STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF BURLEIGH — SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-08-C-2434

Dakota Resource Council and Mark Trechock

Appellants,

vs.

Public Service Commission, Otter Tail Corporation, and Montana-Dakota Utilities Co.,

Appellees.

ORDER

N.D.C.C. §49-05-16 provides an avenue for a public utility company which proposes to invest significant capital for certain energy related purposes to file an application with the Public Service Commission (Commission) for an advance determination of prudence. The parties present information to the Commission regarding their present and future needs for energy, the anticipated costs, together with benefits and concerns involving the investments. The Commission considers all of the information presented and makes a determination on the prudence of the investment. If the Commission issues an order determining that the expenditure is prudent, the utility company is assured that it will be able to recoup the costs of the investment through future rates to consumers.

In November of 2006, Otter Tail Corporation (Otter Tail) and Montana-Dakota Utilities Co. (MDU) applied to the Commission for advance determinations of prudence for their planned construction and operation of a coal-fired electric generating plant at Big Stone, South Dakota, (Big Stone II).

The Dakota Resource Council and Mark Trechock (together referred to as DRC) intervened. DRC presented evidence on behalf of the individual ratepayers of North Dakota. DRC opposed the determination of prudence, arguing that the expenditure for Big Stone II was not the most prudent use of capital investment and that the Commission should look at other forms of renewable energy.

The Commission held a hearing that spanned seven days and generated a voluminous record. DRC participated fully during the hearing and briefing process, presenting evidence and argument to the Commission. DRC attempted to introduce evidence of the anticipated and projected cost of complying with future carbon dioxide emission regulations. The commission determined that the evidence regarding carbon dioxide emissions is an environmental externality value under N.D.C.C. § 49-02-23 and therefore, such evidence was inadmissible at the hearing and could not be considered by the Commission.

Commission's Findings of Fact

At the close of the hearing and after considering the evidence actually presented, the Commission issued its Finding of Fact, Conclusions of Law and Order determining that the investments were prudent. The twenty-seven page Order contains 143 Findings of Fact. Findings of Fact ¶¶ 85 to 90 address future carbon regulation to wit:

> 85. A concern raised primarily by Intervenors [DRC] is that the Applicants failed to consider the costs associated with future regulations of carbon emissions.
>
> 86. The parties agree that the U.S. Congress may, at some time in the future, establish regulations for the control of carbon dioxide from power plants around the country burning coal and other fossil fuels. However, neither we nor the Applicants can predict what those regulations will require.
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> 87. Montana Dakota witness Andrea Stomberg testified that there are currently no known commercial or economical applications for post-combustion removal of carbon dioxide from super-critical pulverized coal electric generating plants.
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> 88. In accordance with North Dakota Century Code Section 49-02-23, Applicants have not utilized prohibited environmental externality values for carbon dioxide regulation in this proceeding. However, they have considered the possibility of future carbon dioxide regulations. While the Commission is prohibited from considering quantitative environmental externality values, the Commission can consider the possibility of carbon regulation in a qualitative manner.
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> 89. Supercritical and ultra-supercritical technologies for coal-fired generation are more efficient than previous technologies for coal-fired plants, using less coal per unit of renewable gene-ration and various conservation and demand-side management

programs in their future resource mix. Implementing these plans will help reduce coal consumption and therefore carbon dioxide output.

90. MDU witness James Heidell testified that, demand for electricity is relatively inelastic so, when the price goes up, consumers don't change their use very much. Should the cost of coal-fired generation increase as a result of carbon dioxide regulations, the demand for electricity from other forms of generation such as gas-fired generation will increase, as will the commodity price of gas. Deason testified that upward pressure on natural gas prices by carbon dioxide regulations is already being manifested to some degree by the number of coal units that have been cancelled and partially replaced by additional gas-fired generation, causing greater demand on existing natural gas supplies. The Commission finds that regulation of carbon dioxide would likely result in an increase in the cost of coal-fired electric energy and that it would also increase the costs of most kinds of generation. The Commission gives weight to the fact that economic risks associated with regulation of carbon dioxide are significant. Also, the Commission recognizes, as did Deason, that carbon dioxide regulation will likely impact not only the price of natural gas but also change the cost comparisons between generation technologies.

Notice of Appeal

DRC filed this appeal, claiming that the Commission committed error when it excluded evidence of the anticipated cost of complying with carbon dioxide emission regulations. DRC contends that the evidence is relevant, reliable and admissible and that, if the Commission would have received and reviewed the carbon dioxide evidence, they may have determined that the investment at Big Stone II was NOT prudent.

