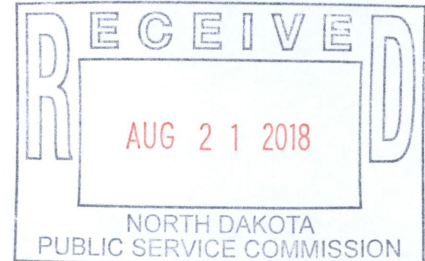


August 20, 2018

Mr. Darrel Nitschke
Executive Secretary
North Dakota Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0480




**Re: Response to Motion to Dismiss in DRC & ELPC v. Meridian Energy
Group, Inc. (Case No. PU-18-223)**

Dear Mr. Nitschke:

Enclosed for filing in Case PU-18-223, please find an original and ten copies of the Response of Complainants/Petitioners to Respondent Meridian Energy Group, Inc.'s Motion to Dismiss.

If you have any questions, please do not hesitate to contact me.

Sincerely,



JJ England

Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Environmental Law & Policy Center and)
Dakota Resource Council,)
)
 Complainants/)
 Petitioners,)
)
 vs.) **Case No. PU-18-223**
)
 Meridian Energy Group, Inc.,)
)
 Respondent.)

**RESPONSE OF COMPLAINANTS/PETITIONERS TO RESPONDENT
MERIDIAN ENERGY GROUP, INC.'S MOTION TO DISMISS**

This case involves the new oil refinery that respondent Meridian Energy Group, Inc. (“Meridian”) has begun to construct less than three miles from the border of Theodore Roosevelt National Park. Complainant/Petitioners Environmental Law & Policy Center (“ELPC”) and Dakota Resource Council (“DRC”) allege in their June 29, 2018 Complaint that Meridian’s decision to move forward with the Davis Refinery project without a certificate of site compatibility from the Public Service Commission (“Commission” or “PSC”) violates North Dakota law. N.D.C.C. § 49-22.1-04. ELPC and DRC’s Complaint raises significant concerns about the proposed siting of the refinery, given its proximity to the Theodore Roosevelt National Park.

On August 8, 2018, twenty-one days after this Commission served the Complaint, Meridian filed a motion to dismiss on the grounds that its Davis Refinery will, at least initially, not have a capacity of over 50,000 barrels per day (“bpd”), and therefore this Commission does not have subject matter jurisdiction over the Complaint.

Meridian’s motion to dismiss should be denied for the following reasons:

First, Meridian's motion is late. Both the North Dakota Administrative Agencies Practice Act and this Commission's own rules require that responsive pleadings be filed no later than twenty days after the Complaint is served, and Meridian missed that deadline.

Second, Meridian's motion improperly conflates the Commission's jurisdiction with the merits of the case. It is a fundamental principle that a court or any tribunal has jurisdiction to determine its own jurisdiction, and can issue orders to preserve the status quo while it makes that assessment.

Third, Meridian's new assertion that it only plans to construct a 49,500 bpd refinery simply creates a factual issue on which the parties need to do discovery and which the PSC must ultimately decide. Given all of Meridian's previous assertions that it plans to construct a 55,000 bpd refinery, the PSC must determine whether Meridian's new claim is credible. That is precisely the kind of factual question that cannot be resolved on a motion to dismiss.¹

STATEMENT OF FACTS

Meridian plans to construct an oil refinery, known as the Davis Refinery, in Billings County, North Dakota, approximately three miles from the South Unit of the Theodore Roosevelt National Park. Both during construction and operation, oil refineries can involve significant air emissions, water consumption, wastewater discharge, noise pollution, truck traffic, and aesthetic impacts, that make siting a major public policy issue. *See, e.g.*, Exhibit A to Complaint at 17-19, Application for Billings County Building and Zoning Certificate and Conditional Use Permit.

¹ It is not clear where Meridian finds authority to file this motion. It cites a statute about informal disposition of disputes, N.D.C.C. § 28-32-22, which has no applicability here, and therefore seems to be relying entirely on Rule 12, North Dakota Rules of Civil Procedure, which applies to civil litigation in the district courts. *Buzick v. North Dakota State Highway Com'r*, 351 N.W.2d 438, 439-40 (N.D. 1984) (explaining that North Dakota Rules of Civil Procedure do not apply in administrative proceedings).

