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08-2018-CV-02937

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

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.)	

**RECOMMENDED DECISION GRANTING MERIDIAN ENERGY GROUP, INC.'S
MOTION TO DISMISS COMPLAINANTS/PETITIONERS' COMPLAINT**

This Order involves the new Davis oil refinery that respondent Meridian Energy Group, Inc. ("Meridian") has begun to construct in Billings County near Belfield alleged to be less than three miles from the border of Theodore Roosevelt National Park. Complainant/Petitioners Environmental Law & Policy Center ("ELPC") and Dakota Resource Counsel ("DRC") allege in their June 29, 2018 Complaint (Docket #1) 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. Meridian filed a Motion to Dismiss the Complaint on August 8, 2018 (Docket #11).

Meridian's Motion to Dismiss presents a question of subject matter jurisdiction – can the PSC exercise jurisdiction over a proposed crude oil refinery that as it now plans to construct has a planned operating capacity of 49,500 barrels per day ("bpd")?

Petitioners present the following three arguments for denial of the Motion to Dismiss:

First, Meridian's motion is late. Petitioners have withdrawn this argument by letter dated August 30, 2018 (Docket #16, September 4).

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 creates a factual issue on which the parties need to do discovery and which the PSC must ultimately decide. Petitioners further argue that Meridian's previous assertions that it plans to construct a 55,000 bpd refinery requires the PSC to determine whether Meridian's new claim is credible, and this creates a factual question that cannot be resolved on a motion to dismiss. Petitioners Response to Motion to Dismiss filed on August 12, 2018 (Docket #12). Meridian, in its reply filed August 27, 2018, disagreed (Docket #14).

On September 5, 2018, the Commission asked OAH to appoint the administrative law judge as a substantive ALJ to make a recommended decision on the Motion to Dismiss and other matters (Docket #17 & 18). On September 7, this ALJ was assigned by OAH Director Tim Dawson to make recommended findings of fact and conclusions of law, and issue a recommended decision in this action (Docket #_____).

STATEMENT OF FACTS ALLEGED

Petitioners argue 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 21 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.

In addition, Petitioners allege Meridian has apparently told its own investors and others that it plans to construct a "55,000 barrel per day refinery" and stated in numerous press releases and statements to the news media that it intends to construct a 55,000 bpd refinery. Meridian counters that it has changed its plans and will now only build a single phase 49,500 bpd facility.

I. MERIDIAN'S MOTION TO DISMISS WAS TIMELY.

As noted above, plaintiffs' originally argued that Meridian's motion to dismiss was one day late and, consequently, should be denied. (Plaintiffs' Brief ("Pls Br.") at 6.) Thereafter, that argument was withdrawn after responsive briefing was filed by Meridian (Docket #16).

The timing requirements for Meridian's motion to dismiss are set out in Chapter 28-32 of the N.D. Century Code. 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. Adm. 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. Counsel for Meridian filed a Notice of Appearance on July 25, 2018 (Docket #8). Because Meridian served and filed its motion to dismiss on August 8, the motion was timely.

Even if Meridian’s motion was submitted 21 days after service (it was not), the motion would still be timely and valid. Motions to dismiss for lack of subject matter jurisdiction can be brought at any time. It is fundamental and elemental that 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.”); citing, *Larson v. Dunn*, 474 N.W.2d 34, 39 (N.D. 1991) (motion to dismiss for lack of subject matter jurisdiction still appropriate when not made until three years after a custody determination was issued by a district court without statutory jurisdiction).

II. THE PSC’S JURISDICTION IS SET BY STATUTE.

Petitioners argue that the PSC has “jurisdiction to determine [its] own jurisdiction” and, therefore, should deny Meridian’s motion. (Pls’ Br. at 7-9.) This is true to some extent. The PSC did make a preliminary finding of a prima facie case based on allegations of the Complaint (Docket #2).

However, the PSC, like any other agency or court, must at all times have subject matter jurisdiction to preside over any 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.”

Meridian points out that the United States Supreme Court has 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).

The authority granted to the PSC by the North Dakota Legislature in Sections 49-22.1-01 and 49-22.1-04 is clear and unambiguous. It is limited by N.D.C.C. § 42-22.1-01(6) which provides in pertinent part as follows:

6. “Gas or liquid energy conversion facility” means any plant, addition, or combination of plant and addition, designed for or capable of:

...

b. Manufacture or refinement of fifty thousand barrels [7949.36 cubic meters] or more of liquid hydrocarbon products per day....

If the refinery Meridian presently intends to construct would have an operating capacity of 50,000 bpd or more, it would be within the PSC’s siting jurisdiction and the company 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. As alleged in its motions and brief and supporting affidavits, Meridian has re-designed the Davis Refinery to be constructed in a single phase with an operating capacity of 49,500 bpd. (Affidavit of Prentice, ¶ 3.) Because that planned capacity is under the jurisdictional threshold requiring a certificate of site compatibility, plaintiffs Complaint must be dismissed.

