

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

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Environmental Law & Policy Center and  
Dakota Resource Council,

Complainants/  
Petitioners,

v.

Meridian Energy Group, Inc.,

Respondent.

Case No. PU-18-223

**BRIEF IN SUPPORT OF MERIDIAN  
ENERGY GROUP, INC.'S  
MOTION TO DISMISS  
COMPLAINANTS/PETITIONERS'  
COMPLAINT**

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**INTRODUCTION**

Meridian Energy Group, Inc. (“Meridian”) submits this Brief in Support of its Motion to Dismiss the Complaint filed by the Environmental Law & Policy Center (“ELPC”) and the Dakota Resource Council (“DRC”) (collectively, “Petitioners”) in Case No. PU-18-223.

In their Complaint, Petitioners assert that Meridian is required, pursuant to N.D.C.C. § 49-22.1-04, to obtain a certificate of site compatibility from the Public Service Commission (“PSC”) before constructing an oil refinery with a capacity of 50,000 or more barrels per day (“bpd”). Meridian agrees that the PSC has jurisdiction over oil refineries that meet this capacity threshold. But Meridian is not constructing a refinery with a capacity of 50,000 or more bpd—instead, Meridian is constructing a refinery with a capacity of 49,500 bpd, below the statutory threshold. As a result, the PSC does not have jurisdiction over this matter and Petitioners’ Complaint must be dismissed.

**STATEMENT OF RELEVANT FACTS**

Meridian is a corporation formed to construct and operate the Davis Refinery, an oil refinery to be built on a site comprised of approximately 157 acres west of Belfield, North Dakota. (Compl. ¶¶ 12, 20.) To date, Meridian has observed various permitting requirements for

the proposed Davis Refinery, and has submitted permitting applications to, among other agencies, the Billings County Planning and Zoning Department, the North Dakota State Water Commission, and the North Dakota Department of Health. (*Id.* at ¶¶ 23-25.) While some of Meridian’s prior permitting applications have referenced 55,000 bpd as a potential capacity estimate for the Davis Refinery, the applications have consistently stated that the actual planned design of the Davis Refinery, as reflected in its engineering and design documentation, will have a capacity below the PSC’s statutory threshold. (*See generally* Compl. Exs. A, C.) Meridian has also confirmed its intention to construct a facility below the statutory threshold via letters to the North Dakota Public Service Commission. (Compl. Ex. G (“[A]t this time Meridian is designing its refinery to be capable of refining twenty seven thousand five hundred (27,500) barrels per day. Further, at this time, there is no design in existence nor plans to propose a design for more than 27,500 barrels.”)); (Compl. Ex. I (“Meridian’s current plans for construction of the Refinery contemplate a facility capable of refining up to 27,500 barrels of oil per day.”))

To eliminate any confusion related to the phasing of the Davis Refinery construction and its ultimate processing capacity, Meridian is finalizing engineering and design plans for a 49,500 bpd facility constructed in a single phase. (Affidavit of William Prentice (“Prentice Aff.”) ¶ 2); *see also* Erin Mundal, *New Refineries Show Oil Industry Betting American Production Here to Stay*, Inside Sources, (June 17, 2018), <http://www.insidesources.com/new-refineries-show-oil-industry-betting-american-production-here-to-stay> (“When completed, the Meridian refinery [Davis] will have a production capacity of 49,500.”); Meridian Energy Group, Inc., Shareholder Information, [www.meridianenergygroupinc.com/shareholders](http://www.meridianenergygroupinc.com/shareholders) (explaining to shareholder that the Davis Refinery will “have a rated capacity of up to 49,500 barrels per day”). This step—which represents a significant investment in additional design and engineering work—removes all

ambiguity regarding the processing capacity and potential expansion of Davis Refinery. (Prentice Aff. ¶ 3.) Meridian has no current plans for any addition to or expansion of the Davis Refinery beyond the capacity of 49,500 barrels per day. (*Id.* at ¶ 4.)

