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Notification of Service

Case Number: 08-2018-CV-02937

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Case Style: Environmental Law and Policy Center, et al. vs. North Dakota Public Service Commission, et al.

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Environmental Law & Policy Center and Dakota Resource Council,)	
)	Civil No. 08-2018-CV-02937
Appellants,)	PSC Case No. PU-18-223
)	
v.)	
)	APPELLANTS' REPLY BRIEF
North Dakota Public Service Commission, and Meridian Energy Group, Inc.,)	
)	
Appellees.)	
)	

I. INTRODUCTION

[¶1] Appellee Meridian Energy Group, Inc. (“Meridian”) has gone out of its way to overcomplicate a case that, procedurally, is simple. Dakota Resource Council’s (“DRC”) and Environmental Law and Policy Center’s (“ELPC”) underlying complaint was well-pled. Initially, the Public Service Commission (“PSC”) agreed, having stated that the complaint made a valid claim *on its face*, and then proceeded to serve the complaint on Meridian. PSC Motion, Doc. ID. 49 (“the Formal Complaint ... states a prima facie case”). The fact is that to this day, Meridian holds a permit to construct a “55,000 bpd” refinery issued by the NDDH. Permit to Construct, Doc. ID 35. DRC and ELPC pled this information directly in their complaint before the PSC and attached the NDDH permit to construct and Meridian’s application for that permit to as factual support. *See* Complaint at ¶ 27, Doc. ID 29; Application for Permit to Construct, Doc. 31; Permit to Construct, Doc. ID 35. DRC and ELPC even re-confirmed that this permit to construct remained in effect when responding to Meridian’s motion to dismiss, and filed conclusive evidence of that fact with the PSC. E-mail from Rheanna Kautzman to JJ England (September 14, 2018), Doc. ID

70, at p. 16. Even today, while this appeal is pending, Meridian still holds a permit to construct a 55,000 barrel per day (“bpd”) refinery. The signed permit is on NDDH's website.¹ It is an active permit. This Court may take judicial notice that this permit remains in effect. N.D.R.Ev. 201. In other words, it is not Appellants who are asking the Court to invoke extraordinary powers—it is the PSC and Meridian who are asking the Court to take a one-page, self-serving affidavit at face value, while ignoring hundreds of pages of additional evidence as well as the explicit terms of a permit that *remains in effect*.

[¶2] The AAPA does not contain a rule for a motion to dismiss. *See generally* N.D.C.C. ch. 28-32. It does, however, clearly set forth a complainant’s right to discovery and an evidentiary hearing. N.D.C.C. §§ 28-32-33, 28-32-35. Based on DRC’s and ELPC’s well-pled complaint, DRC and ELPC were entitled to an opportunity for a fair hearing based on the facts alleged in their well-pled complaint. Only by presenting the bases for the facts DRC and ELPC alleged, and by allowing Meridian to similarly present the bases for the facts *it* alleged, would both sides be afforded a fair opportunity to adequately present their respective cases on behalf of their members and shareholders. Instead, the PSC denied DRC and ELPC these rights in direct violation of the AAPA.

II. MERIDIAN AND THE PSC MISREPRESENT THE FACTUAL ALLEGATIONS IN APPELLANTS’ COMPLAINT

[¶3] Meridian and the PSC misrepresent the factual allegations Appellants ELPC and DRC made in their Complaint. Meridian attempts to frame the Complaint as alleging only a possible or hypothetical violation of North Dakota Century Code § 49-22.1-04, which prohibits the start of construction of a refinery capable of refining 50,000 bpd or more without a certificate

¹ <https://deq.nd.gov/FOIA/AQPermits/AQPermitDownload.aspx?ID=10297> (last accessed March 13, 2019).

of site approval from the PSC. Meridian stated that Appellants complained about Meridian’s plan to “potentially expand the refinery in the future” and that the refinery “could have a potential total capacity of 55,000 bpd.” Meridian Br. at ¶ 8, 30. Meridian and the PSC misrepresent the underlying allegations. What Appellants *actually* alleged is that Meridian was currently constructing or would soon begin to construct a refinery that *would* have a capacity of 55,000 bpd. Complaint at 1, Doc. ID 29.

