

Sarah Vogel Law Firm, P.C.

222 North 4th Street ♦ Bismarck ND 58501-4004

Phone: (701) 221-2911 ♦ Fax: (701) 221-5842

April 23, 2009

RECEIVED

APR 23 2009

Darrell Nitschke
Executive Director
NORTH DAKOTA
PUBLIC SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

PUBLIC SERVICE COMMISSION

RE: Dakota Resource Council *et al.* v. GTLE Dakota Plant 1 LLC
ND PSC Case No. RC-09-32
OAH File No. 20090071

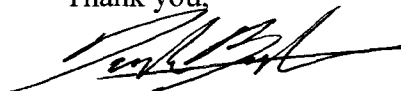
Dear Mr. Nitschke:

Enclosed for filing please find the following, along with 7 copies thereof:

- 1. MOTION TO STRIKE RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF with Certificate of Service**
- 2. MOTION PURSUANT TO N.D.R.CIV.P. 56(F) TO REFUSE OR CONTINUE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF with attached AFFIDAVIT OF PAUL C. BLACKBURN and Certificate of Service**

Please call with any questions.

Thank you,



Derrick Braaten

Encl.

C: Hon. Al Wahl
Brian Bjella
Illona Jeffcoat-Sacco

20 RC-09-32 Filed: 4/23/2009 Pages: 28
Motion to Strike Respondent's Motion to Dismiss & Motion to Refuse or Continue Respondent's Motion for Summary Judgment & Memos in Support
Dakota Resource Council
Derrick Braaten

Sarah Vogel
sarah@svogellaw.com
Licensed in ND

Beth A. Baumstark
beth@svogellaw.com
Licensed in ND, KY

Rudra Tamm
rudra@svogellaw.com
Licensed in ND, CT, NY

Derrick Braaten
derrick@svogellaw.com
Licensed in ND, MN

**BEFORE THE PUBLIC SERVICE COMMISSION
OF NORTH DAKOTA**

Dakota Resource Council,)	
Neil and Laura Tangen,)	
Myron and Nancy Eberts, and)	
Frank and Lucy Hurt,)	
Complainants,)	Case No. RC-09-32
)	
vs.)	
)	
GTLE Dakota Plant 1 LLC)	
Respondent.)	

**MOTION TO STRIKE RESPONDENT’S MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT THEREOF**

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt together Complainants, by their attorneys hereby move pursuant to N.D.R.Civ.P. 12(f) to strike Respondent’s MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, to the extent it is treated by the North Dakota Public Service Commission (“Commission”) as a motion to dismiss. Due to Complainants’ Motion for Leave to Amend and Supplement Complaint, Respondent’s motion to dismiss states an insufficient defense and is immaterial and therefore should be stricken. To the extent that the Commission considers Respondent’s motion to be a motion for summary judgment, Complainants by separate pleading filed contemporaneously with this motion move for relief from Respondent’s motion for summary judgment pursuant to N.D.R.Civ.P. 56(f). To facilitate the Commission’s consideration of this matter, Complainants propose a process for the efficient and concurrent consideration by the Commission of Complainants’ Motion for Leave to

Amend and Supplement Complaint, as well a motion to dismiss such amended and supplemented complaint.

BACKGROUND

On April 8th, Complainants filed their Motion for Leave to Amend and Supplement Complaint and Memorandum in Support Thereof, which contained a proposed First Amended and Supplemented Complaint. Complainants seeks to amend and supplement its complaint due to a change in factual circumstances outside of Complainants' control, specifically those related to Great Northern Project Development's withdrawal of an application to construct and operate a 300,000 ton per year mine to supply Respondent's proposed coal preparation plant. This withdrawal means that some of the facts alleged in the original Complaint have changed.

On April 10, 2009, Respondent filed its Motion to Dismiss the Complaint for Failure to State a Claim upon Which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment. As the Commission had not yet ruled on Complainants' Motion for Leave to Amend and Supplement its Complaint, in its pleading Respondent challenged only Complainants' original Complaint.

On April 20, 2009, Respondent filed its Response to Complainants' Motion for Leave to Amend and Supplement Complaint, in which it opposed Complainants' motion, made various arguments of law reaching to the merits of this proceeding, and generally averred that its motion to dismiss and in the alternative for summary judgment responded to Complainants' motion for leave to file its amended and supplemented complaint.

