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

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

APPELLEE

NORTH DAKOTA PUBLIC SERVICE COMMISSION

RESPONSE BRIEF

TABLE OF CONTENTS

Statement of the Case

This is an appeal of a decision of the North Dakota Public Service Commission granting the applications of two investor owned utilities for advance determinations of prudence for their planned construction and operation of a coal-fired electric generating plant at Big Stone, South Dakota. Applications for advance determinations of prudence were filed in November, 2006 by Montana-Dakota Utilities Co. (MDU) and Otter Tail Corporation (Otter Tail). In June 2008 the Public Service Commission (commission) issued its Finding of Fact, Conclusions of Law and Order granting the applications. The Intervenors, Dakota Resource Council and Mark Trechock, appealed. The basis for the appeal is the exclusion of certain evidence due to the existence of a statute prohibiting the commission from considering that evidence.

Statement of Facts and Background

MDU and Otter Tail are both investor owned utilities providing electric service to North Dakota ratepayers. As such, each company can recover from its ratepayers amounts prudently invested to provide service to its customers. N.D.C.C. § 49-06-02 provides that "The value of the property of a public utility, as determined by the commission for ratemaking purposes, is the money honestly and prudently invested therein by the utility." N.D.C.C. § 49-06-01 provides that "The commission, for the purpose of ascertaining just and reasonable rates and charges of public utilities . . . shall investigate and determine the value of the property of every public utility . . . used and useful for the service and convenience of the public." In the normal course of business, the commission will address the question of whether a utility's capital

investment is 'prudent' when that investment is 'used and useful.' For generation plant, that would normally be when the plant is producing electricity.

In the instant case, the utilities asked the commission to address the question of whether their investment in a proposed generating plant is prudent early on, during the planning stages, and well before the plant is built, let alone producing electricity. Their request was made under a statute enacted in 2005 covering advance determinations of prudence, but utilities have always had the option of requesting early prudence determinations, indeed, even early rate decisions from the commission. Under the law, the commission has great latitude and discretion to determine whether any particular investment is reasonable and prudent.

Each company asked the commission for an advance determination of prudence for their planned Big Stone II coal-fired generating station under N.D.C.C. § 49-05-16. The statute provides:

> A public utility proposing to construct, lease, or make improvements to an energy conversion facility, renewable energy facility, transmission facility, or proposed energy purchase contract from another entity or person 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. The commission may order that expenses associated with investigating the application made by the public utility for prudence of a resource addition be paid by the public utility in accordance with section 49-02-02.
>
> 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. For facilities located or to be located in this state the commission, in determining whether the resource addition is reasonable and prudent, shall consider

the benefits of having the energy conversion facility, renewable energy facility, transmission facility, or facility generating the energy to be purchased located in this state.

2. The commission order must be rendered no later than seven months after the public utility files its application requesting a prudence determination of an electric resource addition.
3. A resource addition approved by the commission is subject to annual reporting requirements until commercial operation of the resource addition.
4. The commission's order determining prudence of the resource adjustment is binding for ratemaking purposes.
5. If at any time following an initial commission order, the commission, following a subsequent hearing, determines that continuation of a project is no longer prudent or that its prior order should be modified, the public utility may recover in its rates, and in a timely manner consistent with the public utility's financial obligations, the amounts the public utility already has expensed, incurred, or obligated on a project, including interest expense and a return on equity invested in the project up to the time the new order is entered even though the project may never be fully operational or used by the public utility to serve its customers.
6. There is a rebuttable presumption that an energy conversion facility, renewable energy facility, transmission facility, or facility generating the energy to be purchased which is located in the state is prudent.

To help the commission determine if the planned facility is reasonable and prudent, the parties filed 1479 pages of testimony and exhibits and the commission held seven days of hearings, resulting in 1765 pages of transcript. Excluded from the evidence on which the commission based its decision was certain testimony of the Appellants, specifically the Appellants' projected cost of possible future carbon dioxide regulation. The exclusion of this testimony was based on a ratemaking prohibition in N.D.C.C. § 49-02-23, which 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. 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.