Meridian Described its Intent to Construct a 55,000 bpd Refinery in Permit Applications to Three Separate Government Entities.

Meridian has filed formal permit applications with at least three governmental entities indicating that Meridian's Davis Refinery will have a capacity of 55,000 bpd. On March 26, 2016, Meridian submitted an application for a building permit and conditional use permit to the Billings County Planning and Zoning Department. The application describes the Davis Refinery as "a phased approximately 55,000 bpd high conversion crude oil refinery." Exhibit A to Complaint at 17. On May 19, 2016, Meridian applied to the North Dakota State Water Commission for a water allocation permit for the Davis Refinery. Meridian requested 645.2 acre feet of water per year, which it characterized as the amount needed for a refinery with a 55,000 bpd capacity. *See generally* State Engineer Administrative Record for Conditional Water Permit No. 6858.

On October 6, 2016, Meridian submitted an application for an air quality Permit to Construct the Davis Refinery to the North Dakota Department of Health. In the application, Meridian requested approval "for the construction of a new crude oil refinery, the Davis Refinery, with a nominal processing capacity of 55,000 barrels per day." Exhibit C to Complaint. On April 15, 2017, Meridian revised its application to the North Dakota Department of Health for an air quality Permit to Construct the Davis Refinery. Exhibit B to Complaint. In the revised application, Meridian continued to describe its planned refinery as "a 55,000 bpd high conversion crude oil refinery, in Billings County, North Dakota." Meridian refers to the Davis Refinery's 55,000 bpd "capacity" and "throughput" in twenty-one separate locations throughout the April 15, 2017 application.

The North Dakota Department of Health issued a Permit to Construct for the Davis Refinery on June 12, 2018. The Permit describes the source as having a capacity of 55,000 bpd

and states that “construction of the Davis Refinery is scheduled to take place in two separate phases. The permit includes the emission sources and limits from both project phases.” Exhibit D to Complaint at 1. The equipment described in the Department of Health’s Permit to Construct includes **two** “[c]rude desalting and distillation unit[s],” each “with an estimated capacity” of “27,500 bbl/day (55,000 bbl/day total).” *Id.* at 2.

Meridian Told Investors and News Media that it Plans to Build a 55,000 bpd Refinery.

Meridian has also explained to its own investors that it plans to construct a “55,000 barrel per day refinery.” Exhibit E to Complaint at 1, 6, 14, 16. In a stock offering dated January 27, 2017, Meridian stated that it expects the full 55,000 bpd refinery to be operational within 18 to 24 months after the first phase has been built. *Id.* at 18.

Meridian has also stated in numerous press releases and statements to the news media that it intends to construct a 55,000 bpd refinery. Many of these press releases and news articles are currently posted on Meridian’s website and the Davis Refinery’s website. Exhibit F to the Complaint includes a table of each of these web addresses. By way of example, a news article posted on Meridian’s webpage, dated October 2, 2017,² states that “Meridian will begin by building the 27,500-bpd hydro-skimming facility called Davis Light.” The article then includes the following quote from Meridian Chairman and CEO William Prentice: “Once we have Davis Light in operation, we will finalize our plans for expanding the Davis Refinery to a full 55,000-bpd capacity, which will include equipment to turn the fuel oil into gasoline, diesel and jet fuel. . . . We call this expanded refinery ‘Davis Full.’”

² Andrew White, *Meridian Energy Group Making Progress on N.D. Refinery*, BIC Magazine, <https://www.meridianenergygroupinc.com/meridian-featured-bic-magazine-october-issue/> (Oct. 2, 2017).

Meridian's Past and Current Statements to the PSC Contradict its Numerous Statements to the Public, Investors, and Government Agencies.

