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Fredrikson & BYRON, P.A.

August 27, 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 Reply Brief in Support of Meridian Energy Group, Inc.'s Motion to Dismiss Complainants/Petitioners' Complaint, Affidavit of Lawrence Bender, Exhibit A, 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,

LAWRENCE BENDER

LB/kl

cc: Patrick J. Ward, Administrative Law Judge (*via U.S. Mail*)
Derrick Braaten (*via U.S. Mail*)
Scott Strand (*via U.S. Mail*)
Rachel Granneman (*via U.S. Mail*)
JJ England (*via U.S. Mail*)

Enclosures
64702548.1

Attorneys & Advisors
main 701.221.8700
fax 701.221.8750
fredlaw.com

Fredrikson & Byron, P.A.
1133 College Drive, Suite 1000
Bismarck, North Dakota
58501-1215

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

INTRODUCTION

Meridian's Motion to Dismiss presents a straightforward question—can the PSC exercise jurisdiction over a crude oil refinery that has a planned operating capacity of 49,500 barrels per day ("bpd")? Under North Dakota law, the answer is an unambiguous "no." For their part, Plaintiffs largely ignore this question and the relevant law and, instead, raise arguments to divert attention from the issue. As discussed below, Plaintiffs' arguments lack merit and cannot change the fact that the PSC has no siting jurisdiction over the Davis Refinery.

LAW AND ARGUMENT

I. MERIDIAN'S MOTION TO DISMISS WAS TIMELY; PLAINTIFFS' ARGUMENT TO THE CONTRARY RELIES ON THE WRONG RULE.

As their lead-off argument, Plaintiffs claim that Meridian's motion to dismiss is one day late and, consequently, should be denied. (Plaintiffs' Brief ("Pls' Br.) at 6.) Plaintiffs' argument is simply wrong and misrepresents the timing requirements under the North Dakota Rules of Civil Procedure.

The timing requirements for Meridian's motion to dismiss are straightforward. Pursuant to the Administrative Agencies Practice Act (the "AAPA"), a party must respond to a complaint within 20 days after that complaint is served. N.D.C.C. § 28-32-21(1)(e); *see also* N.D.C.C.

§ 69-02-02-03. For timing purposes, service of the complaint is considered complete under the AAPA when it would be deemed complete under the North Dakota Rules of Civil Procedure. N.D.C.C. § 28-32-21(1)(f). Rule 4 of the North Dakota Rules of Civil Procedure, in turn, explains when service of a complaint is complete. Specifically, a complaint served by mail is complete upon delivery to the recipient. N. D. R. Civ. P. 4(d), Explanatory Notes ("The time of service for an item served by mail or third-party commercial carrier under subdivision (d) is the time the item is delivered to or refused by the recipient.").

Here, Plaintiffs' Complaint—which was served by mail—was delivered to Meridian on July 19, 2018. This is confirmed by the "Return Receipt" that was signed upon delivery. (Bender Aff., Ex. A.) Thus, service of the Complaint was completed on July 19, 2018. Meridian, then, had until August 8—20 days from the date of service—to submit its motion to dismiss. Because Meridian served and filed its motion to dismiss on August 8, the motion was timely.

In arguing Meridian's motion is one day late, Plaintiffs rely on Rule 5 of the North Dakota Rules of Civil Procedure. For items served under Rule 5, service is complete upon mailing. But Rule 5 does not apply to service of a complaint. Indeed, the first ten words of Rule 5 make plain that it applies to service of items "[o]ther than service of a summons and complaint under Rule 4." N. D. R. Civ. P. 5(a)(1). Accordingly, there is absolutely no legal merit to Plaintiffs' timeliness argument.[1]

Regardless, even if Rule 5 applied (it does not) and even if Meridian's motion was submitted 21 days after service (it was not), the motion would still be timely and valid. Motions

[1] Ironically, the affidavit submitted as support for Plaintiffs' opposition brief was filed and served late. (Letter from J.J. England dated August 21, 2018 (on file) (noting that the affidavit was "inadvertently not included" from the filing of Plaintiffs' opposition brief)). Under Plaintiffs' logic, that affidavit and the arguments it is intended to support should be stricken.

to dismiss for lack of subject matter jurisdiction can be brought at any time. And contrary to Plaintiffs' claim, the defense of lack of subject matter jurisdiction is never waived. *Earnest v. Garcia*, 1999 ND 196, ¶ 7, 601 N.W.2d 260, 263 ("Issues involving subject matter jurisdiction cannot be waived and can be raised sua sponte at any time.").