The Commission has not yet ruled on Complainants' Motion for Leave to Amend and Supplement Complaint. As such, Respondent's motion to dismiss challenged only Complainants' original Complaint.

ARGUMENT

Respondent's motion to dismiss states an insufficient defense and is immaterial to this proceeding under N.D.R.Civ.P. 12(f) and therefore should be stricken. Should the Commission consider Respondent's motion to be a motion to dismiss under N.D.R.Civ.P. 12(b)(vi), the Commission would put itself in a logically and legally untenable position. In order for the Commission to treat Respondent's motion as a motion to dismiss under N.D.R.Civ.P. 12(b)(vi), the Commission could consider only the contents of the original Complaint itself and may not consider the affidavit or other outside evidence presented by Respondent in its motion, or consider Complainants' proposed First Amended and Supplemented Complaint, because consideration of these documents would result in matters outside the pleading being presented to the Commission. Such presentation would by action of N.D.R.Civ.P. 12(b)¹ convert Respondent's motion to one for summary judgment, which, as described in Complainants' motion under N.D.R.Civ.P. 56(f), is premature at this juncture. Respondent's motion to dismiss for failure to state a claim is improper and without legal basis. "Upon a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b) N.D.R.Civ.P. the allegations of the complaint will be deemed to be true." Park Dist. City of Fargo v. City of Fargo, 129 N.W.2d 828, 830 (ND 1964) (citing Nelson v. Westland Oil Co., 8 Cir., 181 F.2d 371; Embassy Dairy v. Camalier, 93 U.S.App.D.C. 364, 211 F.2d 41; Odell v. Humble Oil & Refining Co., 10 Cir., 201 F.2d 123). Respondents inexplicably rely on N.D.R.Civ.P. 12(b), which requires the allegations in the complaint to be deemed to be true, and simultaneously present evidence with the intent of showing that the allegations in the complaint are not true. This is illogical.

¹ N.D.R.Civ.P. 12(b), in relevant part, states: "If, on a motion asserting defense numbered (vi), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must be given reasonable opportunity to present all material made pertinent to the motion by Rule 56."

Moreover, since the Commission has not yet granted leave to amend the complaint, Respondent's motion to dismiss, as drafted, challenges the claims only in the original Complaint. Accordingly, in its motion to dismiss Respondent does not and cannot address Complainants' proposed First Amended and Supplemented Complaint.

It would be nonsensical for the Commission to consider a motion to dismiss directed at the original Complaint because this would result in the Commission considering facts in the Complaint that are no longer in existence. Consideration of Respondent's motion to dismiss, as drafted, would also prevent the Commission from consideration of any facts outside the now outdated Complaint, including any consideration of Great Northern Project Development's mine permit application withdrawal and any of the evidence presented by Respondent in its motion, because all of these matters are outside the complaint. Respondent's motion to dismiss responds to a pleading which contains outdated factual allegations, and as such is irrelevant. Therefore, Respondent's motion, as drafted, is insufficient and immaterial to this proceeding and must be stricken.

Consideration of Respondent's motion to dismiss, as drafted, would in effect force Complainants to base their claims on facts in the original Complaint that have been superseded by changed circumstances, thereby denying Complainants any opportunity to amend or supplement its complaint. For the reasons contained in Complainants' Motion for Leave to Amend and Supplement Complaint, the Commission must grant leave to amend the Complaint. A failure to allow such amendment would be reversible error, such that proceeding with consideration of Respondent's motion to dismiss, as drafted, would also be reversible error. Given that the changed circumstances were caused by Great Northern Project Development, a party that Complainants allege has an interest in this proceeding, which has had dealings with

Respondent, and which undertook its mine withdrawal action to assist Respondent in this proceeding,² a refusal by the Commission to allow Complainants an opportunity to amend and supplement its complaint would be an abuse of discretion and unjust. The Commission must first certify Complainants' Motion for Leave to Amend and Supplement Complaint for consideration by the Commission.