Standard of Review

The standard of review to be applied by the court is set out in the Administrative Agencies Practice Act, N.D.C.C. Chapter 28-32. Appellants base their appeal on subsections (1), (2) and (7) of N.D.C.C. § 28-32-46, which provide that the commission's decision must be affirmed unless the court finds:

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.

Summary of Argument

The heart of this appeal is a simple matter of statutory application. Appellants argue that the commission misapplied the externality law and by so doing, erroneously disallowed their evidence on the possible costs of potential future carbon dioxide regulation, and in the process, denied the appellants due process of law and encroached on the province of the judiciary, all of which undermines the integrity of the commission's decision. We respectfully disagree. The commission did not misapply the externality law and the evidence in question was properly excluded. No constitutional rights have been violated and no constitutional protections have been denied. The commission's decision is in accordance with law and solidly founded on the record.

Argument

I. The commission's decision is in accordance with the law.

There is no basis to find that the commission's decision was not in accordance with law. The statute in question is clear and free of ambiguity. It was properly applied by the commission. The limitation in the externalities law affecting the admissibility of evidence is not inconsistent with the advance determination of prudence law and is not repealed or amended by implication due to enactment of that law.

A. *The externalities law was properly applied.*

This appeal is not about statutory interpretation. The externality law, especially subsection 2 at issue here, is so clear that no interpretation is necessary. This appeal is about how a clear and unambiguous statute was applied by the commission. Appellants argue it was applied erroneously. We respectfully disagree.

Appellants provide substantial information on the legislative history behind the enactment of the externality law and the current status of potential federal carbon dioxide regulation to justify their position. None of that information is relevant to the issue at hand.

Under North Dakota law, there are certain permissible extrinsic aids to statutory construction. These include the objective of the law, the circumstances of enactment, the legislative history, and the possible consequences. However, these considerations apply only when a court must interpret ambiguous statues. N.D.C.C. § 1-02-39. Here, there is no need to interpret the statute because N.D.C.C. § 49-02-23 is not ambiguous.

Ambiguous means "capable of being understood in two or more possible senses or ways." *Merriam-Webster Online Dictionary,* 2009, Merriam-Webster Online, 9 February 2009 http://www.merriam-webster.com/dictionary/ambiguous. How is the phrase "alleged costs of complying with future environmental laws or regulations that have not yet been enacted" capable of being understood in more than one sense? It is not. The statute is clear and easily applied. Yet, it is evidence of such alleged costs of future, not yet enacted, carbon regulations that Appellants hoped to enter into the record. They hoped to enter into the record precisely what the statute prohibits.

All of Appellants' arguments in support of their theory that the commission misapplied the externality law depend on first finding that the statute is ambiguous. Appellants ignore this threshold question. Instead of addressing the question of whether the statute is ambiguous, Appellants urge the court to rely on information and inference outside the plain language of the statute. They depend on extrinsic information to justify their assertion that the prohibition in the externalities law should not have applied to them, but they make no showing that the statute, in the first instance, is ambiguous. We submit it is not ambiguous in any way. When a statute is not ambiguous, it's clear language is not to be disregarded. N.D.C.C. § 1-02-05; *District One Republican Committee v. District One Democrat Committee,* 466 N.W.2d 820 (N.D. 1991).

Appellants further argue that reasonably anticipated environmental regulation costs are not "externalities" as that term is commonly understood. One need not look to a common or customary definition of "externalities," because there is a specific definition in law. Under N.D.C.C. § 1-02-02, statutory language is to be understood in

its common or ordinary sense, *unless* it is defined in the law, and then the definition in the law controls. In this case, "externalities" is defined in N.D.C.C. § 49-02-23 to mean both "numerical costs or quantified values that are assigned to represent" what we do commonly think of as environmental externalities, *and* "numerical costs or quantified values that are assigned to represent [t]he alleged costs of complying with future environmental laws or regulations that have not yet been enacted." N.D.C.C. § 49-02-23.