II. THE PSC'S JURISDICTION IS SET BY STATUTE, NOT PLAINTIFFS.

Plaintiffs argue that the PSC has "jurisdiction to determine [its] own jurisdiction" and, therefore, should deny Meridian's motion. (Pls' Br. at 7-9.) While confusing, Plaintiffs appear to be taking the position that the PSC can set the scope of its jurisdiction—regardless of applicable statute—and require Meridian to undergo a site compatibility certification process for a facility under the 50,000 bpd threshold. Plaintiffs' argument is contrary to law.[2]

The PSC must have subject matter jurisdiction to preside over this matter. *See 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."). Subject matter jurisdiction is "derived from the constitution and the laws." *Cordie v. Tank*, 538 N.W.2d 214, 217 (N.D. 1995). As a result, the PSC's "authority to regulate is limited to that given it by the Legislature." The United States Supreme Court framed the issue best when it stated:

> Judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is "jurisdictional" or "nonjurisdictional." Once those labels are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.

City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 301 (2013) (emphasis added). Here, the answer to that question is "yes."

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[2] Plaintiffs' argument is indeed convoluted. It may be that Plaintiffs have spent pages raising a single issue—"can the Court decide Meridian's motion to dismiss?" The answer to that is, obviously, yes.

The authority granted to the PSC by Sections 49-22.1-01 and 49-22.1-04 is clear, unambiguous, and binary.[3] If the refinery a party presently intends to construct has an operating capacity of 50,000 bpd or more, it is within the PSC's siting jurisdiction and the party must obtain a certificate of site compatibility. If the refinery has an operating capacity under 50,000 bpd, it is not within the PSC's siting jurisdiction and the party need not obtain a certificate of site compatibility. Plaintiffs' speculation aside, Meridian has re-designed the Davis Refinery to be constructed in a single phase with an operating capacity of 49,500 bpd. Because that planned capacity is under the jurisdictional threshold requiring a certificate of site compatibility, Plaintiffs' Complaint must be dismissed.

III. MERIDIAN HAS NOT ENGAGED IN A "BAIT AND SWITCH."

Plaintiffs accuse Meridian of a "bait and switch," arguing that it intends to build a refinery with a capacity below 50,000 bpd and then, after the refinery's construction, seek a certificate of site compatibility to expand beyond 50,000 bpd. (Pls' Br. at 12.) Plaintiffs are mistaken. Meridian clearly stated its current plan—to build a refinery that has a maximum capacity of 49,500 bpd in a single phase. (Prentice Aff. ¶ 3.) Meridian has no plans for an addition to or expansion of the refinery beyond the capacity of 49,500 bpd. (*Id.* ¶ 4.) Accordingly, Plaintiffs' claim that Meridian is engaged in a bait and switch is baseless speculation—and nothing more.

Further, the phrase "bait and switch" implies something devious or improper about building a refinery that is below the 50,000 bpd threshold and, sometime later, applying for a

---

[3] Plaintiffs argue that the logic of the *Chevron* doctrine applies to this case. (Pls' Br. at 8.) It does not. As the United States Supreme Court has made clear, the *Chevron* doctrine only applies when there is a statutory ambiguity regarding the agency's authority. *See City of Arlington, Tex.*, 569 U.S. at 296-97. But "[w]here Congress has established a clear line, the agency cannot go beyond it." *Id.* at 307.

citing certificate from the PSC when the owner decides to expand the refinery to an operating capacity above that threshold. There is nothing devious or improper about doing so. To the contrary, that is exactly what N.D.C.C. §§ 49-22.1-01(6) and 49-22.01-04 contemplate. They also contemplate that the PSC would have the authority not to issue a certificate of site compatibility for any such expansion. Meridian explained as much in Argument Section II.A of its moving brief, which is incorporated by reference. For their part, Plaintiffs do not engage in any statutory analysis or cite any case law that suggests Meridian's analysis of Sections 49-22.1-01(6) and 49-22.01-04 is incorrect. The reason is simple—they cannot do so because the law is clear.