Despite the numerous statements to other government agencies, investors, the press, and the public that Meridian plans to build a 55,000 bpd refinery, Meridian has made conflicting statements to the PSC. For at least the better part of a year, Meridian told the PSC that it only planned to construct a 27,500 bpd refinery. In a letter dated July 20, 2016 to the PSC, an attorney representing Meridian stated that “at 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. This is not to suggest that in the future an addition to the facility will never be considered.” Exhibit G to Complaint.

In a letter dated March 1, 2017 to Meridian, the PSC noted that Meridian had filed an application for a water appropriation permit based on a facility with a 55,000 bpd capacity. The PSC inquired as to whether Meridian would be filing an application for a siting certificate and if not, requested an explanation for its determination that the PSC did not have jurisdiction. Exhibit H to Complaint. In a letter dated March 24, 2017 to the PSC, an attorney representing Meridian stated that Meridian “does not presently have any designs or plans to propose a Refinery with capacity beyond 27,500 barrels of oil per day,” though the letter admitted that there was a “possibility that such addition could be made at a later date.” Exhibit I to Complaint.

Meridian has now changed its story again. In its Motion to Dismiss, Meridian states that it will be building a single phase, 49,500 bpd refinery, a mere 500 bpd under the threshold for the site review requirement. Moreover, Meridian continues to leave the door open to future (potentially imminent) expansion after construction of the initial phase. *See* Meridian Motion to Dismiss at 2-3, 7.

ARGUMENT

I. Meridian's Motion to Dismiss Is Late.

Meridian's attempt to dismiss ELPC and DRC's Complaint at this stage is procedurally improper. The PSC determined on July 9, 2018 that the Complaint is sufficient and states a *prima facie* case. Docket Item #2. Pursuant to this determination, the PSC served the Complaint upon Meridian on July 18, 2018. Docket Item #5. The PSC requested the assignment of an Administrative Law Judge ("ALJ") on July 10, 2018 (Docket Item #3) and was assigned ALJ Patrick Ward on July 19, 2018 (Docket Item #6). The PSC has already determined that the Complaint is sufficient on its face and has exercised its jurisdiction to begin the proceeding.

Under both the Administrative Agencies Practice Act (AAPA) and the PSC's rules, Meridian was required to file its Answer in response to the Complaint within twenty (20) days of service of the Complaint. N.D.C.C. § 28-32-21(1)(e); N.D.A.C. § 69-02-02-03.³ The PSC served the Complaint on Meridian on July 18, 2018.⁴ Docket Item #5. Meridian's Answer was therefore due on August 7, 2018. To date, Meridian has not filed an Answer, and the Motion to Dismiss cannot toll the filing deadline, as the Motion was not filed until August 8, 2018. Accordingly, under the AAPA, the PSC "may deem the complaint to be admitted" and "may enter an order in default as the facts and law may warrant." N.D.C.C. § 28-32-21(1)(e). Failure to meet the deadline certainly should not be rewarded with dismissal of the Complaint.

³ Even if the PSC applied the North Dakota Rules of Civil Procedure generally to this proceeding, Rule 12(a) provides a period of 21 days for an answer "*unless another time is specified*" by this rule or a statute." (Emphasis added).

⁴ The AAPA provides that "[s]ervice is complete upon compliance with the provisions of the North Dakota Rules of Civil Procedure." N.D.C.C. § 28-32-21(1)(f). The North Dakota Rules of Civil Procedure provide that service by mail is complete upon mailing. N.D. Rules of Civ. Pro. 5(b)(3)(c).

II. The PSC Has Jurisdiction to Determine the Applicability of North Dakota’s Site Review Requirements to Meridian’s Davis Refinery.

It is a fundamental principle that courts and other tribunals have jurisdiction to determine their own jurisdiction, and that includes the ability to issue orders and sanction noncompliance with those orders while it makes that determination. *United States v. United Mine Workers*, 330 U.S. 258, 291-94 (1947) (upholding temporary restraining order to preserve status quo until court could determine whether it had jurisdiction). The PSC likewise has subject matter jurisdiction to consider factual matters in dispute that go to the very question of whether a proposed project meets the agency’s review threshold or not. The PSC recognizes this authority in its regulations that provide for PSC determination of whether siting review requirements apply to a specific facility.

