

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Environmental Law & Policy
Center and Dakota Resource
Council,

Case No. PU-18-223

Complainants/
Petitioners,

OAH File No. 2018-0356

vs.

Meridian Energy Group, Inc.,
Respondent.

PARTIAL TRANSCRIPT OF COMMISSION MEETING

DATE: October 10, 2018

PLACE: Public Service Commission
State Capitol
Bismarck, North Dakota

1 COMMISSIONER FEDORCHAK: I move the Commission
2 adopt the order on Recommended Decision Granting Motion
3 to Dismiss Complaint -- Complainants/Petitioners'
4 Complaint with a clarification and correction in ELPC
5 and DRC vs. Meridian Energy Group, Energy Conversion
6 Facility, Davis Refinery, Complaint, Case Number
7 PU-18-223.

8 COMMISSIONER KROSHUS: Second.

9 COMMISSIONER FEDORCHAK: So the Commission, this
10 issue has been going on at the Commission for a number
11 of months, when the complaint was filed by the --
12 several groups, the DRC and another group back earlier
13 this spring and early summer. And we've had a number of
14 filings back and forth.

15 About a month ago, we asked an ALJ to provide an
16 analysis and a recommended order. And this order today
17 basically approves the order on the recommended decision
18 that the ALJ has provided to us.

19 We also clarify that consistent with the policy
20 of the Commission, that we can ensure minimal adverse
21 effects on the environment and the welfare of citizens,
22 the Commission may of its own volition investigate and
23 inquire up to -- into the actions of persons in pursuit
24 of compliance. And this is related to NDCC 49-22.1-20
25 subsection 1 and 5.

1 This is a matter upon which the complaint is
2 filed -- or the matter upon which the complaint is filed
3 has been the subject of Commission monitoring for a good
4 number of years. And so we just wanted to clarify the
5 proposed order with that information.

6 And so the Commission orders that the
7 administrative law judge's September 10 recommended
8 decision granting the motion to dismiss the
9 complainants/petitioners' complaint is adopted as the
10 Public Service Commission's decision granting Meridian
11 Energy Group Inc.'s motion to dismiss. And we also want
12 to clarify the proposed Finding of Fact No. 4 is
13 corrected to state when plans to increase the facility
14 to 50,000 barrels per day or beyond are implemented,
15 that plan subjects the entire facility to the review and
16 approval process.

17 So like I said, this has been going on for a
18 number of months. We had a work session a couple weeks
19 ago. And I just want to restate some of the comments I
20 made in that work session relating to this matter.

21 So the legislature created the Siting Act to
22 provide orderly development of energy resources while
23 having minimal adverse human and environmental impact.
24 And in that law, they provided definitions for projects
25 which in effect declare the point at which the minimal

1 adverse impact cannot be assumed. So in other words,
2 they developed thresholds for projects. Not every
3 project has to be sited, only projects that meet certain
4 thresholds.

5 That threshold for oil refineries is
6 50,000 barrels per day. After that point, a permit is
7 required that requires the companies to provide
8 environmental analysis, cultural resource studies,
9 public hearings, etcetera. Under that point, minimal
10 environmental impact is assumed. They further clarified
11 in the law that when an addition causes a total facility
12 to be jurisdictional, then approval is needed.

13 They could have directed that if additional
14 stages are anticipated on the front end by the company,
15 then a permit is required on the front end. But that's
16 not how the law is written.

17 We've seen this type of staggered development
18 for years, especially in relation to gas plants but some
19 in relation to pipelines and also in relation to
20 generation facilities. Policymakers haven't changed the
21 requirement as it relates to this.

22 And the threshold for this project, a crude oil
23 refinery, is 50,000 barrels per day. The company
24 provided sworn statements that it intends to be at
25 49,500 barrels per day. That's below the jurisdictional

1 threshold. They've further clarified that they don't
2 intend to expand beyond that threshold but yet that they
3 plan to operate at that forty-nine-five threshold for
4 the -- you know, indefinitely.

5 So this is a close call. It's a tough call.
6 All the indications suggest that the company is
7 developing plans to avoid the additional regulatory
8 scrutiny required of a siting permit. The CEO, Bill
9 Prentice, said as much in a meeting with us last fall.

10 But the fact remains that the PSC is a
11 regulatory body and we must have subject matter
12 jurisdiction to preside over any matter. That
13 jurisdiction is developed or derived from the
14 Constitution and the laws, and the bright line on the
15 law as it relates to this is 50,000 barrels per day.

16 I want to read from the order which we're
17 adopting, I want to read a little bit from the judge's
18 order. He re-states a quote from the U.S. Supreme Court
19 that says:

20 Judges should not waste their time in the
21 mental acrobatics needed to decide whether
22 an agency's interpretation of a statutory
23 provision is jurisdictional or
24 non-jurisdictional. Once those labels are
25 sheared away, it becomes clear that the

1 question in every case is simply whether the
2 statutory text of the law forecloses the
3 agency's assertion of authority or not.