IV. PLAINTIFFS' ARGUMENT—INDEED THEIR ENTIRE LAWSUIT—IS BASED ON MISCHARACTERIZATIONS OF MERIDIAN'S PLANS AND DISREGARD FOR THE APPLICABLE LAW.

As stated above, Plaintiffs do not dispute how the plain language of Chapter 49-22.1 operates. A refinery capable of refining less than 50,000 bpd is not subject to the PSC's jurisdiction under the statute, and a person may construct such a refinery without a certificate of site compatibility. *See* N.D.C.C. §§ 49-22.1-01(6); 49-22.1-04. If the person wishes to construct a subsequent "addition" to such a facility that would increase the production capacity beyond 50,000 bpd, the statute specifically contemplates that the "addition" would cause the total facility to come within the jurisdiction of the PSC, and that the person could not construct this subsequent addition without obtaining PSC approval.

Based solely on outdated statements Meridian previously made regarding its original plan for the Davis Refinery, Plaintiffs claim that Meridian is planning to construct a 55,000 bpd facility without PSC approval. In doing so, Plaintiffs repeatedly mischaracterize the statements Meridian actually made and ignore the plain language of Ch. 49-22.1.

Consistent with its original plan, Meridian previously represented to agencies, the public, and investors that it was planning to construct the Davis Refinery in two separate, distinct phases. The first phase would have involved the construction of a standalone, operational facility capable of refining 27,500 bpd. (*See, e.g.*, Compl., Ex. A at 1 ("The Refinery will be constructed in two phases, with the initial design capacity of the Refinery being 27,500 bpd capacity"); *id.*, Ex. E at 1 ("Davis is being permitted and constructed in two phases: the initial 27,500 bpd Stage 1 hydro-skimming configuration, known as 'Davis Light,' followed by Stage 2 to bring the refinery to its full 55,000 bpd capacity . . . ."). The second phase would have involved the construction of a 27,500 bpd addition to the first phase, bringing to total operating capacity of the facility to 55,000 bpd. The second phase would have been initiated sometime after completing the construction of an operational refinery under the first phase. There was no definitive time or plan to begin construction of the second phase. *See* Ex. B at 12 (explaining that the second phase would be dependent on "allowing reinvestment of initial operational profits [from the first phase] into the construction"). Accordingly, if and when the second phase would have occurred was indeterminate.[4]

Even if Meridian was proceeding under its original plan—as Plaintiffs apparently believe—Meridian would not need a certificate of site compatibility under Sections 49-22.1-01(6) and 49-22.1-04. Meridian would be constructing the first phase of the Davis Refinery, a facility capable of refining 27,500 bpd, which does not require a certificate of site compatibility. Meridian would only need a certificate of site compatibility if and when it moved forward with the second phase, which would have brought the Davis Refinery over the 50,000 bpd threshold. So, even assuming the scenario that Plaintiffs present still existed, the PSC would not have

[4] At one point, Meridian estimated that phase two would be operational within 18 to 24 months after the first phase was constructed. (Compl., Ex. E at 18.)

jurisdiction over Meridian's construction of its formerly-planned 27,500 bpd facility. As a result, Plaintiffs' reliance on (and mischaracterization of) Meridian's statements about its previous plan for the Davis Refinery does not alleviate the jurisdictional problems with Plaintiffs' case.

Regardless, Meridian has modified its plans for the Davis Refinery—at great cost and expense—to create a single-phase 49,500 bpd facility. Under the plain language of Sections 49-22.1-01(6) and 49-22.1-04, the PSC does not have jurisdiction over this facility. Accordingly, under either scenario (Plaintiffs' hypothetical or Meridian's actual, current plans), Meridian is constructing a facility that is not subject to the PSC's siting jurisdiction.

Ultimately, Plaintiffs are advocating for a position that, if applied, would allow any party to file a complaint with the PSC contesting the applicability of Chapter 49-22.1 based on the fear that a project could potentially be expanded beyond the 50,000 bpd threshold at some point in the future. There is simply no statutory support for such a position.