The Billings County Board of County Commissioners has issued a Conditional Use Permit and the North Dakota Department of Health has issued Meridian a Permit to Construct the Davis Refinery. (Compl. at ¶ 27.)

### LAW AND ARGUMENT

#### **I. THE PSC MUST HAVE SUBJECT MATTER JURISDICTION TO ADJUDICATE THIS DISPUTE.**

##### **A. The PSC Is Subject to the Administrative Agencies Practice Act and the North Dakota Rules of Civil Procedure.**

The PSC is an administrative agency subject to the Administrative Agencies Practice Act (“AAPA”). *See* N.D.C.C. § 28-32-21 (setting forth the procedures “[a]dministrative agencies shall comply with . . . in all adjudicative proceedings”); N.D.C.C. § 28-32-01, subd. 2 (defining “administrative agency” or “agency” as “each board, bureau, commission, department, or other administrative unit of the executive branch of state government” and not listing the PSC as an exempt agency).

Administrative proceedings involving the PSC must also comply with the North Dakota Rules of Civil Procedure. *See* N.D. Att’y Gen. Op. No. 85-24 (June 12, 1985) (“The North Dakota Rules of Civil Procedure, although specifically designed to govern proceedings in courts of law, are applicable to administrative agencies with respect to their administrative proceedings.”). Under the North Dakota Rules of Civil Procedure, a tribunal must have subject matter jurisdiction in order to adjudicate a dispute. *See* N.D. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction is a valid defense requiring dismissal of a complaint); *Albrecht v. Metro Area Ambulance*, 1998 ND 132, ¶¶ 10-11, 580 N.W.2d 583, 585 (“For a [tribunal] to issue a valid

order or judgment, the [tribunal] must have jurisdiction over both the subject-matter of the action and the parties.”). For subject-matter jurisdiction to attach, “the particular issue to be determined must be properly brought before the [tribunal] in the particular proceeding.” *Albrecht*, 580 N.W.2d at 585. “Subject-matter jurisdiction is derived from the constitution and the laws, and cannot be conferred by agreement, consent or waiver.” *Cordie v. Tank*, 538 N.W.2d 214, 217 (N.D. 1995).

“In deciding jurisdiction under [Rule 12(b)(1)], a trial court may consider matters outside the pleadings without converting the proceedings to summary judgment.” *Thompson v. Peterson*, 546 N.W.2d 856, 860 (N.D. 1996).

**B. Under the AAPA, PSC Must Dismiss a Complaint for Lack of Jurisdiction.**

Unless otherwise prohibited by a specific statute or rule, an administrative agency may dispose of an adjudicative proceeding by informal disposition. N.D.C.C. § 28-32-22. Under the AAPA, claims may only be brought before an “agency having subject matter jurisdiction of the proceeding.” N.D.C.C. § 28-32-21. Administrative agencies are creatures of legislative action and only have the power which has been granted to them by statute. *Heier v. N.D. Dept. of Corr. & Rehab.*, 2012 ND 171, ¶ 18, 820 N.W.2d 394; *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984); *see also Schwind v. Dir., N. Dakota Dep’t of Transp.*, 462 N.W.2d 147, 150 (N.D. 1990) (“[T]he jurisdiction of an administrative agency is dependent upon the terms of a statute. . . .”). Thus, if a complaint does not raise issues within an agency’s statutorily-granted authority, the agency must dismiss the complaint for lack of subject matter jurisdiction. *See, e.g.*, NDIC Order No. 28315, Case No. 25900, ¶¶ 18-19 (July 18, 2017) (“Since the Commission does not have jurisdiction over the relief that has been requested in the application, further hearing is unnecessary and would result in a waste of time and resources for both the parties and the Commission . . . . The motion to dismiss is GRANTED.”)