A. The PSC Has Statutory Authority to Determine the Applicability of Statutes it Implements, Including Siting Review Requirements.

This Commission has general jurisdiction over “public utilities engaged in business in this state,” N.D.C.C. § 49-02-01,⁵ and the authority to accept, hear, and rule on complaints. N.D.C.C. § 49-05-01 *et seq.* The PSC also has explicit statutory authority to “[i]nvestigate all methods and practices of public utilities or other persons, subject to the provisions of this title.” N.D.C.C. § 49-02-02. The PSC therefore necessarily has authority to determine when the siting review requirement in N.D.C.C. § 49-22.1-04 applies, either on its own motion, pursuant to a utility’s request, or in response to a complaint of violation. It would be nonsensical to hold that the PSC has jurisdiction over refineries with a capacity of 50,000 bpd, but does not have the

⁵ Meridian is a utility under N.D.C.C. Chapter 49-22.1, which defines “utility” to include “any person engaged in and controlling the generation, manufacture, refinement, or transmission of gas, liquid hydrocarbons, or liquid hydrocarbon products, including coal gasification, coal liquefaction, petroleum refinement, uranium enrichment, and the transmission of coal, gas, liquid hydrocarbons, or liquid hydrocarbon products, or the transmission of water from or to any gas or liquid energy conversion facility.” N.D.C.C. § 49-22.1-01(12).

jurisdiction to determine if a specific refinery meets that threshold. In *Schwind v. Director, North Dakota Dep't of Transportation*, 462 N.W.2d 147, 150 (1990), cited by Meridian in its Motion, the court explained that “[w]hile the jurisdiction of an administrative agency is dependent upon the terms of a statute, these terms must be construed logically so as not to produce an absurd result.” The PSC’s finding that the Complaint was sufficient and stated a *prima facie* case is evidence that the PSC recognized that it had jurisdiction to make this threshold determination.

It is also clear that administrative agencies in North Dakota generally have the jurisdiction to determine the scope of their own statutory authority. The PSC has made such determinations in the past, and the North Dakota Attorney General has explicitly acknowledged that this is appropriate. N.D. Op. Att’y Gen. 149 (Dec. 19, 1988) (explaining that PSC decision that it had jurisdiction to regulate saltwater was correct and “as an agency decision, . . . entitled to respect”). In fact, the Supreme Court of the United States has held that an agency’s determination of its own jurisdiction is entitled to deference under the *Chevron* doctrine.⁶ *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013) (explaining that in all administrative review cases, whether framed as a jurisdiction or non-jurisdictional issue, the question is simply whether the agency acted within its statutory jurisdiction). That same logic applies here.

B. The PSC’s Regulations Reflect its Authority to Determine Applicability of Siting Review Requirements.

Reflecting its inherent jurisdiction to determine the scope of its own authority, the PSC’s regulations explicitly acknowledge its authority to determine whether the statutory siting review requirements apply to a specific facility. North Dakota Administrative Code 69-06-02.1-01

⁶ *Chevron* deference is a doctrine set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which explains that when a court reviews an agency’s interpretation of a statute that it implements, if there is any ambiguity in the statute, the court will grant significant deference to the agency’s interpretation.

provides that “[a] utility planning to construct an energy conversion or transmission facility may request a jurisdictional determination from the commission.” If the PSC has authority to determine its jurisdiction upon request from a utility, it certainly also has the authority to determine its jurisdiction when a formal Complaint states that a utility is moving forward with a facility in violation of site review requirements.

II. The Burden on Complainants at this Stage Is a Pleading Burden and the PSC Certainly Cannot Simply Rely on Meridian’s Claims Regarding its Newest “Plans” for the Davis Refinery.

At the pleading stage in civil litigation, when a case is just beginning, the burden on complainants is to *plead* facts which, if true, would be sufficient to support the assertion of jurisdiction. In North Dakota, as in most states, a plaintiff needs only to make out a *prima facie* case for jurisdiction and when a motion to dismiss for lack of jurisdiction is based on pleadings and affidavits, the tribunal must look at the facts in the light most favorable to the plaintiff. *Northstar Founders LLC v. Hayden Capital USA, LLC*, 855 N.W.2d 614, 624-25 (N.D. 2014), *citing Rodenburg v. Fargo-Moorhead Young Men’s Christian Ass’n*, 632 N.W.2d 407 (N.D. 2001). That same approach must be applied in this case.

