

September 26, 2018

VIA HAND-DELIVERY

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



**Re: Meridian Energy Group, Inc.
Case No. PU-18-223**

Dear Mr. Nitschke:

Please find enclosed for filing in the above-referenced matter an original and ten (10) copies of the Brief in Opposition to Petitioners' Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery and Certificate of Service, submitted on behalf of Meridian Energy Group, Inc.

A disk containing the above-referenced documents in PDF format is also provided.

Should you have any questions, please advise.

Sincerely,

/s/ Lawrence Bender

LAWRENCE BENDER

LB/kl

cc: Patrick J. Ward, Administrative Law Judge (*via U.S. Mail*)
JJ England (*via e-mail*)
Derrick Braaten (*via e-mail*)
Rachel Granneman (*via e-mail*)
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27 **PU-18-223** Filed: 9/26/2018 Pages: 11
**Brief in Opposition to Petitioner's Motion to Reopen
and Supplement the Record and to Permit
Jurisdictional Discovery**
Meridian Energy Group, Inc.
Lawrence Bender, Fredrikson&Byron, P.A.

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Environmental Law & Policy Center and
Dakota Resource Council,

Complainants/
Petitioners,

v.

Meridian Energy Group, Inc.,

Respondent.

Case No. PU-18-223

**BRIEF IN OPPOSITION TO
PETITIONERS' MOTION TO
REOPEN AND SUPPLEMENT THE
RECORD AND TO PERMIT
JURISDICTIONAL DISCOVERY**

INTRODUCTION

In a continued effort to stymie progress on Meridian Energy Group, Inc.'s ("Meridian") oil refinery, the Environmental Law & Policy Center and Dakota Resource Council (collectively, "Petitioners") have filed a Motion to Reopen and Supplement the Record and Permit Jurisdictional Discovery. There is no legal basis for Petitioners' Motion; instead, it is a spurious attempt to dissuade the Public Service Commission of North Dakota (the "PSC") from adopting a well-reasoned decision from an Administrative Law Judge. Quite simply, Petitioners' reliance on their own speculation that Meridian intends to build a 55,000 bpd oil refinery (rather than the 49,500 bpd facility Meridian has sworn, under oath, that it is building), remains insufficient to confer subject matter jurisdiction to the PSC. Petitioners' request to reopen the record or allow jurisdictional discovery should, therefore, be denied.

BACKGROUND

I. THE UNDERLYING COMPLAINT AND MOTION TO DISMISS.

On June 29, 2018, Petitioners filed a Complaint with the PSC (the "Complaint") alleging that Meridian was planning to construct an oil refinery with a capacity of over 50,000 barrels per day without obtaining a certificate of site compatibility from the PSC. (*See generally* Docket No. 1.)

In response to the Complaint, on August 8, 2018 Meridian filed a Motion to Dismiss for lack of subject matter jurisdiction. (Docket No. 11.) In its Motion to Dismiss, Meridian established that it intends to build an oil refinery with a capacity of 49,500 bpd, which falls outside of the PSC's statutory jurisdictional threshold of 50,000 bpd. (*See generally id.*) In support of its Motion to Dismiss, Meridian submitted an affidavit from its Chief Executive Officer and also cited to documents in the public record, all of which indicated that Meridian intends to construct a 49,500 bpd facility. (*See id.*) For their part, Petitioners opposed Meridian's Motion to Dismiss and also requested an opportunity to conduct jurisdictional discovery. (Docket No. 12.)