Standard of Review:

The scope of the Court's review is limited by N.D.C.C. § 28-32-46, which states:

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
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> 1. The order is not in accordance with the law.
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> 2. The order is in violation of the constitutional rights of the appellant.
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> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
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> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
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> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
>
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
>
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

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

Specification of Errors

DRC alleges that the Commission's Findings of Fact, Conclusions of Law and Order was not in accordance with the law; that the order violates the constitutional rights of DRC; and that the Commission's Findings of Fact do not sufficiently address the evidence presented to the Commission.

I. Was the Commission's Decision to Exclude Evidence of the Cost of Carbon Dioxide Emissions in Violation of State Law?

DRC's argues this issue on several levels. It argues that the evidence of the cost of complying with future carbon dioxide emission regulations should be admitted because it is relevant to the issues considered in making an advance determination of prudence under §49-05-16.

DRC argues that the evidence should not be considered to be an "environmental externality" under N.D.C.C. § 49-02-23 and precluded from consideration.

Further, DRC argues that, to the extent that there is a conflict between admitting the evidence under §49-05-16 and excluding the evidence under §48-02-23, the Commission should balance the statutes, determine the legislative history and err on the side of full disclosure and consideration.

If the Commission were only dealing with the advance determination of prudence under §49-05-16 and if §49-02-23 did not exist, then the evidence regarding the cost of complying with future regulations regarding carbon dioxide emissions would likely be admissible. The uncertainty of what the final regulations may or may not require could go to the weight the Commission would give that evidence, and not the admissibility of the evidence.

However, we cannot ignore §49-02-23, which prohibits the Commission from considering environmental externalities in any rate setting procedure and defines environmental externalities. The statute reads as follows:

> 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:
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> 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.

Section 49-02-23 is clear and unambiguous. If the evidence comes under the definition of an "environmental externality", the Commission has no

discretion to admit the evidence. The statute clearly states that the Commission may not use, or allow electric utilities to use, that evidence in the planning, selection, or acquisition of electric resources or the setting of rates.

Clearly, the process of advance determination of prudence must be considered part of the "planning, selection, or acquisition of electric resources or the setting of rates". The advance determination of prudence specifically involves planning and acquiring electric resources, and affects the future settings of rates.

It is also clear that the anticipated costs of complying with future regulations for carbon dioxide emissions, is an environmental externality as that term is defined in the statute. The DRC admits that the "Environmental Protection Agency (EPA) has not yet promulgated final regulations in response to the U.S. Supreme Court decision, *Massachusetts v. EPA*, 549 U.S. 497 (2007), " The regulations are not final and do not establish any final costs; the costs are only alleged at this point.

In addition, because the utilities do not know what the costs of complying with the future regulations may be, those costs have not yet been internalized by the utilities.

The evidence must be excluded due to §49-02-23.

DRC contends the Commission did not properly interpret and apply §49-02-23 (the environmental externalties statute) in the larger context of §49-05-16 (the advance determination of prudence statute). DRC contends that §49-05-16 requires a broader base of knowledge and evidence so that the Commission makes an informed decision, and therefore, the restriction on admissible evidence set forth in §49-02-23 should be disregarded or at least determined to be not applicable to advance determination of prudence proceedings.

In support of this argument, DRC argues that the Commission and this Court should examine the legislative history of sections § 49-02-23 and § 49-05-16; and should have come to the conclusion that the legislative purpose for enacting § 49-05-16 was to allow all of the cost information to be considered, including the anticipated cost of carbon dioxide emissions.

The first step in statutory construction is to determine whether either statute is ambiguous. In *In re M.W.*, 2009 ND 55, ¶ 6, the North Dakota Supreme Court stated:

> 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. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it is susceptible to meanings that are different, but rational. We presume the legislature did not intend an absurd or ludicrous

> result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted.

The Court finds that both cited statutes are clear and unambiguous. They are not susceptible to multiple different yet rational meanings, nor do they lead to ludicrous or absurd results. "The Legislature must be presumed to have meant what is has plainly expressed." *Rausch v. Nelson*, 134 N.W.2d 519, 525 (1965).

The Legislature enacted section 4 49-02-23 in 1995 and it enacted section 9-05-16 ten years later, in 2005. However, the Legislature did not repeal or alter section 49-02-23 when it enacted section 49-05-16. Thus, the statutes must be construed together and harmonized to give meaning to the related provisions in each statute. *See Public Serv. Com'n v. Minnesota Grain, Inc.*, 2008 ND 184, ¶ 9, 756 N.W.2d 763.

