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Subject: Filing Accepted for Case: 08-2018-CV-02937; Environmental Law and Policy Center, et al. vs. North Dakota Public Service Commission, et al.; Envelope Number: 3293206
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Envelope Number: 3293206

Case Number: 08-2018-CV-02937

Case Style: Environmental Law and
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Filing Details	
Court	Burleigh County - South Central District
Case Number	08-2018-CV-02937
Case Style	Environmental Law and Policy Center, et al. vs. North Dakota Public Service Commission, et al.
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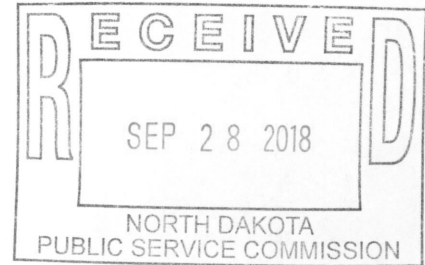
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CR Exhibit 27 Reply in Support of Motion to Reopen

08-2018-CV-02937

September 28, 2018



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

Re: Reply Brief 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 a Reply in Support of Motion to Reopen and Supplement the Record filed by Complainants/Petitioners DRC and ELPC.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "JJ England".

JJ England

Enclosures

cc: Patrick J. Ward

28 **PU-18-223** Filed: 9/28/2018 Pages: 6
Reply in Support of Motion to Reopen and Supplement the Record

Dakota Resource Council & The Environmental Law & Policy
Center
JJ England

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.)

**REPLY IN SUPPORT OF
MOTION TO REOPEN AND SUPPLEMENT THE RECORD**

Complainants Environmental Law & Policy Center (“ELPC”) and Dakota Resource Council (“DRC”) respectfully submit this Reply in support of their Motion to Reopen and Supplement the Record in order to briefly make three points: (1) the *prima facie* finding by the Public Service Commission (“PSC”) triggered the requirement for a hearing, (2) Meridian Energy Group, Inc. (“Meridian”) failed to address several provisions of the Permit to Construct (“PTC”), and (3) Complainants acted promptly once they had reason to believe that the PSC might issue a decision without the opportunity for a hearing or discovery and, regardless, the Commission should consider the information Complainants filed with their Motion because the PSC determined that the record is still open.

I. The PSC’s *Prima Facie* Finding Triggered the Hearing Requirement.

Meridian argues that the PSC does not have jurisdiction over this case and therefore is not required by the Administrative Agencies Practice Act (AAPA), N.D.C.C. 28-32-01 *et seq.*, to hold a hearing. To the contrary, the statutory language clearly demonstrates that the PSC’s

finding that the Complaint presented a *prima facie* case triggers the requirement that the PSC hold a hearing. The AAPA provides that agencies shall comply with the following:

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. The complaint shall contain a concise statement of the claims or charges upon which the complainant relies, including reference to the statute or rule alleged to be violated, and the relief sought.

b. **After a complaint is filed, the appropriate administrative agency shall serve a copy of the complaint upon the respondent** in the manner allowed for the service of process under the North Dakota Rules of Civil Procedure at least forty-five days before the hearing on the complaint.

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 in the manner allowed for service under the North Dakota Rules of Civil Procedure, at least twenty days before the hearing on the complaint. Service of the notice of hearing may be waived in writing by the respondent, or the parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction

N.D.C.C. § 28-32-21. The AAPA clearly lays out a set of steps that must be followed for an administrative adjudicative proceeding. First, the complainant files a complaint with the appropriate agency. If the complaint is sufficient, that “appropriate administrative agency” serves the complaint on the respondent. Then, the agency holds a hearing on the complaint.

If the PSC was not the “appropriate administrative agency” “having subject matter jurisdiction,” it would not have served the respondent with the Complaint. Once the PSC determined that the Complaint was sufficient and stated a *prima facie* case, the PSC was required to hold a hearing. If anything, the language of the AAPA demonstrates that the PSC already determined that it has jurisdiction in this case.

II. **Meridian Failed to Address Several Relevant Provisions of the Permit.**

Meridian mischaracterizes and ignores provisions of the Permit to Construct. Meridian first states that it is not required to update its Permit because reducing the planned refinery

capacity from 55,000 bpd to 49,500 bpd would not increase emissions. There is no way for the PSC to judge the validity of this claim, however, because Meridian has not submitted any updated information to the North Dakota Department of Health describing how it plans to build or operate a 49,500 bpd refinery, and Complainants have not been given an opportunity to conduct discovery. There certainly should not be an assumption that a facility with a slightly lower capacity would lead to less emissions, as decreased size of industrial facilities often corresponds to a decrease in the efficiency of processes.

Meridian's Response also completely fails to address the permit requirement that construction be carried out as described in the permit application and other submissions and that "any construction which proceeds in variance with any information submitted in the application[] is regarded as a violation of construction authority and is subject to enforcement action." Complainants' Brief at 5-6. Meridian also fails to address the requirement that operations at the refinery must be as described in the application, and the statement that the permit "is issued in reliance upon the accuracy and completeness of the information set forth in the application." Complainants' Brief at 6. Meridian clearly stated in its application that it is constructing "a new crude oil refinery, the Davis Refinery, with a nominal processing capacity of 55,000 barrels per day." Exhibit B to Complaint at 1.

Meridian's also claims that because it is alleging a reduction in capacity, its plans are still consistent with the Permit for a refinery of "up to" 55,000 barrels per day (bpd). This argument fails because both Meridian's application and the permit are clearly for the construction and operation of a refinery with a final capacity, once complete, of 55,000 bpd. For example, the Permit states that the refinery equipment will include two crude desalting and distillation units with a capacity of 27,500 bpd each. Exhibit D to Complaint at 2. The "up to" language is no

doubt meant to reflect Meridian's statement that it would build the refinery in two stages, with the first stage having a capacity of less than 55,000 bpd.

III. The PSC Should Include in the Record Complainants' Evidence that Meridian Has Not Taken Steps to Update its Permit.

Meridian also claims that Complainants have not met the standard to reopen and supplement the record. First, Complainants promptly filed an open records request as soon as they had reason to believe that the PSC might issue a final order in the case without holding a hearing or allowing discovery. Complainants could not rely on the lack of new information on the North Dakota Department of Health's website to verify that Meridian had not taken actions to inform the Department of its alleged change in plans.

Second, and perhaps more importantly, the PSC determined in its work session on September 17, 2018, that the record in this case is still open. Docket # 24. Accordingly, the information submitted by Complainants with its Motion should be included in the record.

Dated this 28th day of September, 2018.

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 28th day of September, 2018, served by e-mailing the same to:

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Derrick Braaten
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Scott Strand
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Rachel Granneman
rgranneman@elpc.org

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

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

An original and ten copies of the foregoing document will also be hand-delivered to the North Dakota Public Service Commission on said date.

/s/ JJ England
JJ England