Appellants argue much about the legislative history behind the enactment of N.D.C.C. § 49-02-23 and what they claim was the intended 'target' of the externalities law. Again, legislative history and any perceived 'target' are irrelevant to this appeal. The law is clear, not ambiguous, and the legislative intent is to be determined from the plain language of the law. N.D.C.C. § 1-02-05; *District One Republican Committee v. District One Democrat Committee,* 466 N.W.2d 820 (N.D. 1991).

Similarly, the Appellants ask the court to consider the imminent likelihood of federal carbon regulation and its resulting costs as a rationale for negating the clear meaning of the statute. Such judicial license is inappropriate. Neither the court nor the commission may legislate by adding to or limiting what the clear language of the statue provides. *Haggard v. Meier,* 368 N.W.2d 539 (N.D.1985).

B. *The externalities law is not amended or repealed by implication.*

Appellants argue that the later enacted advance determination of prudence law (N.D.C.C. § 49-05-16) amends the externalities law (N.D.C.C. § 49-02-23) by implication. Again, this argument is without merit. If two statutes conflict, the law

requires they be construed to give effect to both, unless the conflict is irreconcilable. In that instance, the more specific law prevails over the more general law. N.D.C.C. § 1-02-07; *Birst v. Sanstead,* 493 N.W.2d 690 (N.D. 1992); *Tharaldson v. Unsatisfied Judgment Fund,* 225 N.W.2d 39 (N.D. 1974).

Here, the two laws are not inconsistent or conflicting. However, even if one could find a conflict between the externalities law and the advance determination of prudence law (and we are not admitting one can), the two must be construed to give effect to both, and if that is not possible, the special prevails over the general. N.D.C.C. § 1-02-07. In either situation, the externalities provisions would still apply, either because the statutes are construed to give effect to both provisions, or because the externalities law is the more specific of the two statutes.

Under any analysis, then, the plain language of the externalities law still applies. That language is not inconsistent with the advance determination of prudence law. Even if the court finds some inconsistency, the inconsistency is not so great that two laws are irreconcilable and consequently they must be construed so both have effect. And, even if an irreconcilable conflict is found (although we do not concede there is one), the externalities law is the more specific of the two, and so it would prevail.

Further, in construing statutes, there is a presumption against a court finding that a statutory provision is amended or repealed by implication due to the later enactment of another law, because there is a presumption that when the later statute was enacted, the legislature had knowledge of the existence of the earlier statute. *Birst v. Sanstead,* 493 N.W.2d 690 (N.D. 1992); *Tharaldson v. Unsatisfied Judgment Fund,* 225 N.W.2d 39 (N.D. 1974). To overcome the presumption against an implied repeal or amendment, a

court must find an irreconcilable conflict between the two statutes. *Birst*; *Tharaldson.* No such irreconcilable conflict exists in the instant case. The externalities law and the advance determination of prudence law are easily reconcilable and not conflicting, as the commission's decision in the instant case shows. Both Statutes can easily and comfortably be given effect.

In *Tharaldson*, the North Dakota Supreme Court stated "Implied amendments and implied repeals are not favored. . . . The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the [s]ubsequent act are so inconsistent with the provisions of the prior law that they cannot stand together." *Tharaldson*, at 45 (citation omitted). In *Birst,* the North Dakota Supreme Court noted that in addition to the presumptions against implied revisions, North Dakota law imposes a directive on the court to "harmonize different statutes...and give them full effect." *Birst,* at 695 (citation omitted).

No reading of the two statutes in question here would indicate that the two are so inconsistent that they cannot coexist. They can easily be harmonized and given full effect. The presumptions against implied amendments and the statutory requirement to harmonize statutes apply here and support the commission's application of the externalities law to the evidence in question.