II. THE ADMINISTRATIVE LAW JUDGE FINDS THAT THE PSC LACKS JURISDICTION.

On September 5, 2018, the PSC moved to designate an Administrative Law Judge ("ALJ") to make a recommended decision on Meridian's Motion to Dismiss. (Docket No. 17.) On September 10, 2018, ALJ Patrick J. Ward issued a Recommended Decision Granting Meridian Energy Group, Inc.'s Motion to Dismiss Complainants/Petitioners' Complaint ("ALJ's Recommended Decision"). (Docket No. 21.) The ALJ's Recommended Decision holds that "[t]he PSC lacks statutory subject matter jurisdiction over [Meridian's] proposed 49,500 bpd facility." (*Id.* at 11.) The ALJ's Recommended Decision further holds that, due to the PSC's lack of subject matter jurisdiction, Petitioners' request for discovery should be denied. (*Id.*)

III. PETITIONERS SEEK TO REOPEN THE RECORD.

On September 14, 2018, Petitioners filed their Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery ("Motion to Reopen"). (*See* Docket No. 22.) In support of their Motion to Reopen, Petitioners argue that they were impermissibly denied an opportunity for a hearing on Meridian's Motion to Dismiss. (*Id.* at 3-4.) Petitioners also allege

that because Meridian did not submit updated plans to the NDDOH, Meridian still intends to construct a 55,000 bpd facility. (*Id.* at 5-8.) Petitioners also renew their request to engage in jurisdictional discovery. (*Id.* at 9.) For the reasons set forth below, Petitioners' arguments lack any merit.

LAW AND ARGUMENT

I. THE PSC HAS THE AUTHORITY TO DISMISS A COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION BY MOTION WITHOUT A FORMAL HEARING.

Petitioners argue that the record must be reopened because Petitioners were not able to present their opposition to Meridian's Motion to Dismiss at a hearing. Notably, in Petitioners' opposition to Meridian's Motion to Dismiss, Petitioners neither argued for nor mentioned a purported right to a hearing on Meridian's Motion. *See* Response of Petitioners to Meridian's Motion to Dismiss (dated August 20, 2018).¹ With their current motion, Petitioners have presented a last-ditch effort to undermine an unfavorable decision by the ALJ by arguing that they are entitled to a formal hearing before the PSC.

A. Under the AAPA, the PSC May Only Hear Matters Over Which It Has Subject Matter Jurisdiction.

To support their argument, Petitioners rely on N.D.C.C. § 28-32-21, which generally pertains to procedures before administrative agencies, and a sub-section that instructs agencies to

¹ To the extent Petitioners would argue that N.D.R.Civ.P. 12(b)(1), or an analogous principle, does not permit the PSC to dismiss a complaint for lack of subject matter jurisdiction because the Rules of Civil Procedure do not apply to proceedings before the PSC, Petitioners premised their request for jurisdictional discovery entirely on N.D.R.Civ.P. 56, which pertains to motions for summary judgment before a district court. Furthermore, as already addressed in Meridian's prior briefing, "[t]he 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," N.D. Att'y Gen. Op. No. 85-24 (June 12, 1985), and N.D.R.Civ.P. 12(b)(1) specifically provides the basis for a tribunal to dismiss a complaint for lack of subject matter jurisdiction by motion.

set a time and place for a hearing in adjudicative proceedings. *See* N.D.C.C. § 28-32-21(1)(c). Petitioners ignore, however, that this section—as well as several other provisions of the AAPA—expressly recognizes that an agency may only proceed on and hear matters over which the agency has subject matter jurisdiction. N.D.C.C. § 28-32-21(1)(c) (“The administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice of hearing upon the respondent [T]he parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction.”) (emphasis added); *see also* N.D.C.C. § 28-32-21(1)(a) (“For adjudicative proceedings involving a hearing on a complaint against a specific-named respondent, a complainant shall prepare and file a clear and concise complaint with the agency having subject matter jurisdiction of the proceeding.”) (emphasis added); N.D.C.C. § 28-32-40 (“This section does not limit the right of any agency to reopen any proceeding or rehear any matter under any continuing jurisdiction which is granted to the agency by statute.”) (emphasis added). In other words, Petitioners’ argument that a formal hearing must be held before the PSC assumes that the threshold prerequisite to proceed before the PSC—subject matter jurisdiction—exists. As the ALJ found, it clearly does not.