V. DISCOVERY IS NOT NECESSARY OR APPROPRIATE FOR THE PSC TO DECIDE MERIDIAN'S MOTION.

Plaintiffs' argument that they are entitled to expansive discovery regarding the Davis Refinery under N.D.R.Civ.P. 56(f) lacks merit for three reasons.

First, discovery under N.D.R.Civ.P. 56(f) is discretionary, not mandatory. *See id.* ("If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken . . . .") (emphasis added). Here, there is no reason to permit discovery. The issue presented by Meridian's motion is simple and straightforward—whether the PSC has jurisdiction over a 49,500 bpd refinery. The PSC is more than capable of deciding that issue without discovery. Simply put, nothing compels the PSC to apply Rule 56(f) to complicate a clear-cut jurisdictional question.

Second, assuming Rule 56(f) applies, "[a] party invoking N.D.R.Civ.P 56(f) may not merely recite conclusory, general allegations that additional discovery is needed. Rather, N.D.R.Civ.P. 56(f) requires that the party, preferably by affidavit, identify with specificity what particular information is sought, and explain how that information would preclude summary judgment and why it has not previously been obtained." *Poppe v. Stockert*, 2015 ND 252, ¶ 18, 870 N.W.2d 187, 194 (internal quotation omitted). To this end, the affidavit submitted by Plaintiffs is deficient. It does not identify with specificity what particular information is sought or why it would preclude summary judgment. Indeed, the affidavit dedicates a single sentence to this issue, which identifies a vague array of documents—"internal communications, private communications with investors, engineering plans and blueprints, etc." (Affidavit of Rachel Granneman at ¶ 7 (emphasis added).) This cursory list hardly satisfies Rule 56(f)'s particularity requirement.

Third, "[w]hile a Rule 56(f) discovery request may be granted to allow a plaintiff to fill material evidentiary gaps, it may not be premised solely on speculation as to evidence which might be discovered: it does not permit a plaintiff to engage in a 'fishing expedition.'" *Wright v. Eastman Kodak Co.*, 550 F. Supp. 2d 371, 382 (W.D.N.Y. 2008) (emphasis added) (internal quotations omitted), aff'd, 328 F. App'x 738 (2d Cir. 2009); *Morrow v. Farrell*, 187 F. Supp. 2d 548, 551 (D. Md.), aff'd, 50 F. App'x 179 (4th Cir. 2002) (holding that Rule 56(f) does not allow a party to engage in a "fishing expedition"). Engaging is a fishing expedition, however, appears to be exactly what Plaintiffs intend to do.

In Plaintiffs' Brief, they identify a series of questions they believe discovery can "shed light" on:

> 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?

(Plaintiffs' Brief, pp. 10-11.) Plaintiffs do not articulate, however, how any one of these matters has any relevance to the simple jurisdictional issue that is actually before the PSC (i.e., is 49,500, or alternatively, 27,500, less than 50,000). Indeed, the only thing these questions "illuminate" is that Plaintiffs would use discovery as an unbounded effort to explore Meridian's confidential information in an attempt to dig up dirt—a quintessential fishing expedition. As a result, Plaintiffs' request for discovery should be denied.

CONCLUSION

For the reasons set forth above and Meridian's Brief in Support of its Motion to Dismiss, Meridian respectfully requests that the PSC dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

Dated this 27th day of August, 2018.

FREDRIKSON & BYRON P.A.

By: _____

Lawrence Bender ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
701.221.8700
lbender@fredlaw.com

Attorneys for Meridian Energy Group

64675504.3

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

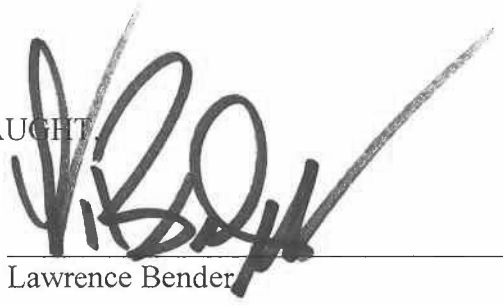
Environmental Law & Policy Center and Dakota Resource Council, Complainants/ Petitioners, v. Meridian Energy Group, Inc., Respondent.	Case No. PU-18-223 **AFFIDAVIT OF LAWRENCE BENDER**

Lawrence Bender, being first duly sworn on oath, states as follows:

1. I am an attorney with the law firm of Fredrikson & Byron, P.A., 1133 College Drive, Suite 1000, Bismarck, North Dakota, counsel for the above-named Defendant Meridian Energy Group, Inc. ("Meridian Energy"), and I am personally familiar with the procedural history of this litigation.

