



100 1st Street SW, Suite 201
Cedar Rapids, Iowa 52404

RECEIVED

SEP 29 2008

PUBLIC SERVICE COMMISSION

Sender's Telephone: (319) 362-2120
Sender's E-mail: claseur@plainsjustice.org

September 26, 2008

VIA HAND DELIVERY

Burleigh County Clerk of Court
PO Box 1055
Bismarck, ND 58502-1055

**RE: Dakota Resource Council and Mark Trechock, Appellants
vs.
Public Service Commission, Otter Tail Corporation and Montana-Dakota
Utilities, Co., Appellees
(Agency Case Nos. PU-06-481 and PU-06-482)**

To the Burleigh County Clerk of Court:

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

1. Notice of Appeal and Specifications of Error
2. Certificate of Service

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

Very truly yours,

Carrie L. La Seur

Enclosures

Copies to: Service List

345 PU-06-482 Filed: 9/29/2008 Pages: 10
**APPEAL - Notice of Appeal and Specifications of
Error**

Intervenors

Plains Justice Carrie La Seur

340 PU-06-481 Filed: 9/29/2008 Pages: 10
**APPEAL - Notice of Appeal and Specifications of
Error**

Intervenors

Plains Justice Carrie La Seur

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council)	
and	)	Civil No. <u>8-C-2434</u>
Mark Trechock,)	
	)	Agency Case Nos.
Appellants	)	PU-06-481 and PU-06-482
)	
vs.)	
	)	NOTICE OF APPEAL AND
Public Service Commission,	)	SPECIFICATIONS OF ERROR
Otter Tail Corporation,)	
and)	
Montana-Dakota Utilities Co.,)	
)	
Appellees)	

**TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION,
OTTER TAIL CORPORATION, AND
MONTANA-DAKOTA UTILITIES CO.**

PLEASE TAKE NOTICE that the Appellants Dakota Resource Council and Mark Trechock ("Appellants"), pursuant to N.D.C.C. §§ 28-32-42 and 49-05-12, hereby give notice of appeal from an agency determination of the North Dakota Public Service Commission ("PSC"), and in support thereof state:

1. The agency determination appealed from is the PSC's Findings of Fact, Conclusions of Law, and Order ("Order") issued August 27, 2008 in the matter of Otter Tail Corporation, Advance Determination of Prudence Application (PU-06-481) and Montana-Dakota Utilities Co., Advance Determination of Prudence Application (PU-06-482). Pursuant to this Order, the PSC issued to Applicants Otter Tail Corporation ("Otter Tail") and Montana-Dakota Utilities Co. ("MDU") an Advance Determination

SEP 26 2008

Ck. of Crt. Burleigh Co.

of Prudence for Applicants' ownership in the proposed Big Stone II electric generating facility and associated electric transmission resource additions.

2. The Appellants were Intervenor in the above-referenced proceedings before the PSC.
3. The Appellee PSC is a state administrative agency. The Appellees Otter Tail and MDU were Applicants in the above-referenced proceedings before the PSC.
4. This Court has jurisdiction over this matter pursuant to N.D.C.C. §§ 28-32-42(1) and 49-05-12.
5. Venue in this matter properly lies with this Court pursuant to N.D.C.C. § 28-32-42(3)(a), which provides that an appeal of an agency determination may be taken to the district court designated by law, and if none is designated, then to the district court of the county in which the hearing or a part thereof was held. No other district court is designated by law for this appeal, and hearings in this matter were held in the PSC hearing room at the State Capitol, Bismarck, Burleigh County, North Dakota.

Specifications of Error

6. The PSC Order is not in accordance with the law. N.D.C.C. § 28-32-46(1).
 - a. The PSC Order does not properly interpret and apply N.D.C.C. § 49-02-03 (the "environmental externalities statute"), which provides that:

The [Public Service] 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.