Petitioners also suggest that a recent jurisdictional decision by North Dakota Industrial Commission, affirmed by the North Dakota Supreme Court, supports the proposition that Petitioners are entitled to a hearing. *See Black Hills Trucking, Inc. v. North Dakota Indus. Comm’n*, 2017 ND 284, 904 N.W.2d 326. *Black Hills* is inapposite because the NDIC actually possessed statutorily-granted jurisdiction over the matter before it, whereas in this case, the PSC does not. Moreover, because the NDIC had subject matter jurisdiction in *Black Hills*, neither the NDIC nor Supreme Court’s decisions addressed the proper means by which an agency may dispose of an adjudicative proceeding over which the agency does *not* have subject matter

jurisdiction. To this end, as Meridian cited in its prior briefing, the NDIC has determined (after its decision in *Black Hills*) that an adjudicative proceeding over which an agency has no subject matter jurisdiction can and should be dismissed on a motion, briefed by the parties, without a hearing. *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.”). This is consistent with N.D.C.C. § 28-32-22, which allows an administrative agency to dispose of an adjudicative proceeding by informal disposition.

In sum, after reviewing argument and evidence of the parties, the ALJ determined that the PSC has no jurisdiction to proceed on Petitioners’ Complaint against Meridian under applicable law, and that Meridian’s Motion to Dismiss must accordingly be granted. Petitioners have not cited any authority suggesting that the PSC is required to hold a hearing on a matter over which it has no subject matter jurisdiction, prohibiting the PSC from disposing of such a matter by motion, or providing any basis to otherwise disregard the ALJ’s determination. The ALJ’s Recommended Decision should be adopted in full and Meridian’s Motion to Dismiss must be granted.

II. PETITIONERS LACK ANY BASIS TO REOPEN THE RECORD.

A. Meridian Was Not Required to Update Its NDDOH Application.

Petitioners argue that Meridian intends to build a 55,000 bpd facility based solely on the fact that Meridian did not submit revised plans to the NDDOH. This is a renewed attempt by Petitioners to “search out or speculate as to . . . [Meridian’s] ulterior motives or intentions.” (Docket No. 21 at 9.) Petitioners’ argument is specious. First, it conveniently ignores the scope of the NDDOH Permit to Construct, which defines the Source Type as a “Petroleum Refinery

with a rated capacity of up to approximately 55,000 barrels of crude oil per day.” (Docket No. 1, Ex. D at 1) (emphasis added). As written, the permit encompasses Meridian’s plan to construct a 49,500 bpd facility and Meridian is not required to provide the NDDOH with new plans.

Second, the permit only requires the NDDOH to review and approve alterations to plans that result in the emission of more or additional pollutants:

Any alteration, repairing, expansion, or change in the method of operation of the source which results in the emission of an additional type or greater amount of air contaminants or which results in an increase in the ambient concentration of any air contaminant, must be reviewed and approved by the Department prior to the start of any such alteration, repairing, expansion, or change in the method of operation.

(Docket No. 1, Ex. D at 44) (emphasis added). Here, there is no suggestion that a reduction of the Davis Refinery’s operating capacity would result in greater pollutants.

Because Meridian’s plans for a reduced-capacity 49,500 bpd facility do not result in new or increased air emissions beyond those emissions already contemplated in the Permit to Construct, Petitioners’ attempt to draw conclusions—specifically that Meridian is building a 55,000 bpd facility—from the fact that Meridian did not revise plans, when it was under no obligation to do so, is frivolous. Meridian is under no obligation to submit revised plans to the NDDOH.

B. The “Relevant and Important Information That Supports [Petitioners’] Position” Was Previously Available to Petitioners.

