energy generation projects, once financed and built, will be approved by the PSC and allowed to recoup their costs via commercial sales.

The legislative history of NDCC 49-05-16 is critical to determining whether or not the Environmental Externalities statute should apply in such a proceeding. The Lignite Energy Council was silent on the question. MDU, which offered testimony, made no reference to environmental externalities, but instead focused on separating the Advance Determination of Prudence proceeding from ratemaking.

**HB 1324**, an alternative draft of the present statute, entitled **Advance Determination of Prudence and Ratemaking Principles**, was rejected by the legislature. The adopted present NDCC 49-05-16 makes no reference to the rate making and rate determination powers of the PSC.

There was a deliberate effort on the part of the Legislature to create a separate and new procedure in response to utility concerns about increased costs related to uncertainty in the PSC approval process.

**In his testimony, Dan Kuntz, Attorney for MDU, opposed combining the prudence proceeding with the ratemaking proceeding. Kuntz 4-12-05 Testimony on HB 1324 ("Kuntz Testimony") at pp. 2, 3.**

The legislature accepted Mr. Kuntz's testimony and removed any requirement for a utility to file a ratemaking request with the Advance Determination of Prudence Application. The Lignite Energy Council expressed no concern with the language of NDCC 49-05-16, which neither incorporates NDCC 49-02-23 by reference nor creates language of its own regarding PSC consideration of environmental externalities in Advance Determination of Prudence.

The utility industry had an opportunity in direct testimony to the Legislature to request that HB 1324 incorporate the

Environmental Externalities statute, or include its own language about consideration of environmental externalities or the cost of anticipated regulation. MDU's Attorney explicitly requested that the Legislature make the Advance Determination of Prudence a new and separate proceeding, unrelated to ratemaking.

It is only just that the PSC should hold MDU to the bargain it made and rule NDCC 49-02-23 applies only to ratemaking proceedings, which it references explicitly, and that 49-02-23 does not apply to an Advance Determination of Prudence.

### **ARGUMENT**

**1. NDCC 49-02-23 does not apply to an Advance Determination of Prudence proceeding under 49-05-16. NDCC 49-02-23 explicitly references ratemaking cases and determinations.**

It could not have encompassed an Advance Determination of Prudence because that procedure did not exist when NDCC 49-02-23 was enacted. The legislative history of 49-02-23 shows plainly that the statute was intended to apply to the type of comprehensive ratemaking proceeding that existed when 49-02-23 was enacted, in which lignite would be at a disadvantage if forced to internalize its environmental externalities.

The Legislature intended to create a separate proceeding independent of the ratemaking and rate determining authority of the PSC to determine prudence. There was every opportunity in 2005 for the Legislature to extend the reach of NDCC 49-02-23 to include Advanced Determination of Prudence proceedings. The Legislature did not do so, and in spite of ample opportunity, neither the utilities nor the lignite industry offered any objection.

**The PSC does not have the authority to do what the legislature did not do, simply because it has received this Motion in Limine.**

2. The U.S. Supreme Court has declared CO<sub>2</sub> a pollutant and ordered its regulation by U.S. E.P.A. under the Clean Air Act. Massachusetts v. EPA, No 05-1120 (published April 2, 2007). Because the U.S. Supreme Court has classified CO<sub>2</sub> as a regulated pollutant, it no longer constitutes an environmental externality under the definition created by NDCC 49-02-23(2): "The alleged costs of complying with future environmental laws or regulations that have not yet been enacted." The classification of CO<sub>2</sub> as a regulated pollutant means that the PSC is no longer barred from considering the anticipated cost of carbon regulation, which will have a reasonably predictable effect on consumers, an effect on which Interveners wish to offer testimony.

**3. Ultimately, upon judicial review, the Environmental Externalities statute must be stricken for the following reasons:**

NDCC 49-02-23 violates the separation of powers of the North Dakota Constitution when it enacts 49-02-23 which establishes a rule of evidence to exclude evidence in a judicial and/or administrative proceeding.

NDCC 49-02-23 denies Interveners their constitutional right to access to the court "for any injury done [Interveners] in [their] lands, goods, person or reputation" for which Interveners have a right to "remedy by due process of law, and right and justice administered without sale, denial or delay." ND Constitution, Art. 1, Sec. 9. The PSC acts in this proceeding as the trier of fact and law, and if NDCC 49-02-23 is applied, Interveners will be denied constitutional rights of access to have their case fully heard.