One additional assertion of the Appellants on this issue should be addressed here. Appellants argue that the externalities law and the advance determination of prudence law cannot coexist because the concept of an advance determination of prudence (codified in 2005) did not exist when the externalities law was enacted in 1995. This is not only irrelevant to the analysis, but also simply not true. In fact, the

commission has always had the discretion under N.D.C.C. Title 49 to consider any type of rate or rate-related request or application filed by a regulated utility at any time. Authority for the commission to act on an early request for a prudence determination does not depend on the enactment of N.D.C.C. § 49-05-16. *See generally* N.D.C.C. chapters 49-02 (general powers), 49-04 (duties of utilities), 49-05 (regulatory procedure) and 49-06 (utility property valuation).

II. The commission's decision does not violate Appellants' constitutional rights.

The commission's application of the externalities statute did not deny Appellants due process of law or violate the Separation of Powers Doctrine.

A. *Appellants were not denied due process.*

Appellants assert that they were denied due process of law because their proposed evidence was excluded from the record on which the commission could base its decision. Appellants apply a three-part balancing test to support their denial of due process claim. They first assert they have a private interest in demonstrating why a coal-fired generation plant may eventually be harmful to ratepayers. Next, they assert the risk of error is high because the Commission refused to consider the actual cost of carbon emissions. Finally they assert there is no commission interest in excluding the evidence at issue here.

As with their earlier allegations, Appellants have ignored the threshold issue that must be addressed before any due process balancing test is applied. Appellants' assert that they have a constitutionally protected right to present evidence regarding reliable,

cost effective electric service. They make no showing that their interest in presenting evidence is a constitutionally protected right to which due process requirements attach. Before the three-part balancing test can be applied, there must exist a constitutionally protected right to which due process applies. *Ennis v. Williams County Board of Commissioners,* 493 N.W.2d 675, 678 (N.D. 1992). Appellants have made no showing that they have such a right.

It is the commission's statutory responsibility to fairly balance the interests of ratepayers and the utility, and ensure safe, reliable service at just and reasonable rates (*See, generally* N.D.C.C. Chapters 49-02, 49-04, 49-05 and 49-06). Since this is the commission's statutory responsibility, any party to a commission proceeding has the opportunity to present evidence that will help the commission reach its decision. That opportunity was not denied the Appellants. In fact, both the Appellants/Intervenors and the Appellees/Applicants had that opportunity in this proceeding, and both were limited to evidence that did not include "numerical costs or quantified values that are assigned to represent . . . [t]he alleged costs of complying with future environmental laws or regulations that have not yet been enacted." (N.D.C.C. § 49-02-23). Even if it could be argued that Appellants have a constitutionally protected right, they were afforded due process, including adequate notice and a fair hearing.

Appellants devote considerable argument to their assertions that the externalities law interferes with the utilities' resource planning processes. Again, the resource planning process is only one tool that utilities and the commission use to arrive at decisions about how to provide safe, reliable service at just and reasonable rates. The limitation in the externalities law simply imposes one condition on that process and how

it is used. The integrity of the process is not harmed by this condition because the numerical costs and quantified values excluded by the externalities law are, by definition, only numbers arrived at by conjecture. The resource planning process can and does include legitimate projections and forecasts for usage, prices and costs that are not subject to the limitations of N.D.C.C. § 49-02-23.

The Appellants also argue that the commission does not have an interest in excluding possible future carbon regulation costs because that the commission's own decision indicates that it understands the importance of potential carbon regulation. This argument is self-defeating. The commission order in this case does recognize the potential for future carbon regulation (findings of fact 85-90) and the commission has never asserted otherwise. The evidence was excluded because the commission had no discretion under the law to do otherwise.

B. *The externalities law does not interfere with the authority of the judiciary to promulgate rules of evidence.*

Appellants argue that N.D.C.C. § 49-02-23, by imposing a rule regarding admissibility of evidence, constitutes an improper intrusion by the legislature into the province of the judiciary. This argument is without merit.