- b. Advance Determination of Prudence proceedings are governed by N.D.C.C. § 49-05-16. The plain statutory purpose of N.D.C.C. § 49-05-16 is to provide advance regulatory approval for the reasonably anticipated costs of constructing, leasing or improving energy generation and transmission facilities. The PSC improperly interpreted and applied the environmental externalities statute to exclude relevant evidence of the reasonably anticipated costs of carbon dioxide (CO₂) emissions from the proposed Big Stone II generating facility. Advance Determination of Prudence proceedings were not contemplated at the time the environmental externalities statute was drafted and enacted into law, and N.D.C.C. § 49-05-16 makes no reference to environmental externalities. 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 and excludes relevant evidence of reasonably anticipated costs.
- c. Costs related to CO₂ emissions from the proposed Big Stone II generating facility are not “externalities” pursuant to N.D.C.C. § 49-02-23. The U.S. Supreme Court has declared that CO₂ is a pollutant under the federal Clean Air Act and has ordered the U.S. Environmental Protection Agency to regulate CO₂ emissions. *Massachusetts v. EPA*, 549 U.S. 497 (2007). As such, the costs related to CO₂ emissions from a proposed electric generating facility cannot reasonably be classified as either “costs that are not internalized in the cost of production” or “alleged costs of complying with future environmental laws.” Any new generating facility can reasonably be

anticipated to incur actual costs related to CO₂ emissions, pursuant to a federal statute now in force, and there is a reasonable basis for estimating those costs. The PSC improperly applied the environmental externalities statute to classify the costs of CO₂ emissions as an “externality” and to reject evidence of what those costs are reasonably anticipated to be, after the U.S. Supreme Court has explicitly stated that the regulation and mitigation of CO₂ emissions are requirements of federal law.

7. As interpreted and applied in the PSC Order, the environmental externalities statute in N.D.C.C. § 49-02-23 violates the constitutional rights of Appellants. N.D.C.C. § 28-32-46(2).
 - a. The PSC Order interprets and applies the environmental externalities statute in a way that violates the due process rights of Appellants pursuant to Article 1, Section 9 of the North Dakota Constitution and the 5th and 14th Amendments to the United States Constitution. Appellants were prevented from presenting and the PSC was prevented from considering relevant evidence of the reasonably anticipated costs of CO₂ emissions from the proposed Big Stone II facility. Under the PSC interpretation of the environmental externalities statute, neither utilities nor administrative agencies are permitted to plan for or consider the reasonably anticipated costs of CO₂ emissions and to select the truly least-cost electric resource options. As a result, more cost-effective carbon-neutral options, including renewable electric resources, energy efficiency and demand side management, are improperly disadvantaged, and

electric ratepayers are unfairly harmed in the form of higher electric rates, without any available redress in the administrative process.

- b. The PSC Order interprets and applies the environmental externalities statute in a way that violates the separation of powers among the branches of state government and improperly interferes with the right of Appellants to offer relevant and otherwise admissible evidence in a contested administrative proceeding. The PSC, an administrative agency within the executive branch, has clear authority to conduct contested Advance Determination of Prudence proceedings pursuant to N.D.C.C. § 49-05-16. PSC hearings are conducted pursuant to the North Dakota Rules of Evidence and the North Dakota Rules of Civil Procedure, which are established by the North Dakota Supreme Court. Under the PSC interpretation of the environmental externalities statute, the legislature has fundamentally subverted the Rules of Evidence and prohibited the PSC from considering evidence that is relevant and otherwise admissible in an Advance Determination of Prudence proceeding. As a result, the PSC is prevented from examining all reasonably anticipated costs of proposed electric generation resources, and thereby is prevented from carrying out its statutory obligations under N.D.C.C. § 49-05-16. The Legislature does not have the right to effectively repeal the Rules of Evidence for a vital category of evidence in contested proceedings before the PSC, and thereby undermine the ability of Appellants and other parties to present relevant evidence in support of their position.