2. Attached hereto as **Exhibit A** is a true and correct copy of a "Return Receipt" that that was signed for on behalf of Meridian Energy on July 19, 2018, to acknowledge delivery of the Complaint in the above-referenced matter.

FURTHER AFFIANT SAYETH NAUGHT.



Lawrence Bender

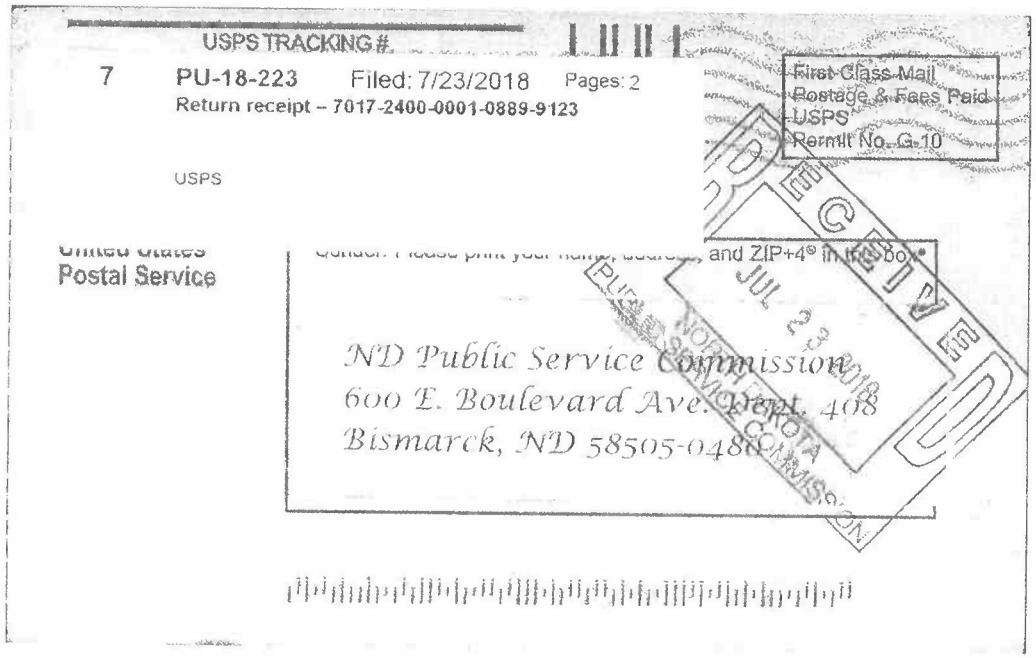
Subscribed and sworn to before me
this 27 th day of August, 2018.

Bethany Hughes
Notary Public

64699091.1

BETHANY HUGHES
Notary Public
State of North Dakota
My Commission Expires February 5, 2020

EXHIBIT A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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 **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that true and correct copies of the following:

1. Reply Brief in Support of Meridian Energy Group, Inc.'s Motion to Dismiss Complainants/Petitioners' Complaint;
2. Affidavit of Lawrence Bender; and
3. Exhibit A

were, on August 27th, 2018, served by placing the same in the United States mail, postage prepaid, properly addressed to the following:

Derrick Braaten
Baumstark Braaten Law Partners
109 North Fourth Street, Suite 100
Bismarck, ND 58501-4003

JJ England
Baumstark Braaten Law Partners
109 North Fourth Street, Suite 100
Bismarck, ND 58501-4003

Scott Strand
Environmental Law & Policy Center
15 South Fifth Street, Suite 500
Minneapolis, MN 55402

Rachel Granneman
Environmental Law & Policy Center
35 East Wacker Dr., Suite 1600
Chicago, IL 60601

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

DATED this 27th day of August, 2018.

FREDRIKSON & BYRON P.A.

By: _____

Lawrence Bender, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
701.221.8700
lbender@fredlaw.com

Attorneys for Meridian Energy Group

64703404.1