Complainants respectfully suggest that the appropriate procedure here is for the Administrative Law Judge to certify Complainants' Motion for Leave to Amend and Supplement Complaint to the Commission, and that the Commission strike Respondent's extant motion to dismiss but also grant Respondent leave to move that the First Amended and Supplemented Complaint be dismissed for failure to state a prima facie case under NDAC § 69-02-02-02(4), or in the alternative for failure to state a claim upon which relief can be granted under N.D.R.Civ.P. 12(b)(vi), or for a judgment on the pleadings pursuant to N.D.R.Civ.P. 12(c). Such motion could be heard by the Commission concurrently as part of its consideration pursuant to N.D.A.C. § 69-02-02-02 of the sufficiency of Complainants' proposed First Amended and Supplemented Complaint.

Complainants also request that the Administrative Law Judge confer with the parties and order a briefing schedule for these motions to facilitate consideration of this matter by the Commission. Complainants propose that initial briefs on this matter be due within 15 days of a certification to the Commission of the Motion for Leave to Amend and Supplement Complaint, and that reply briefs be due within 10 days of receipt of initial briefs. Since Complainants

² As described in Complainant's motion for leave to amend and supplement its complaint, GNPD stated in its March 25, 2009, letter to the Commission withdrawing its mine application that its purpose in doing so was to assist Respondent in this action. In an article published on March 26, 2009, in the Dickinson Press, Robert French, who is identified as the "chief executive" of Respondent, is reported to have stated, "We appreciate Great Northern's action of withdrawing its small mine permit to help demonstrate that our (coal-drying) plant is not operationally or financially dependent on any single source of coal. . . . This should resolve any remaining issues brought before the (Public Service Commission) by the Dakota Resource Council." The Commission should consider the possibility that Respondent cooperated with Great Northern Project Development to create the changed circumstances.

submitted their proposed First Amended and Supplemented Complaint after Great Northern Project Development's withdrawal of its mining permit, the procedure proposed herein would allow the Commission to consider the changed circumstances. It would also allow the Commission to focus on the law at issue in this matter and, if appropriate, render a dispositive judgment based on the law. Should the Commission deny such motion to dismiss by Respondent, thereby allowing the First Amended and Supplemented Complaint to proceed to hearing, then subsequent motions for summary judgment could be made at a later date.

Should the Commission hear Respondent's as-filed motion to dismiss or in the alternative for summary judgment, Complainants reserve the right to fully respond to these motions on the merits.

For the foregoing reasons, Complainants respectfully request that the Administrative Law Judge:

1. Certify Complainants' Motion for Leave to Amend and Supplement Complaint for consideration by the Commission pursuant to N.D.A.C. § 69-02-02-02.
2. Strike Respondent's Motion to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment, to the extent that such motion is treated as a motion to dismiss.
3. Grant Respondent leave to move for dismissal of Complainants' Amended and Supplemented Complaint on the grounds that such amended and supplemented complaint fails to state a prima facie case, fails to state a claim upon which relief may be granted, or for a judgment on the pleadings.
4. Order a briefing schedule for such motions.

Respectfully Submitted,

Dated this 23rd day of April, 2009.

SARAH VOGEL LAW FIRM, P.C.



By: Derrick Braaten (ID 06394)
Sarah Vogel Law Firm, PC
222 North 4th Street
Bismarck, ND 58501-4004
Telephone: 701-221-2911
Fax: 701-221-5842
Attorneys for Complainants

Dated this 23rd day of April, 2009.

PLAINS JUSTICE



By: Paul Blackburn (ID 06501)
Plains Justice
P.O. Box 251
Vermillion, SD 57069
Phone: 605-675-9268
Fax: (866) 484-2373
Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION TO STRIKE RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF** was on April 23, 2009, mailed and emailed to the following:

Brian Bjella
Crowley Fleck, PLLP
P.O. Box 2798
Bismarck, ND 58502

With courtesy copies mailed and emailed to:

Al Wahl
Administrative Law Judge
138 East Edmonton Drive
Bismarck, ND 58503-0384

Illona Jeffcoat-Sacco
ND Public Service Commission
600 E Boulevard Ave., Dept. 408
Bismarck, ND 58505



Derrick Braaten
Sarah Vogel Law Firm, P.C.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF NORTH DAKOTA**

Dakota Resource Council,)	
Neil and Laura Tangen,)	
Myron and Nancy Eberts, and)	
Frank and Lucy Hurt,)	
Complainants,)	Case No. RC-09-32
)	
v.)	
)	
GTLE Dakota Plant 1 LLC)	
Respondent.)	