"[T]he Legislature is presumed to know the law when enacting legislation." *State v. Clark*, 367 N.W.2d 168, 170 (N.D. 1985). As such, statutes must be interpreted "in context and in relation to others on the same subject to give meaning to each without rendering one or the other useless." *Rojas v. Workforce Safety & Ins.*, 2006 ND 221, ¶ 13, 723 N.W.2d 403. Courts need to "harmonize statutes when possible to avoid conflict between them." *Id.*

"Only when conflicting statutes cannot be harmonized and are irreconcilable will the special provision prevail and be construed as an exception to the general provision." *Id.* The interpretation of statutes must be consistent with the Legislature's intent in enacting the statutes and done in such a way as to further the policy goals and objectives of the statutes. *Id.*

Sections 49-02-23 and 49-05-16 both address costs associated with electric resources. Section 49-05-16 states in part that "the commission may issue an order approving the prudence of an electric resource addition if . . . [t]he public utility files with its application a projection of costs to the date of the commercial operation of the electric resource addition." Section 49-02-23 addresses which "costs" the Commission can consider. Section 49-02-23 states that the Commission cannot consider environmental externality values when it addresses the costs for the planning, selection, or acquisition of electric resources.

These statutes are not in conflict; rather, section 49-02-23 specifically defines which costs the Commission cannot utilize when determining the prudence of an electric resource addition.

Moreover, even if the statutes did conflict, that does not mean that they could not be read in conjunction with each other. When an irreconcilable conflict exists between two statutes, "the special provision must prevail and

must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail." N.D.C.C. § 1-02-07.

Section 49-05-16 generally states that costs can be considered. Section 49-02-23 specifically defines which costs can be considered. Therefore, section 49-02-23 is the specific statute. The Legislature did enact Section 49-05-16 after section 49-02-23, but there is no manifest legislative intent on the face of the statute that indicates that section 49-05-16 prevails over section 49-02-23. As such, even if the statutes could not be harmonized, section 49-02-23 would nonetheless prevail because it is the specific statute.

As indicated above, carbon dioxide emissions are an environmental externality value, and an environmental externality value is a cost that cannot be addressed in an advance determination of prudence proceeding. The Court finds that the Commission properly applied section 49-02-23 in accordance with the provisions of section 49-05-16.

II. Was DRC Denied Due Process in the Presentation of the CO2 Costs?

DRC next argues that the Commission's actions violated DRC's procedural due process rights. "Due process is an issue of time, place, and circumstances." *Whitecalfe v. North Dakota Dep't of Transp.*, 2007 ND 32, ¶

22, 727 N.W.2d 779. There are two issues that must be addressed with a due process argument: (1) "whether a constitutionally protected property or liberty interest is at stake," and (2) "if so, whether minimum procedural due process requirements were met." *State v. Loomer*, 2008 ND 69, ¶ 6, 747 N.W.2d 113. "If no constitutionally protected [property or liberty] interest is involved, the due process requirements do not apply." *Morrell v. North Dakota Dept. of Transportation*, 1999 ND 140, ¶ 8, 598 N.W.2d 111.

DRC states that it has a "private interest" because it needs to aid in "ensuring the provision of reliable electricity in a manner that is cost-effective and that adequately protects the financial interest of electric ratepayers." DRC fails to state how its proclaimed "private interest" is a liberty or property interest. Moreover, the DRC does not cite any state law which gives them a liberty or property interest.

N.D.C.C. § 49-02-03 requires due process. Under N.D.C.C. § 49-02-03, the Commission is required to supervise the rates for all public utilities and can only change rates if it finds the current rates are unjust and only after notice and a hearing. N.D.C.C. § 49-02-03.

However, DRC does not state that it has a protected interest under N.D.C.C. § 49-02-03. DRC only states that its interest is in "ensuring the provision of reliable electricity in a manner that is cost-effective." Also, under

section 49-02-03, it is the Commission's responsibility to ensure that rates are reasonable.

"In any event, a party raising a constitutional claim must bring up his heavy artillery or forego the attack entirely." *Montana-Dakota Utilities Co., Div. of MDU Resources Group, Inc. v. Public Serv. Com'n*, 413 N.W.2d 308, 313 n. 4 (N.D. 1987).

DRC has not established a due process violation because DRC failed to state what liberty or property interest is involved. Even if a liberty or property interest was involved here, the DRC has failed to establish that it did not receive due process. *See Loomer*, ¶ 6, 747 N.W.2d 113.