Under this standard, complainants have clearly met their burden. The Complaint and its attachments include many statements by Meridian about its intent to build a refinery with 55,000 bpd capacity—to investors, to regulators, and to the public. There is likely more such evidence in Meridian’s files. Meridian may try to convince the Commission that those statements are all immaterial or somehow inoperative, but standing alone, they certainly are enough for the Commission to conclude that the intent is for this facility to exceed the 50,000 bpd threshold.

Moreover, if the PSC decides to follow the North Dakota Rules of Civil Procedure, the standards of Rule 56 would apply because Meridian has introduced evidence outside of the

pleadings and jurisdictional facts are intertwined with the merits of the case. ELPC and DRC hereby show by affidavit that discovery is necessary to make sure Complainants can provide the PSC with all material evidence to support their position. Exhibit A, Rule 56(f) Affidavit of Granneman. Accordingly, the PSC may deny Meridian's motion and/or order discovery. N.D. R. Civ. P. 56(f). Meridian claims that it may introduce matters outside the pleadings without its Motion to Dismiss being treated under the standards for a Rule 56 Motion for Summary Judgment, citing to *Thompson v. Peterson*, 546 N.W.2d 856, 860 (N.D. 1996). *Thompson v. Peterson*, however, applies the relevant standard "[i]f the jurisdictional facts are not in dispute." *Id.* at 860. Here, jurisdictional facts are absolutely in dispute. Meridian claims that the PSC does not have jurisdiction because it disagrees with the facts set out in the Complaint (i.e., that Meridian plans to construct a refinery over the 50,000 bpd threshold). Accordingly, North Dakota law holds that the standards for a Rule 56 Motion for Summary Judgment *do* apply. *See, e.g., Allied Mut. Ins. Co. v. Dir. of N. Dakota Dep't of Transp.*, 589 N.W.2d 201, 203, n.1 (N.D. 1990) ("If the jurisdictional issue is intertwined with the merits of the case, a Rule 12(b)(i) motion should be addressed utilizing Rule 56 standards."); *Kautzman v. McDonald*, 621 N.W.2d 871, 875-76 (2001) (same and also explaining that under Rule 56, "evidence must be viewed in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence").

Since many of the facts supporting jurisdiction are in Meridian's exclusive possession, the appropriate next step is to allow a reasonable period for discovery. Meridian has said repeatedly that it plans a 55,000 bpd refinery. Has it made similar statements to other potential investors in presentations, prospectuses, pro forma financial statements? What financial and/or technical considerations led to repeated public statements that Meridian intends to build a 55,000

bpd refinery? Would a refinery under 50,000 bpd be financially viable? Is there anything other than avoiding PSC scrutiny behind Meridian's previous "two phase" (27,500 bpd now, another 27,500 bpd later) contention or its current 49,500 bpd statements? What internal and external discussions have there been about Meridian's PSC siting "problem"? Why is avoiding PSC site review so important? Discovery can shed light on all these questions.

The PSC cannot just rely on Meridian's newest set of claims regarding its proposed Davis Refinery. Contrary to Meridian's statements, ELPC and DRC's Complaint is not based on some imagined theoretical expansion of the Davis Refinery "at some point in the future." Meridian Motion to Dismiss at 6. Rather, it is based on numerous and repeated claims that Meridian will build a 55,000 bpd refinery.⁷ Complaint ¶¶ 19-29 (Docket Item #1).