8. The findings of fact in the PSC Order do not sufficiently address the evidence presented to the agency by the Appellants. N.D.C.C. § 28-32-46(7).
- a. The PSC improperly excluded from consideration expert testimony and exhibits offered by Appellants at hearing and failed to properly account for this evidence in the findings of fact and conclusions of law contained in the PSC Order.
 - b. Applicants Otter Tail and MDU filed a number of pleadings seeking to exclude, on the basis of the environmental externalities statute, expert testimony and exhibits offered by Appellants. These pleadings include: a Motion in Limine filed April 10, 2007, a Motion to Strike filed June 11, 2007, and a Motion to Strike filed April 15, 2008. As a result of these motions, Appellants were precluded from presenting and the PSC was precluded from considering relevant expert testimony and exhibits that demonstrated the reasonably anticipated costs of CO₂ emissions from the proposed Big Stone II electric generating facility.¹
 - c. Because this evidence was excluded and not properly considered by the PSC, the Order did not properly address the reasonably anticipated cost impacts of CO₂ emissions from the proposed Big Stone II facility, and the PSC therefore failed to consider all relevant evidence in its finding that the proposed Big Stone II facility is reasonable and prudent for North Dakota electric ratepayers.

¹ Appellants did make an offer of proof of all expert testimony and exhibits regarding the reasonably anticipated costs of CO₂ emissions from Big Stone II, including those portions of testimony and exhibits that ultimately were not admitted as evidence or considered by the PSC in its final Order.

The Appellants therefore request that the Court:

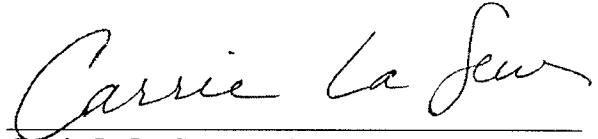
- (1) review the agency determination pursuant to the specifications of error enumerated above;
- (2) strike the environmental externalities statute at N.D.C.C. § 49-02-23 as contrary to the North Dakota Constitution and the United States Constitution;
- (3) reverse and vacate the PSC's August 27, 2008 Findings of Fact, Conclusions of Law, and Order;
- (4) remand the case to the PSC with instructions to correct the errors specified herein;
and
- (5) grant such other and further relief as the Court may deem just and equitable, including the assessment of costs and fees in this matter to the PSC.

Dated this 26th day of September, 2008.

Respectfully submitted,

PLAINS JUSTICE

By:



Carrie L. La Seur IA Bar No. 18855

(admitted *pro hac vice*)

100 1st Street SW, Suite 201

Cedar Rapids, IA 52404

Phone: (319) 362-2120

Facsimile: (866) 484-2373

E-mail: claseur@plainsjustice.org

SARAH VOGEL LAW FIRM, PC

By:



Derrick L. Braaten ND ID 06394

222 N 4th Street

Bismarck, ND 58501

Phone: (701) 221-2911

Facsimile: (701) 221-5842

E-mail: derrick@svogellaw.com

ATTORNEYS FOR APPELLANTS

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council)	
and)	
Mark Trechock,	)	Civil No. <u>8-C-2434</u>
)	
Appellants	)	Agency Case Nos.
	)	PU-06-481 and PU-06-482
vs.)	
	)	CERTIFICATE OF SERVICE
Public Service Commission,	)	BY MAIL
Otter Tail Corporation,)	
and)	
Montana-Dakota Utilities Co.,)	
)	
Appellees)	

The undersigned hereby certifies that on the 26th day of September, 2008, 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. Notice of Appeal and Specifications of Error

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

Todd J. Guerrero
 Lindquist and Vennum, P.L.L.P.
 4200 IDS Center
 80 South 8th Street
 Minneapolis, MN 55402

Hlona Jeffcoat-Saeco
 Public Service Commission
 600 E Boulevard Avenue
 Department 408
 Bismarck, ND 58505

Mark Bring
 Associate General Counsel
 Otter Tail Corporation
 215 South Cascade Street
 Fergus Falls, MN 56537

Wayne Stenehjem
 Attorney General
 600 E Boulevard Avenue
 Department 125
 Bismarck, ND 58505

Daniel S. Kuntz
 Associate General Counsel
 MDU Resource Group, Inc.
 PO Box 5650
 Bismarck, ND 58506-5650

Carrie La Seur

Carrie L. La Seur
 Plains Justice
 100 1st Street SW, Suite 201
 Cedar Rapids, IA 52404
 (319) 362-2120

RECEIVED & FILED
 SEP 26 2008
 Clk. of Crt. Burleigh Co.