

December 18, 2008

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PUBLIC SERVICE COMMISSION

Commissioner Susan Wefald  
Commissioner Tony Clark  
Commissioner Kevin Cramer  
North Dakota Public Service Commission  
600 East Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-4080

**RE: CASE NO. PU-08-871 Pecan Pipeline (North Dakota), Inc.; Extension of Gas Gathering Facility From Palermo, North Dakota to Alliance Pipeline Interconnect Near Towner, North Dakota Referred To As The Prairie Rose Pipeline**

Dear Commissioners:

As a follow-up to our recent informal hearing, I am writing regarding the proposed extension of a gas gathering facility near Palermo, North Dakota (the "Proposed Extension") by Pecan Pipeline (North Dakota), Inc. ("Pecan North Dakota"), a wholly owned subsidiary of EOG Resources, Inc. ("EOG"). As detailed in a letter request for a determination of non-jurisdictional status, dated October 14, 2008 (the "Letter Request"), the Proposed Extension is exempt from the jurisdiction of the North Dakota Public Service Commission ("PSC").

During our hearing, Commissioner Susan Wefald expressed concern over the consequences of a determination of non-jurisdictional status. Commissioner Wefald rhetorically asked who would regulate the Proposed Extension if the PSC does not.

While Pecan North Dakota appreciates Commissioner Wefald's concerns, the PSC's authority to regulate the Proposed Extension must be determined based on the PSC's statutory authority. In other words, the PSC cannot exceed its statutory authority simply because of apprehensions regarding who will regulate the Proposed Extension in the absence of PSC jurisdiction.

The North Dakota Supreme Court has made clear that an administrative agency can only act within its statutory authority. "It is a basic rule of administrative law that an administrative regulation may not exceed statutory authority or supersede a statute, and that a regulation which goes beyond what the Legislature has authorized is void." *Moore v. North Dakota Workmen's Compensation Bureau*, 374 N.W.2d 71, 74 (N.D. 1985) (citing *Steele v. North Dakota Workmen's Compensation Bureau*, 273 N.W.2d 692, 701 (N.D. 1978)); see also *Berger v. State Personnel Board*, 502 N.W.2d 539, 542 (N.D. 1993) ("Administrative regulation may not exceed

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statutory authority and regulation which goes beyond what the legislature has authorized is void”). The rationale for this statutory limit is that allowing administrative agencies to exercise authority beyond their statutory mandate “constitutes an improper delegation of legislative power.” *Moore*, 373 N.W.2d at 74.

As detailed in the Letter Request, the PSC does not have jurisdiction under the Energy Conversion and Transmission Facility Siting Act, N.D.C.C. § 49-22 (the “Act”) because the Proposed Extension constitutes a gathering system, not a transmission facility. The Act expressly exempts gas pipeline gathering systems from the definition of transmission facilities. As the Letter Request explains, the Proposed Extension, unlike a transmission facility, will not carry “pipeline quality” gas.

Because the Proposed Extension is expressly exempt from PSC jurisdiction under the Act, concerns regarding regulation in the absence of PSC jurisdiction are irrelevant. Exercising jurisdiction based on an “if we don’t act, who will” standard is contrary to the statutory powers delegated to the PSC and would result in PSC regulation in myriad areas in which regulation would be improper and contrary to law.

Various energy-related projects exist in North Dakota that are not regulated by the PSC. The Act provides for certain thresholds before the PSC’s jurisdiction applies. For example, the Act defines “energy conversion facility” as a plant “designed for or capable of” generating one hundred thousand kilowatts or more of electricity, manufacturing or refining one hundred million cubic feet of gas per day, or manufacturing or refining fifty thousand barrels of liquid hydrocarbon per day. N.D.C.C. § 49-22-03(5). By way of example, a wind farm that generates less than 100,000 kilowatts of electricity is not subject to PSC regulation. However, even though not regulated by the PSC, such a wind farm is still subject to local regulation. The same would be true of the Proposed Extension. While the PSC does not have jurisdiction, the Proposed Extension is still subject to local zoning and land use laws. The PSC’s lack of jurisdiction under the Act does not mean the Proposed Extension will exist in a jurisdictional vacuum, completely free of any governmental oversight. In other words, the choice is not between PSC regulation and no regulation at all. Rather, non-jurisdictional status simply means that the Proposed Extension is beyond the PSC’s statutory authority and will be regulated at the local level, as is the case with many energy-related facilities throughout the state.

Concerns about who will regulate the Proposed Extension in the absence of PSC jurisdiction have been considered and resolved by the North Dakota Legislature. By exempting certain energy projects from PSC jurisdiction, the Legislature has determined that such projects are best regulated at the local level. The Legislature having made that judgment, it is not the PSC’s job to determine who will regulate if they do not. The PSC’s job is simply to regulate in the areas in which the Legislature has granted them authority to do so.

Finally, as noted in the Letter Request, there is a pressing need for expanded gathering infrastructure in the Parshall-Bakken Pool and the Bakken formation generally. As such, a determination of non-jurisdictional status for the Proposed Extension is not only required by law, it is also sound policy. The PSC plays an important role in the development of North Dakota’s energy resources. Where the Legislature has authorized it to act, the PSC helps ensure that our

state's energy resources are developed efficiently and safely. Given the importance of the PSC's authority, it is crucial that it be used only where the Legislature intended. The PSC should not expend its time and resources attempting to exercise jurisdiction where the Legislature has determined that PSC regulation is not proper. Energy projects such as the Proposed Extension that are beyond the jurisdictional reach of the PSC should be left to local regulation. That is exactly the result the Legislature intended by placing limits on the PSC's jurisdiction.

Thank you for all of your time in consideration of this matter. Should you have any questions, do not hesitate to contact me.

Sincerely,  
  
LAWRENCE BENDER

Cc: Illona Jeffcoat-Sacco  
Annette Bendish  
Patrick Fahn

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