The PSC should be especially skeptical of Meridian's claims because of Meridian's previous apparent attempts to mislead the PSC. Meridian twice told the PSC in writing that it was not planning to design or propose a refinery with a capacity of more than 27,500 bpd, while representing to other agencies, the public, and investors both *before and after* its letters to the PSC that it planned to build a 55,000 bpd refinery. Complaint ¶¶ 19-34 (Docket Item #1). There is no reason to believe that the Meridian Chief Executive Officer's ("CEO") statement that Meridian "has no current plans for any addition to or expansion of the Davis Refinery beyond the capacity of 49,500 bpd" is any more reliable than Meridian's previous statements. Perhaps Meridian's CEO does not consider the company to "have plans" for an expansion until all details of that expansion are finalized. However, linguistic gymnastics cannot be used to excuse a run-around of North Dakota law.

⁷ Meridian's claim that its "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" is unsupported and false. Meridian Motion to Dismiss at 2.

Meridian appears to be attempting a “bait and switch,” asserting that it could build a refinery with a capacity below the 50,000 bpd threshold, and then “after the plant’s construction,” plan an addition, and only then seek a certificate of site compatibility from the PSC when the siting of the refinery has become a *fait accompli*. Meridian Motion to Dismiss at 7. The problem with Meridian’s hypothetical is that Meridian has widely, repeatedly stated that it *already* plans to expand its refinery beyond 50,000 bpd. Meridian cannot avoid this fact by playing linguistic games.

Notably, Meridian refrains from making any commitments to not expand the Davis Refinery past the 50,000 bpd threshold, or even to not expand past the threshold for a certain number of years. Instead, Meridian argues for an interpretation of the law that would allow it to build a refinery below the threshold while claiming that it has no finalized plans to expand, and then at some point after construction—maybe sooner, maybe later—finalize plans to expand past the threshold. This run-around of the siting review requirements cannot be tolerated.

Meridian’s legal citations do nothing to support its claims. Meridian cites to a North Dakota Attorney General Opinion for the assertion that “applications to different state agencies concerning the same energy conversion facility need not be identical.” Meridian Motion to Dismiss at 9. In fact, however, the Attorney General Opinion says nothing to validate Meridian’s approach of telling one agency one thing and another agency something else. N.D. Op. Att’y Gen. 76-130 (Apr. 29, 1976). The Opinion simply explains that *as a practical matter*, the point of water diversion under a water permit may not have to be the exact same geographic location as a corresponding plant or transmission facility site, presumably because the water could be diverted at one point and then transported to the plant or transmission facility site. *Id.* at 6. This

observation does not support Meridian's presentation of alternative "plans" to different agencies for the same refinery.

Meridian also attempts to explain the discrepancy between its permit applications and statements to the PSC by claiming that it was simply "following guidance from the North Dakota Department of Health" to identify "alternative operating scenarios." Meridian Motion to Dismiss at 10. However, in its permit application, Meridian never characterized its plans to build a 55,000 bpd refinery as an "alternative operating scenario." Rather, it was presented as the single current planned scenario. Accordingly, the air permit issued to Meridian reflects this plan and is for a 55,000 bpd refinery. Complaint at ¶ 27 (noting that the equipment described in the Davis Refinery air permit includes two "[c]rude desalting and distillation unit[s]," each "with an estimated capacity" of 27,500 bpd).

The only way to get to the truth of Meridian's plans for the Davis Refinery is through this proceeding, including through discovery. The PSC should deny Meridian's motion and expeditiously move forward with this proceeding.

III. Conclusion

Meridian's motion to dismiss is untimely, procedurally inappropriate, conflates jurisdictional issues with the merits of the case, and fails to provide a valid legal basis for dismissal. The PSC should deny the motion, set a reasonable deadline for jurisdictional discovery, and expeditiously move forward with the proceeding.

Respectfully submitted,

BRAATEN LAW FIRM

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was on the 20th day of August, 2018, served by e-mailing the same to:

Lawrence Bender
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Derrick Braaten
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Rachel Granneman
rgranneman@elpc.org

and by mailing a copy via USPS First Class Mail to:

Patrick J. Ward
Administrative Law Judge
c/o Zuger Kirmis & Smith
PO Box 1695
Bismarck, ND 58502-1695

An original and ten copies of the foregoing document were also mail by USPS mail to the North Dakota Public Service Commission on said date.

/s/ JJ England
JJ England