[¶4] Similarly, the PSC complains—by analogy to a Tom Cruise action flick—that Appellants are acting as “psychics” based on “premonitions” in their Complaint because they stated that Meridian would “soon” be in violation of N.D.C.C. § 49-22.1-04. In the very first paragraph of their Complaint, Appellants alleged:

[Meridian] is currently or will soon be acting in violation of North Dakota law through its planning and construction of a refinery with a capacity of over 50,000 barrels per day (“bpd”) without obtaining a certificate of site compatibility from the North Dakota Public Service Commission.

Complaint at 1, Doc. ID 29. The Siting Act is violated when the company “begin[s] construction.” N.D.C.C. §§ 49-22.1-01(3), 49-22.1-20. Appellants included the “or will soon be” clause because although Appellants had significant evidence that Meridian was planning to construct a 55,000 bpd refinery (for example, Meridian had formally received its Permit to Construct from NDDH), it was not yet clear whether Meridian had actually *begun construction*. By its own admission, Meridian began construction of its Davis Refinery by grading the site while the underlying complaint before PSC was pending. Press Release “Meridian Energy Group, Inc. Begins Civil Construction of the Davis Refinery,” Doc. ID 63. Thus, as alleged by DRC and ELPC in their Complaint, Meridian is in violation of the law.

[¶5] Meridian also misstates the facts when it claims that “all of the statements Appellants cited in their Complaint were made over a year before the Complaint was filed.”

Meridian Br. at ¶ 8. In fact, Appellants' Complaint quoted from a news article dated October 2, 2017, in which Meridian Chairman and CEO William Prentice stated “[o]nce we have Davis Light in operation, we will finalize our plans for expanding the Davis Refinery to a full 55,000-bpd capacity.” Complaint at ¶ 29, Doc. ID 29. This article was published less than nine months prior to the June 29, 2018 Complaint filing date. Additionally, Appellants included an appendix to their Complaint with a list of 77 press releases and news articles as were then currently posted on Meridian’s website and the Davis Refinery’s website. Appendix F to Complaint, Doc. ID 37.

III. MERIDIAN MISREPRESENTS THE FINDINGS OF THE COMMISSION ORDER

[¶6] Meridian also claims that the Commission “concluded that it lacked subject matter jurisdiction” even in the “scenario” “presented by Appellants,” which Meridian describes as: “the Davis Refinery is constructed as a two-phase facility with an initial capacity of 27,500 bpd.” Meridian Br. at ¶ 22. First, the Commission made no such determination on whether the circumstances alleged in Appellants’ Complaint would support PSC jurisdiction. Rather, it acknowledges that Meridian may have been attempting to circumvent PSC jurisdiction with its original “two phase” plan, but determines that based on the new claims by Meridian—that it is only building a 49,500 bpd refinery—that Meridian’s *currently planned* refinery is below the 50,000 bpd threshold for PSC jurisdiction:

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.

Commission Order at 9, Doc. ID 109.

**IV. MERIDIAN ATTEMPTS TO CONFUSE THE ISSUES BY
COMPLAINING THAT APPELLANTS DID NOT EXPLICITLY
ADDRESS SUBJECT MATTER JURISDICTION ON APPEAL**

[¶7] Meridian apparently misses the point of Appellants’ appeal when it complains that “Appellants’ specifications of error do not address the matter truly at issue in this case” and that “[b]ecause Appellants’ specifications of error do not challenge the PSC’s jurisdictional determination, this Court cannot consider the propriety of that determination on appeal.” Meridian Br. at ¶ 19.