The commission acknowledges that it is the responsibility of the judiciary to promulgate rules applicable to judicial proceedings and the judiciary has done so. N.D. Const. Art. VI, § 3; N.D.C.C. § 27-02-08. Some of these rules are, by statute, applicable to administrative agencies. *See e.g.* N.D.C.C. §§ 28-32-21(1)(h) and 28-32-21(3)(b). N.D.C.C. § 28-32-24 specifically makes the North Dakota Rules of Evidence applicable to proceedings before administrative agencies. That section even

emphasizes the applicability of certain specific evidence rules to agency proceedings. These include the rules on admissibility in N.D.C.C. § 28-32-24(1) and privileges in N.D.C.C. § 28-32-24(4). It is clear from the Administrative Agencies Practice Act that the legislative scheme for administrative proceedings contemplates that both procedural rules promulgated by the judiciary and statutory provisions will apply to administrative proceedings.

Appellants claim that the constitutional separation of powers is violated if any relevant evidence is excluded due to the applicability of the externalities law. This argument ignores the fact that the evidence rules themselves provide that otherwise admissible evidence can be excluded if another provision of law or constitution so requires. N.D.R.Ev. 402 provides:

> 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.

The rules themselves, the law governing practice before an administrative agency, and North Dakota case law all contemplate that statutory provisions can affect the admissibility of otherwise relevant evidence. *Falcon v. Williams County Social Services Board,* 430 N.W.2d 569 (N.D. 1988). The judiciary recognizes a role for the legislature in supplementing procedural rules. Quoting the Arizona Supreme Court, the North Dakota Supreme Court stated it "will recognize statutory arrangements which seem reasonable and workable . . . ." *Fargo v. Ruether,* 490 N.W.2d 481, 483 (citations omitted); *State v. Vetsch*, 368 N.W.2d 547, 552 (citations omitted). Only when the

statutory rule conflicts with procedural rules promulgated by the judiciary , or the statutory rule engulfs those rules, will the Court intervene. *Fargo; Vetch.* When the rules and law are compatible and not conflicting, the procedural rules and statutory supplement will both apply. This is precisely the situation in the instant case.

The externalities law is a statute that, among other things, supplements the rules of evidence. The existing externalities law does not conflict with the rules or evidence and does not engulf those rules. The externalities law is simply a policy statement of the legislature defining certain parameters for regulated utilities and the commission in certain limited situations. The externalities law's applicability to the instant case does not constitute a violation of the Separation of Powers Doctrine or infringe upon the domain of the judiciary. Legislative actions are presumed constitutional. *Tharaldson v. Unsatisfied Judgment Fund,* 225 N.W.2d 39 (N.D. 1974).

III The commission's decision sufficiently addresses the evidence.

The commission properly applied a valid statute to exclude the evidence in question. In so doing, the commission action violated no law or constitutional provision and denied no constitutional rights. Consequently, the commission's decision in this case sufficiently addressed the evidence and N.D.C.C. 28-32-46 (7) provides no basis for the court to overturn that decision.

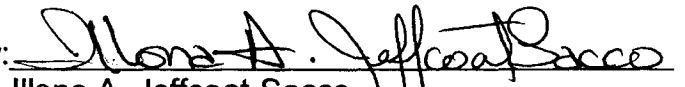
Conclusion

The commission's decision is in accordance with the law. The externalities law was properly applied and no part of it is amended or repealed by implication. The commission's decision does not violate Appellants' constitutional rights. Appellants

were not denied due process and the externalities law does not interfere with the authority of the judiciary to promulgate rules of evidence. Since the Commission properly applied the externalities law and violated no provision of law or constitution, the commission's decision must be affirmed.

Dated: February 13, 2009

Respectfully submitted:

By: 

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John G. Hamre deposes and says that:
he is over the age of 18 years and not a party to this action and on the **13th** day of **February, 2009**, he deposited in the United States Mail, Bismarck, North Dakota, **5** envelopes by regular mail, with postage fully prepaid, securely sealed and each containing a photocopy of:

Appellee North Dakota Public Service Commission Response Brief.

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Subscribed and sworn to before me
this **13th day of February, 2009.**

Notary Public

SHELLY A BAUSKE
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My Commission Expires July 22, 2010