## II. PETITIONERS' COMPLAINT DOES NOT RAISE ISSUES SUBJECT TO THE PSC'S JURISDICTION AND MUST BE DISMISSED.

The North Dakota Supreme Court has held that the PSC's "authority to regulate is limited to that given it by the Legislature." *Appl. of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 148-49 (N.D. 1983) (internal citations omitted). Under N.D.C.C. § 49-22.1-01, *et seq.*, the PSC is authorized to issue certificates of site compatibility or route permits to utilities constructing gas or liquid energy conversion facilities. N.D.C.C. § 49-22.1-04 ("A utility may not begin construction of a gas or liquid energy conversion facility or gas or liquid transmission facility . . . without first having obtained a certificate of site compatibility or a route permit from the commission pursuant to this chapter."). A "gas or liquid energy conversion facility means any plant, addition, or combination of plant and addition, designed for and capable of . . . [m]anufacture or refinement of fifty thousand barrels . . . or more of liquid hydrocarbon products per day." N.D.C.C. § 49-22.1-01.

Further, the PSC is authorized to impose a penalty on a company that engages in the following conduct:

- a. Begins construction of an energy conversion facility or a transmission facility [with capacity of 50,000 barrels or more per day] without having been issued a certificate or permit pursuant to this chapter.
- b. Constructs, operates, or maintains an energy conversion facility or a transmission facility [with capacity of 50,000 barrels or more per day] other than in compliance with the certificate or permit and any terms, conditions, or modifications contained therein.

N.D.C.C. § 49-22.1-20.

Thus, the North Dakota legislature has limited the PSC's jurisdiction, for both siting review and enforcement, to facilities capable of refining 50,000 or more barrels of oil per day. Below that threshold, the PSC has no jurisdiction.

**A. Because the Davis Refinery’s Operating Capacity Is Under 50,000 Barrels Per Day, The PSC Lacks Jurisdiction.**

To be clear, the Davis Refinery will only be capable of refining 49,500 bpd. Because the facility’s operating capacity is under the 50,000 bpd threshold for siting review, North Dakota law does not require Meridian to obtain a siting permit for the facility. *See* N.D.C.C. §§ 49-22.1-04, 49-22.1-01 (establishing that the PSC has siting jurisdiction over facilities with a capacity of 50,000 barrels or more of oil per day) The PSC, consequently, lacks any authority to require siting review and must dismiss Petitioner’s Complaint for a lack of jurisdiction. *Id.*

Nevertheless, Petitioners argue that because the Davis Refinery could (in theory) be expanded beyond the 50,000 bpd threshold at some point in the future, it is subject to the PSC’s siting jurisdiction. (*See* Compl. ¶ 46.) This argument lacks merit. Meridian is not, in fact, proposing to expand the facility beyond 50,000 bpd. And Petitioners’ position—that a facility under the 50,000 bpd threshold nevertheless requires a siting permit because it could be expanded in the future—is contrary to the plain language of relevant statutes.

Taken together, N.D.C.C. §§ 49-22.1-01(6) and 49-22.1-04, address when the expansion of a plant to an operating capacity of 50,000 bpd or more can bring it within the PSC’s siting jurisdiction. To that end, Section 49-22.1-01(6) defines “gas or liquid energy conversion facility” as “any *plant, addition, or combination of plant and addition*, designed for or capable of . . . “[m]anufacture or refinement of fifty thousand barrels or more of liquid hydrocarbon products per day . . . .” *Id.* (emphasis added). Section 49-22.1-04, in turn, provides that “[a] utility may not begin construction of a gas or liquid energy conversion facility or gas or liquid transmission facility in the state without first having obtained a certificate of site compatibility or a route permit from the commission pursuant to this chapter.”

The meaning of these two provisions is clear. If a plant has a capacity less than 50,000 bpd, it is not a “gas or liquid energy conversion facility” and there is no need for a certificate of site compatibility prior to its construction—period. *If*, after the plant’s construction, there is a planned “addition” to (i.e., “expansion” of) the plant that would bring its operating capacity over the 50,000 bpd threshold, the plant and addition are then a “gas or liquid energy conversion facility” requiring a certificate of site compatibility prior to the construction of the addition. Only then does the PSC’s jurisdiction attach.