[¶8] Once again, Meridian confuses and conflates the ultimate issue on the merits, questions of jurisdiction, and procedural issues. Appellants have appealed the Commission’s Order because they were not afforded a fair hearing and adequate opportunity to develop their case, as required by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. They were not required to *also* specifically allege that the outcome of the improper process was erroneous. It is of course Appellants’ position that the PSC has subject matter jurisdiction based upon their well-pled Complaint. This appeal is about whether the Commission should even have gotten to the point of making a determination on jurisdiction, weighing evidence, and entering findings of fact without first providing Appellants a hearing and an opportunity for discovery. Further, Meridian’s case law does not support its argument. *Johnson v. N. Dakota Workforce Safety & Insurance*, 2010 ND 198, ¶ 16, 789 N.W.2d 565, 569, simply stands for the principle that a notice of appeal must reasonably put the other parties on notice of the appellants’ claims and cannot raise new issues later in the appeal that were not included in the notice.

[¶9] Meridian also cites to *Citizens Utilities Co. of Illinois v. Illinois Pollution Control Bd.*, 265 Ill. App. 3d 773, 778, 639 N.E.2d 1306, 1310 (1994), an Illinois case that is not analogous, as there were no facts at issue in that opinion. The question of jurisdiction in that case was a purely legal question, and the court determined as a matter of law that “the Board lacks jurisdiction over

third party petitions against the issuance of NPDES permits.” *Id.* at 1310. By comparison, in the current case, Appellants’ right to file their Complaint was affirmed by the Commission’s finding of a prima facie case, and the dispute over DRC’s and ELPC’s *factual* allegations in their Complaint regarding the actual capacity of the Davis Refinery is the key element that requires a fair hearing and discovery.

V. **THE PSC ATTEMPTS TO ABDICATE ITS REGULATORY RESPONSIBILITIES**

[¶10] Perhaps the most concerning aspect of the PSC’s brief is the agency’s willingness to take Meridian at its word while abdicating its own authority. The PSC states:

Until a potential applicant voluntarily consents to an administrative agency’s jurisdiction (by seeking a permit) or there is a statutory violation, an administrative agency is forced to take potential permit applicants at their word as to whether permitting requirements apply to a given project or action.

PSC Brief at ¶ 13. The PSC’s position is apparently that *the permittee* determines whether permitting requirements apply to its project. This is a confounding statement coming from a regulatory body charged with making its own, independent judgments regarding potentially sensitive siting of public utilities and energy conversation facilities. Further, it makes one wonder why the PSC has any statutory authority at all to revoke or suspend permits, or to impose penalties for misrepresentations and falsifications. *See e.g.* N.D.C.C. § 49-22.1-19(1) (Commission may revoke or suspend permit or certificate of site compatibility for “any material false statement in the application or in accompanying statements or studies required of the applicant.”).

[¶11] DRC and ELPC alleged in their complaint in great detail that Meridian *is currently* constructing a 55,000 bpd refinery *in violation of the law*. Yet the PSC is apparently content to wait until the refinery is fully built and operational before determining that the Davis Refinery’s capacity exceeds 50,000 bpd. The PSC states that “[o]nly Meridian can truly know its own intent.” PSC Br. at ¶ 19. The PSC’s position fundamentally ignores the purpose of the adjudicative process,

which is to allow *the fact-finder* (i.e., the PSC) to make these determinations based upon an adequate factual record developed at an evidentiary hearing. Discovery into engineering plans, Meridian's communications, etc. followed by the required evidentiary hearing would give the PSC the ability to make a determination regarding Meridian's plans and its intent.

VI. CONCLUSION

[¶12] For the foregoing reasons and for the reasons stated in ELPC's and DRC's opening brief, DRC and ELPC respectfully request that the Court:

- a. Enter a ruling that the PSC did not provide a fair hearing and did not comply with the requirements of the AAPA;
- b. Reverse the PSC's order dismissing DRC's and ELPC's Complaint against Meridian;
- c. Vacate the PSC's findings of fact and conclusions of law; and
- d. Remand this proceeding to the PSC with instructions to allow discovery and an evidentiary hearing.

Dated this 8th day of April, 2019.

Respectfully submitted,

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3(A)(1)(a)(1)*

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