NDCC 49-02-23 denies Interveners the right to present evidence of harm caused by applicants' proposal and by so doing denies interveners due process of law under the state and federal constitution. ND Const. Art. 1, Sec. 9; U.S. Const., 5<sup>th</sup> and 14<sup>th</sup> Amendments.

NDCC 49-02-23 denies Interveners the opportunity to present evidence that alternative energy produced by wind will

produce lower rates once the cost of mitigation of carbon dioxide are included in the rate determination process.

NDCC 49-02-23 further sponsors the continued growth of coal-fired power generation without carbon management at the expense of the development of carbon free electrical generation sources such as wind, which has created significant economic growth in neighboring states with policies more friendly to wind development.

NDCC 49-02-23 interferes inappropriately, harmfully, and beyond the authority of the State of North Dakota in the prudent planning of publicly and privately held corporations, cooperatives, and municipalities for the reasonably predictable future costs of carbon regulation, which will be passed on to shareholders and consumers who shall suffer economic damages thereby.

NDCC 49-02-23 violates the Full Faith and Credit and Commerce clauses of the U.S. Constitution by barring certain activities by corporations registered in other states and bound by laws requiring consideration of environmental externalities, and by usurping Congressional authority to regulate commerce among the states. U.S. Const. Art. IV Sec. I; Art. I, Sec. 8.

The canon of Constitutional avoidance holds that when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909).

For all of these reasons, an appropriate and lawful standard of review requires the PSC to hear testimony regarding the cost of carbon regulation, now ordered by the U.S. Supreme Court, prior to ruling on the prudence of Applicants' proposed investment.

### **CONCRETE EXAMPLES OF TESTIMONY PROFFERED**

These abstract arguments become clear when applied to the type of evidence interveners seek to present.

As an example, I refer you to testimony of Sandy Tabor, General Counsel to Lignite Energy Counsel before the State Senate in opposition to SCR 4033.

**SCR 4033 sought a study to make recommendations to the legislature on a combination of federal and state financial incentives of millions of dollars to enable Lignite Coal to mitigate carbon dioxide.** Documents are attached.

Sandy Tabor's testimony announced to the legislature corporate resolutions approved by Lignite Energy on Global warming.

**The Lignite Energy Council supports energy policies that encourage cost-effective Global greenhouse gas emission reductions rather than regional or national mandates**

**The Lignite Energy Council supports public and private investment in research and development on greenhouse gas emission reduction research technologies.**

Sandy Tabor's testimony continues to describe the research efforts of Lignite energy including carbon sequestration projects which pipe and sell carbon dioxide to Canadian energy companies.

As an example, I refer you to facts discussed in an article in the Bismarck Tribune, "Carbon Managed Future" published April 15, 2007. The article describes a working carbon sequestration project by the Dakota Gasification Company in Mercer County ND, in which carbon dioxide is sequestered, piped and sold to Canadian energy companies. This article confirms that **this carbon sequestration project is now a \$10,000,000,00 annual sales opportunity.** Such streams of income, if captured, can positively effect ratepayers.

All the parties, attorneys, and panel members in this matter, the General Counsel of Lignite Energy Counsel, members of the legislature and the readers of the Bismarck Tribune know about global warming, carbon dioxide, and carbon mitigation costs. Yet applicants, MDU and OTP, will have us pretend in a prudence hearing that none of this evidence exists and that none of it could reasonably effect the ratepayer and interveners.

MDU and OTP prefer that such testimony be kept in the public forum only, in the Bismarck Tribune or before the

legislature, but not in the hearing room record.

### Conclusion

**The PSC has authority it can exercise to hear the testimony on carbon mitigation and costs and the alternative remedies available to the Big Stone II project and how they effect North Dakota Ratepayers.**

Why would North Dakota accept less than is available in North Dakota, from a South Dakota power plant, burning Wyoming coal, who wants to sell its power here?

Granting this Motion in Limine would harm North Dakota ratepayers for the benefit of an out-of-state power plant burning out-of-state coal. There is neither a legal nor a policy reason to exclude Interveners' proffered testimony. The ultimate prudence decision will remain with the PSC, so Applicants will not be harmed by denial of the Motion in Limine.

Accordingly the motion to exclude testimony concerning carbon regulation costs in a Prudence hearing should be denied.

Submitted April 20, 2007

Interveners

Mark Trechock and

Dakota Resource Council

By



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