Here, because the Davis Refinery has an operating capacity less than 50,000 bpd, it is not subject to the PSC’s siting jurisdiction. If after construction, Meridian proposes to expand the Davis Refinery and increase the capacity above the 50,000 bpd threshold, then—and only then—would it be required to obtain a certificate of site compatibility.

To be sure, if Petitioners’ argument were taken to its logical conclusion, it would expand the PSC’s siting jurisdiction to any refinement facility, regardless of operating capacity. Under Petitioners’ argument, the PSC would have siting jurisdiction over *any facility* based on the theoretical possibility that it could be expanded beyond 50,000 bpd threshold at some point in the future. The North Dakota legislature, however, did not provide the PSC with unlimited jurisdiction. Rather, it limited the PSC’s siting jurisdiction to the “construction” of plants with a capacity of 50,000 or more bpd, and to additions to smaller plants that increase their operating capacity beyond 50,000 bpd. Because the Davis Refinery does not fall within that limited jurisdiction, the PSC must dismiss Petitioners’ Complaint.

**B. The Cases Petitioners Cite Are Inapposite.**

In support of its argument that the PSC has siting jurisdiction because the Davis Refinery could be expanded over the 50,000 bpd threshold, Petitioner relies on extra-jurisdictional cases involving different state and federal laws. Petitioners' cases are readily distinguishable.

As an initial matter, the issue in this case is whether the PSC has siting jurisdiction over the Davis Refinery pursuant to Sections 49-22.1-01(6) and 49-22.1-04. None of the cases Petitioner cites address that issue. Indeed, none of the cases that Petitioners cite even involve those statutes.

Moreover, the cases are legally and factually dissimilar. For example, *In the Matter of: Hacienda Heights Improvement Association v. County Sanitation Districts of Los Angeles County*, 1987 WL 93993 (Cal. Energy Conservation and Development Comm'n) involved the California Energy Commission's siting jurisdiction over a waste-to-energy facility when the facility, to be constructed in two phases, would exceed the California Energy Commission's 50 megawatt jurisdictional threshold. *Id.* at \*2. There, the waste-to-energy facility was initially planned as two 47 megawatt units, which would be simultaneously constructed and operated, achieving a total capacity of 94 megawatts. *Id.* at \*59. The plan was later changed so the two units would not be built simultaneously; however the waste-to-energy facility's planned total capacity remained unchanged at 94 megawatts. *Id.* Thus, under either plan, the capacity of the facility exceeded the California Energy Commission's 50 megawatt statutory threshold for jurisdiction. Here, in contrast, Meridian plans to construct the Davis Refinery in a single phase with an operating capacity below the PSC's statutory threshold.

The remaining cases cited by Petitioners discuss the National Environmental Policy Act ("NEPA"), which has no bearing on the PSC's jurisdiction over Meridian's Davis Refinery. Both cases criticize agencies for improperly segmenting projects into smaller components,

thereby avoiding the agency's environmental impact reporting duties under NEPA. *See Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (stating that “NEPA requires every federal agency to include an environmental impact statement . . . ‘in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment’”); *Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 401 F. Supp. 2d 1298, 1313-17 (S.D. Fla. 2005) (discussing the U.S. Army Corps of Engineers' duty under NEPA to prepare Environmental Impact Statements on any “major Federal action,” and the impropriety of the Corps' segmentation of a project into multiple phases in order to avoid this duty). That issue is irrelevant to this case. Meridian plans to construct the Davis Refinery in a single phase and with an operating capacity below the 50,000 bpd threshold. Petitioners cannot possibly argue that PSC has shirked its statutory duties—based on the clear language of Sections 49-22.1-01(6) and 49-22.1-04, the PSC lacks the authority to require a certificate of site compatibility for the Davis Refinery.