III. PETITIONERS' REQUEST FOR DISCOVERY.

Petitioners argue that 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, and that 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.

They argue 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. Both parties have submitted affidavits with their briefs. ELPC and DRC hereby argue by affidavit of Rachel Granneman 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, they believe the Commission may deny Meridian's motion to dismiss and order discovery because jurisdictional facts are in dispute. N.D. R. Civ. P. 56(f). *See, citing, 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)(1) 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.”)

Petitioners assert that many of the facts supporting jurisdiction are in Meridian’s exclusive possession and the appropriate next step is to allow a reasonable period of discovery. They state Meridian has said repeatedly that it plans a 55,000 bpd refinery.

They also argue the Commission should be especially skeptical of Meridian’s claims because of Meridian’s previous apparent attempts to mislead the PSC as alleged in the Complaint. Complaint ¶¶ 19-34 (Docket Item #1). They further state there is no reason to believe the Meridian Chief Executive Officer (“CEO”) William Prentice’s 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 conflicting statements. They request the PSC deny the motion, set a reasonable deadline for jurisdictional discovery, and expeditiously move forward with the proceeding.

Petitioners 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. (Petitioners’ Br. at 12.) However, Meridian has now clearly stated its current plan is to build a refinery that has a maximum capacity of 49,500 bpd in a single phase. (Prentice Aff. ¶ 3.) Meridian has now stated it has no current plans for an addition to or expansion of the refinery beyond the capacity of 49,500 bpd. (*Id.* ¶ 4.) When and if it does, the PSC would then acquire the siting jurisdiction which it currently lacks.

It may be that Meridian originally intended to build the refinery in two phases. It may be they planned to do so in order to try to circumvent PSC jurisdiction for the initial phase and build a second phase later. It may also be that the opposition by Petitioners and others here caused them to reconsider and downsize the project to 49,500 bpd in order to avoid PSC jurisdiction. However, even taking all those assumptions as true, the PSC does not have statutory authorization to assert jurisdiction below its threshold of 50,000 bpd or to engage in speculation now about the company's plans for future expansion.

By virtue of the plain language of Chapter 49-22.1, the legislature clearly articulated that a refinery capable of refining less than 50,000 bpd is not subject to the PSC's citing jurisdiction under the statute, and a person may construct such a refinery without a certificate of site compatibility from the Commission. See N.D.C.C. §§ 49-22.1-01(6); 49-22.1-04. Petitioners have not cited North Dakota statutory authority permitting an expansion of PSC citing authority to search out or speculate as to such ulterior motives or intentions. If the person wishes to construct a subsequent "addition" to such a facility that would increase the production capacity of the facility 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 the person could not construct this subsequent addition without obtaining PSC approval.

Because the company has now revised its construction plan to build a refinery below the jurisdictional authority granted the PSC by the legislature, the PSC is not currently the proper forum to contest the project. Taking the facts in the light most favorable to Petitioners and considering both parties' affidavits, I accept the assertions

that the plan being finalized for construction at 49,500 bpd is not within the jurisdictional authority of this Commission at this time. Unless 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.

REQUEST FOR CEASE AND DESIST ORDER

After briefing of the Motion to Dismiss was complete, Petitioners DRC and ELPC have filed a motion for a Cease and Desist Order (Docket #15) on August 31, 2018. This is based on the argument that Meridien has already begun construction of the refinery without permits for approvals from the PSC.

However, because I find that the facility now being constructed by Meridian is not within the jurisdictional authority of PSC, the commission also lacks the power to issue a Cease and Desist Order at this time.

PROPOSED FINDINGS OF FACT

1. The Davis Refinery currently being constructed in Billings County is a 49,500 bpd facility.
2. Construction has begun on the facility.
3. Previous representations as to the company's plans in other permit applications are not relevant to the final permitting requirement so long as the facility constructed stays below 50,000 bpd.
4. When plans to increase the facility beyond 49,500 bpd are implemented, that plan subjects the entire facility to the review and approval process.

PROPOSED CONCLUSIONS OF LAW

1. The PSC lacks statutory subject matter jurisdiction over this proposed 49,500 bpd facility.

RECOMMENDED ORDER

1. The Motion to Dismiss the Complaint of DRC and ELPC should be Granted.

2. The Request for Discovery should be Denied.

3. The Request for a Cease and Desist Oder should also be Denied.

Dated this 10th day of September, 2018.

State of North Dakota
OFFICE OF ADMINISTRATIVE HEARINGS

By


Patrick J. Ward ID#03626

Administrative Law Judge
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BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

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.)	

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the following:

**RECOMMENDED DECISION GRANTING MERIDIAN ENERGY GROUP, INC.'S
MOTION TO DISMISS COMPLAINANTS/PETITIONERS' COMPLAINT**

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Dated this 10th day of September, 2018.

State of North Dakota
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/Patrick J. Ward

Patrick J. Ward ID#03626

Administrative Law Judge

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