

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

State of North Dakota; Industrial Commission of)
North Dakota; Lignite Energy Council; Basin)
Electric Power Cooperative; The North)
American Coal Corporation; Great Northern)
Properties Limited Partnership; Missouri Basin)
Municipal Power Agency, doing business as)
Missouri River Energy Services; Minnkota)
Power Cooperative, Inc.)

Plaintiffs - Appellees)

v.)

Beverly Heydinger, Commissioner and Chair,)
Minnesota Public Utilities Commission; David)
C. Boyd, Commissioner, Minnesota Public)
Utilities Commission; Nancy Lange,)
Commissioner and Vice Chair, Minnesota)
Public Utilities Commission; Dan M. Lipschultz,)
Commissioner, Minnesota Public Utilities)
Commission; Betsy Wergin, Commissioner,)
Minnesota Public Utilities Commission; Mike)
Rothman, Commissioner, Minnesota)
Department of Commerce, each in his or her)
official capacity)

Defendants - Appellants)

-----)
State of North Dakota; Industrial Commission of)
North Dakota; Lignite Energy Council; Basin)
Electric Power Cooperative; The North)
American Coal Corporation; Great Northern)
Properties Limited Partnership; Missouri Basin)
Municipal Power Agency, doing business as)
Missouri River Energy Services; Minnkota)
Power Cooperative, Inc.)

Plaintiffs – Appellants)

Case No. 14-2156

**APPELLANTS' REPLY
IN SUPPORT OF
MOTION TO DISMISS
APPELLEES'
CROSS-APPEAL**

Case No. 14-2251

v.)
)
)
 Beverly Heydinger, Commissioner and Chair,)
 Minnesota Public Utilities Commission; David)
 C. Boyd, Commissioner, Minnesota Public)
 Utilities Commission; Nancy Lange,)
 Commissioner and Vice Chair, Minnesota)
 Public Utilities Commission; Dan M. Lipschultz,)
 Commissioner, Minnesota Public Utilities)
 Commission; Betsy Wergin, Commissioner,)
 Minnesota Public Utilities Commission; Mike)
 Rothman, Commissioner, Minnesota)
 Department of Commerce, each in his or her)
 official capacity)
)
 Defendants - Appellees)

Appellees twenty-page memorandum serves only to obfuscate the material facts and law which dictate a dismissal of their cross appeal. Appellees sought a judgment declaring Minn. Stat. § 216H.03, subd. 3(2)-(3) unconstitutional and enjoining its enforcement. (Am. Compl. Doc. No. 9) at 39.) The district court Order granted Appellee that relief. (Apr. 18, 2014 Mem. Op. and Order (Doc. No. 210) at 47-48). As such, Appellee’s are simply making arguments to support affirmance for which no cross-appeal is necessary or appropriate. *See, e.g., Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) (“We may affirm a judgment on any ground raised in the district court, and the party that

prevailed in the district court need not file a cross-appeal to raise alternative grounds for affirmance.”)¹

Appellees’ concern that a protective cross-appeal is necessary to protect their interests is also specious because Appellants have affirmatively raised the same issues that Appellees alternatively claim support affirmance of the district court decision. (Appellants’ Statement of the Issues at No. 5 (raising issue of whether district court erred in failing to award Appellants summary judgment on all claims)).

Finally, Appellees apparently take the position that they can litigate the issue of attorney fees on their summary judgment motion simultaneously before the district court and this Court. Appellees filed a motion for attorney fees with the

¹ Contrary to Appellees’ representation, a cross-appeal is not necessary to support arguments seeking affirmance of the judgment based on a separate legal theory or claim. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 475 & n.6 (1970) (holding that even though the district court decided a regulation was invalid only on constitutional grounds, cross-appeal was not necessary for the Court to consider whether judgment should be upheld on a separate statutory basis rejected by the district court); *Castellano v. Fragozo*, 352 F.3d 939, 960 (5th Cir. 2003) (concluding that even when district court rejected Fourteenth Amendment claims and then submitted only Fourth Amendment claims to jury, cross-appeal was not necessary to support verdict on Fourteenth Amendment theory). The cases cited by Appellees to the contrary are inapposite. *See, e.g., General Mills Operation, LLC v. Five Star Custom Foods, Ltd.*, 703 F.3d 1104, 1111 (8th Cir. 2013) (dismissing cross-appeal as moot without deciding appropriateness); *Beachwalk Homeowners Ass’n v. Gen. Star. Indem. Co.*, 76 Fed. Appx. 494, 495 (4th Cir. 2003) (same); *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.3d 518, 548 & n.44 (5th Cir. 1974) (same).

district court on May 2, 2014. (Motion for Attorneys' Fees (Doc. No. 212).) On May 5, 2014, Appellants took the position that the Court had already entered an order on the issue of attorney fees, and that no further proceedings were needed. (Letter to Court (Doc. No. 215).) In the event the court disagreed, Appellants alternatively sought to submit an adversarial brief. (*Id.*) On May 6, 2014, the Court decided to permit the Motion to proceed and set a briefing schedule on Plaintiffs' motion. (Order Setting Briefing Schedule for Motion for Attorneys' Fees (Doc. No. 216).)

On May 29, 2014, Appellees represented to the district court that it had jurisdiction to decide the issue of fees. (Letter to Court (Doc. No. 223).) That same day, Appellees filed a cross-appeal asking this Court to review, among other things, the issue of fees. (Notice of Cross-Appeal (Doc No. 224).) However, both courts cannot simultaneously exercise jurisdiction over the issue of fees on the same motion. *See, e.g., Liddell by Liddell v. Board of Educ. of City of St. Louis*, 73 F.3d 819, 822 (8th Cir. 1996) (“[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.” (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982))). Appellees' motion for fees has been briefed and argued and is currently under advisement at the district court. Appellees can appeal that decision if aggrieved.

CONCLUSION

Based upon the foregoing, Appellees' cross-appeal should be dismissed and the briefing schedule be modified accordingly.

Dated: July 24, 2014

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/ Alethea M. Huyser
Alethea M. Huyser
Assistant Attorney General
Atty. Reg. No. 0389270
alethea.huyser@ag.state.mn.us

Michael Everson
Assistant Attorney General
Atty. Reg. No. 0388310
michael.everson@ag.state.mn.us

445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
Telephone: (651) 757-1243
Fax: (651) 282-5832

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Alethea M. Huyser

Alethea M. Huyser
Assistant Attorney General