**C. Meridian's Statements to Investors and the Media Do Not Confer Jurisdiction to the PSC.**

In their Complaint, Petitioners allege that Meridian has told its investors and the news media that it plans to build a 55,000 bpd refinery. (Compl. ¶¶ 28-29.) The statements Petitioners rely on are outdated—some were made over two-and-a-half years ago. Regardless, whether Meridian's prior public statements are inconsistent with Meridian's current design plans is irrelevant; applications to different state agencies concerning the same energy conversion facility need not be identical. *See N.D. Op. Atty. Gen.* 76-130 (Apr. 29, 1976).

Meridian's previous statements to investors and the media do not—and cannot—confer jurisdiction to the PSC. Such jurisdiction can only be granted by statute. *See Appl. of Neb. Pub. Power Dist.*, 330 N.W.2d at 148-49 (holding that the PSC's authority to regulate is limited to

that given to it by the legislature). As previously discussed, the PSC’s statutorily granted siting jurisdiction is narrow and does not attach in this case. *See* N.D.C.C. §§ 49-22.1-04, 49-22.1-01.<sup>1</sup>

**D. Meridian’s Permit Applications Referencing a 55,000 bpd Refinery Do Not Give the PSC Jurisdiction.**

Petitioners allege that Meridian has informed other government entities, via permit applications, that it plans to build a 55,000 bpd refinery. (*See* Compl. ¶¶ 22-27.) These applications, however, reference potential future expansions and not Meridian’s current design plans.<sup>2</sup>

As discussed above, the possibility of a future addition does not give the PSC current jurisdiction over Meridian’s 49,500 bpd facility under applicable statutes. N.D.C.C. § 49-22.1-04 provides that a utility “may not begin construction of an energy conversion facility [with capacity of 50,000 barrels or more per day] . . . in the state without first having obtained a certificate of site compatibility.” *Id.* Meridian has not begun construction, and has no current plans to begin construction, of a facility with a capacity of 50,000 or more bpd. Thus, until Meridian plans an expansion to increase the Davis Refinery’s operating capacity to 50,000 or more bpd, Meridian is not required to obtain a certificate of site compatibility.<sup>3</sup> Further,

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<sup>1</sup> Assuming *arguendo* that Meridian had applied for a certificate of site compatibility from the PSC, its prior statements to investors and the news media would also have no bearing on the PSC’s decision to grant a certificate. *See* N.D.C.C. § 49-22.1-06 (setting forth requirements for an application for a certificate of site compatibility).

<sup>2</sup> Meridian accounted for the possibility of an addition to the Davis Refinery in its applications to the North Dakota Department of Health and the State Water Commission so that expansion could be possible at a future date. Indeed, Meridian was following guidance from the North Dakota Department of Health; under Chapter 33-15-14 of the North Dakota Administrative Code, identification of “alternative operating scenarios” are contemplated as part of a permit application. *See, e.g.*, N.D.A.C. § 33-15-14-02(3)(b)(2)(c).

<sup>3</sup> If Meridian decides to move forward with an addition to the Davis Refinery, thereby increasing the facility’s capacity to 50,000 or more bpd (which it has no plans to do), Meridian will seek a siting permit from the PSC.


Meridian's de-phasing of the Davis Refinery through a single construction of a 49,500 bpd facility eliminates the alleged concern over a potential expansion above the statutory threshold. Through its design and engineering documentation, Meridian is finalizing a refinery that is *not* designed for or capable of refining 50,000 or more bpd, and Meridian has no plans for any additional expansion.

**CONCLUSION**

Meridian plans to construct the Davis Refinery in a single phase with a capacity of 49,500 bpd. As a result, the Davis Refinery is not a "gas or liquid energy conversion facility" subject to the Siting Act, Meridian is not required to obtain a certificate of site compatibility for the facility prior to construction, and the PSC cannot exercise jurisdiction over this matter. Petitioners' Complaint must accordingly be dismissed for lack of subject matter jurisdiction.

Dated this 8th day of August, 2018.

By: \_\_\_\_\_



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