4 And then he writes again:

5 By virtue of the plain language in Chapter
6 49-22.1, the legislature clearly articulated
7 that a refinery capable of refining less
8 than 50,000 barrels per day is not subject
9 to the PSC's siting jurisdiction under the
10 statute, and a person may construct such a
11 refinery without a certificate of site
12 compatibility from the Commission.

13 Petitioners have not cited North Dakota
14 statutory authority permitting an expansion
15 of PSC siting authority to search out or
16 speculate as to such ulterior motives or
17 intentions.

18 So it's for these reasons that I feel that the
19 judge's order is appropriate and that I am prepared to
20 support his order to grant the motion to dismiss the
21 complaint.

22 MR. NITSCHKE: We have a motion and a second.
23 Is there any further discussion?

24 COMMISSIONER CHRISTMANN: Yes. I saw someone
25 taking notes quickly with the correction, and so I just

1 want to highlight what that was. In the judge's
2 proposed findings of fact, it had to do with, when plans
3 to increase the facility beyond 49,500 barrels per day
4 are implemented, that plan subjects the entire facility
5 to review and approval process. But it's actually not
6 forty-nine-five, and so this correction changes that to
7 50,000 barrels per day or more. And so that was just
8 the correction there.

9 I also want to say that it's going to be very
10 tempting for people to make this decision into something
11 that it is not. This case has made a lot of headlines
12 over these last few months and has been discussed at
13 length by many people because it is interesting, it is
14 heartfelt, and it is vitally important to a lot of
15 people. And much of that interest and discussion has
16 revolved around a decision that is not being made with
17 this motion.

18 I'm reminded of a different quote from a Supreme
19 Court justice when ruling on a jurisdictional case
20 involving the EPA. And that judge said however much we
21 might sympathize or agree with the EPA's policy
22 objectives, EPA may act only within the boundaries of
23 its statutory authority.

24 I think that really fits this situation that we
25 face today. Our responsibility is not to rewrite the

1 laws as we wish they were. The Commission's task is to
2 make our decisions within the boundaries of our
3 statutory authority.

4 The thresholds for energy infrastructure siting
5 are not lost upon the legislators. Believe me, I was
6 one for 18 years. And siting thresholds have been
7 looked at many times. Much discussion has occurred in
8 recent years about gathering pipelines being
9 transitioned into jurisdictional transmission lines
10 after installation. Some have even alleged that certain
11 developers have taken advantage of a loophole in the
12 law. But the legislature has chosen not to make changes
13 there.

14 But a few sessions ago, discussion occurred
15 about wind farms being built just under the siting
16 threshold to avoid siting. And in that case, the
17 legislature took action and lowered the threshold. So
18 they will respond when they choose to.

19 And when a new refinery was announced just a few
20 years ago, also along the interstate and near the
21 Theodore Roosevelt National Park, I'm sure many
22 legislators considered whether the threshold for
23 refineries should be changed, but it was not. The
24 threshold for refineries was left at 50,000 barrels per
25 day.

1 So let's be clear. Our decision today is not
2 about whether or not the Davis refinery is extremely
3 close to the 50,000-barrel-per-day threshold. Because
4 the law says nothing about being close. It either is or
5 it is not over the threshold.

6 And our decision today is not about whether this
7 is an appropriate location to construct a refinery. The
8 law says nothing about the appropriateness of
9 non-jurisdictional facilities.

10 Our decision today is about one thing, and that
11 is whether or not the Davis refinery meets the threshold
12 set by the legislature for PSC jurisdiction. And
13 there's no evidence that the developers' current plan
14 exceeds the legal threshold.

15 The chairman and CEO of Meridian has sworn under
16 oath that their current plan is for a facility that is
17 designed for and capable of refining no more than
18 49,500 barrels per day, which is to be constructed in a
19 single phase, and that there are no current plans for
20 any addition or expansion. If that turns out to be
21 untrue, there could be significant legal consequences.
22 But the law gives this Commission no authority to
23 predict that result.

24 So upon reviewing all the filings, this
25 Commission does not have legal authority to compel

1 Meridian Energy Group to seek a siting certificate.

2 MR. NITSCHKE: Is there any further discussion?

3 Sensing none, all those in favor signify by
4 saying "aye".

5 (Responses of "aye")

6 MR. NITSCHKE: Those opposed?

7 (No response)

8 MR. NITSCHKE: Motion is approved.

9 COMMISSIONER FEDORCHAK: That concludes my
10 portfolio, Mr. Chairman.

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