Petitioners suggest that Meridian’s inactivity is new information that was not available to Petitioners prior to the issuance of the ALJ’s Recommended Decision, and, therefore, justifies reopening the record. This information and Petitioners’ accompanying argument were available to Petitioners when they opposed Meridian’s Motion to Dismiss. (See Docket No. 22, England Aff. at Ex. B) (indicating that modifications to NDDOH permit applications are publically available online). To the extent Petitioners believe Meridian’s inactivity—as related to the

NDDOH permit—confers subject matter jurisdiction to the PSC, Petitioners should have presented this argument in their opposition to Meridian’s Motion to Dismiss. This previously-available “evidence” does not demonstrate a material change of fact, and is thus insufficient to reopen the record. *See* N.D.A.C. 69-02-06-01(4) (stating that “[i]f the commission has reason to believe the conditions of fact or law have so changed as to require . . . the reopening of a proceeding, the commission may issue an order to reopen”).

C. Even If Petitioners’ “Evidence” Is Admitted, It Is Insufficient to Confer Jurisdiction to the PSC.

The fact that Meridian has not submitted updated plans to the NDDOH has no bearing on the only matter at issue here—whether the PSC has subject matter jurisdiction. Meridian’s absence of action does not negate that the Davis Refinery will have an operating capacity of 49,500 bpd. It also does not prove that Meridian intends to build a facility with a capacity of 50,000 bpd or more. At most, Petitioners have identified an issue that may be addressed by the NDDOH—should the NDDOH desire updated design plans from Meridian, it is within the NDDOH’s purview to request them. Meridian’s non-submission of revised plans to the NDDOH, however, is simply not relevant, probative evidence of the capacity of the Davis Refinery and does not change the ALJ’s analysis regarding the PSC’s lack of subject matter jurisdiction.

III. PETITIONERS’ REQUEST FOR JURISDICTIONAL DISCOVERY IS UNSUPPORTED AND WAS ALREADY REJECTED BY THE ALJ.

Petitioners’ argument that they are entitled to jurisdictional discovery has already been briefed by the parties and rejected by the ALJ. As established by the ALJ’s Recommended Decision, Meridian has “clearly stated its current plan is to build a refinery that has a maximum capacity of 49,500 bpd in a single phase” and “the PSC does not have statutory authorization to assert jurisdiction below its threshold of 50,000 bpd” (Docket No. 21 at 9.) Therefore, “[u]nless the legislature expands PSC authority or Meridian goes forward with an addition to that

49,500 bpd capacity, discovery as to its previously stated plans or possible future plans for expansion cannot be permitted by this agency.” (*Id.* at 10.) Petitioners have not presented any basis for rejecting the ALJ’s determination that jurisdictional discovery is improper, therefore the ALJ’s Recommended Decision should be adopted in full and Petitioners’ request for jurisdictional discovery should be denied.

CONCLUSION

For the reasons set forth above, Meridian respectfully requests that the PSC dismiss Petitioners’ Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery.

Dated this 26th day of September, 2018.

FREDRIKSON & BYRON P.A.

By: 

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BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

<p>Environmental Law & Policy Center and Dakota Resource Council,</p> <p style="text-align: center;">Complainants/ Petitioners,</p> <p style="text-align: center;">v.</p> <p>Meridian Energy Group, Inc.,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">Case No. PU-18-223</p> <p style="text-align: center;">CERTIFICATE OF SERVICE</p>
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I, the undersigned, hereby certify that a true and correct copy of the Brief in Opposition to Petitioners' Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery was, on September 26th, 2018, served electronically by e-mailing the same to the following:

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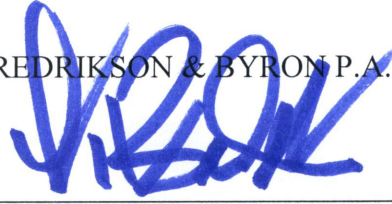
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and was served on September 26th, 2018, by placing the same in the United States mail, postage prepaid, properly addressed to the following:

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

Dated this 26th day of September, 2018.

FREDRIKSON & BYRON P.A.

A handwritten signature in blue ink, appearing to read 'L. Bender', is written over the printed name of the firm.

By: _____

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