The question of "what process is due" requires a balancing of the specific interest involved, the likelihood that the procedures would result in an erroneous deprivation, and the government's interest in providing the process that it did, including the administrative costs and burdens of providing additional process. *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006). In administrative proceedings, "[d]ue process requires a participant . . . be given notice of the general nature of the questions to be heard, and an opportunity to prepare and be heard on those questions." *Morrell*, ¶ 9, 598 N.W.2d. 111.

DRC participated in the proceedings before the Commission. DRC was given the same opportunity to be heard that Otter Tail and MDU were given. All the parties were precluded from presenting evidence that consisted of environmental externality values. DRC was not denied procedural due process.

IV. Did the Commission Violate the Rules of Evidence, Promulgated by the Supreme Court in Refusing to Allow DCR to Introduce the CO2 Emission Evidence and Thereby Violate the Separation of Powers Between the Judicial and Executive Branch?

The DRC's next argument is that the Commission's interpretation of section 49-02-23 violates the separation of powers among the branches of state government, because the statute conflicts with the Rules of Evidence that our Supreme Court has established. The DRC's argument rests on the notion that section 49-02-23 constitutes an improper legislative interference with the rules of evidence that the judicial branch established pursuant to N.D. Const. Art. VI § 3.

Under N.D. Const. Art. VI § 3, "[t]he supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by *all the courts* of this state." (emphasis added). Likewise, the Supreme Court has statutory authority to "make all rules of pleading, practice, and procedure which it may deem necessary for . . . [t]he administration of justice in all civil and criminal actions, remedies, and proceedings *in any and all courts* of this state." N.D.C.C. § 27-02-08 (emphasis added). Finally, N.D.C.C. § 27-02-09

provides 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).

Thus, the North Dakota Constitution and Century Code both provide that the Supreme Court only makes procedural rules for the courts of this state, and those rules only apply to the courts of this state. The Supreme Court makes the rules for the courts, and not any other branch, because of the separation of powers.

The Supreme Court is part of the judicial branch, whereas the Commission is part of the executive branch. N.D. Const. Art. V; N.D. Const. Art. VI. "[D]ifferences in the origins and functions of administrative agencies prevents wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of the courts." *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976). Thus, it appears that the Supreme Court's authority to create procedural rules only extends to the courts within the judicial branch.

Moreover, in *City of Fargo v. Ruether*, 490 N.W.2d 481, 484 (N.D. 1992), the Court noted that it gives "special deference to the Legislature when

a statute governing admissibility of evidence is part of a legislative design that essentially authorizes and creates the item of disputed evidence." In this case, section 49-02-23 provides that evidence of environmental externality values is inadmissible in a proceeding before the Commission. In enacting section 49-02-23, the Legislature created and defined that evidence which is considered to be an environmental externality value, and the statute provides that evidence of an environmental externality value is inadmissible. Thus, this Court will give special deference to the Legislature's decision to limit the admissibility of evidence under section 49-02-23.

Finally, under rule 402 of the North Dakota rules of evidence, "[a]ll relevant evidence is admissible, except as otherwise provided by . . . statutes of North Dakota. . . . The rule specifically says that even relevant evidence may be made inadmissible by the Legislature." *Ruether*, 490 N.W.2d at 484 (citing N.D. R. Ev. 402). Accordingly, there is no conflict between section 49-02-23 and the North Dakota Rules of Evidence.

V. Do the findings of fact in the Commission's sufficiently address the evidence presented to the agency by the DRC?

DRC's argument on this issue focuses on the failure of the Commission to address the excluded evidence of carbon dioxide emissions. That evidence was not presented to the Commission because it was properly excluded by

statute. DRC does not suggest that the Commission failed to address any other evidence which was properly before the Commission, but argues that the Commission's determination lacks validity because the Commission did not consider the evidence regarding carbon dioxide emissions.

For the reasons stated above in this Order, the Court finds that the evidence of the cost of carbon dioxide emission regulations was properly excluded. The DRC has not suggested any other category of information which was not properly addressed by the commission, and this Court is not aware of any other information which was not properly addressed by the Commission.

CONCLUSION

The Court finds that the Commission's Order has been issued in accordance with the law, the order does not violate DRC's constitutional rights, DRC has had the opportunity for a full and fair hearing; the findings order is supported by a preponderance of the evidence and the Commission did consider all of the evidence properly before it.

The Appeal is denied, the Commission's Order is affirmed.

Dated this 19th day of August, 2009.

Sonna M. Anderson
District Judge

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