**MOTION PURSUANT TO N.D.R.CIV.P. 56(F) TO REFUSE OR CONTINUE
RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN
SUPPORT THEREOF**

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt together Complainants, by their attorneys hereby move pursuant to N.D.R.Civ.P. 56(f) to refuse or continue Respondent’s MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, in the event that the Commission treats this motion as one for summary judgment. Such refusal or continuance is appropriate given that Complainants have had no opportunity for discovery, information sought in discovery is critical to resolution of this matter but is within the control of Respondent, this action was commenced only 14 weeks ago, Complainants have diligently prosecuted their claim, and to the extent that delays in this proceeding have happened, they were not caused by Complainant.

BACKGROUND

Complainants filed their Complaint on January 22, 2009, approximately 14 weeks (three months) ago. On February 11, 2009, the Commission found that the Complaint was sufficient under N.D.A.C. § 69-02-02-02(4) and served Respondent. On March 3, 2009, the Commission

assigned an Administrative Law Judge to this matter and a prehearing conference was scheduled for March 27, 2009. The order for this prehearing conference included the establishment of a schedule for discovery.

On March 25, 2009, counsel for Respondent requested that this prehearing conference be continued due to flooding in Bismarck. The Commission continued the prehearing conference until April 15, 2009.

On March 25, 2009, Great Northern Project Development LLC (“GNPD”) sent a letter to the Commission informing it that GNPD was withdrawing its application for a 300,000 ton per year mine. GNPD stated in its March 25, 2009, letter to the Commission withdrawing its mine application that its purpose in doing so was to assist Respondent in the present action. This withdrawal changed facts related to the Complaint.

In a newspaper article published on March 26, 2009, in the Dickinson Press, Robert French, who is identified as the “chief executive” of Respondent, is reported to have stated, “We appreciate Great Northern's action of withdrawing its small mine permit to help demonstrate that our (coal-drying) plant is not operationally or financially dependent on any single source of coal. . . . This should resolve any remaining issues brought before the (Public Service Commission) by the Dakota Resource Council.”

On April 8th, 2009, Complainants filed their Motion for Leave to Amend and Supplement Complaint and Memorandum in Support Thereof, which contained a proposed First Amended and Supplemented Complaint. Complainants seek to amend and supplement their complaint due to a change in factual circumstances outside of Complainants’ control, specifically those related to Great Northern Project Development’s withdrawal of its mine application.

On April 10, 2009, Respondent filed its Motion to Dismiss the Complaint for Failure to State a Claim upon Which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment.

On April 11, 2009, the Administrative Law Judge issued an order continuing the prehearing conference indefinitely.

On April 20, 2009, Respondent filed its Response to Complainants' Motion for Leave to Amend and Supplement Complaint, in which it opposed Complainants' motion, made various arguments of law reaching to the merits of this proceeding, and generally averred that its motion to dismiss and in the alternative for summary judgment responded to Complainants' motion for leave to file their amended and supplemented complaint.

The Commission has not yet ruled on Complainants' Motion for Leave to Amend and Supplement Complaint. As such, Respondent's motion challenged only Complainants' original Complaint.

ARGUMENT

To the extent that the Commission considers matters outside the Complaint, the Commission must treat Respondent's Motion to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted, or in the Alternative for Summary Judgment as a motion for summary judgment. N.D.R.Civ.P. 12(b). Since the basis for Respondent's motion for summary judgment is largely GNPD's withdrawal of a mining permit and such withdrawal did not exist at the time the Complaint was filed, information related to the withdrawal of the mining permit is a matter outside of the Complaint. As such, should the Commission proceed with consideration of Respondent's motion, it would consider information outside the Complaint and therefore must treat the motion only as a motion for summary judgment. On the other hand,

as described in Complainants' contemporaneously filed Motion to Strike Respondent's Motion to Dismiss, should the Commission treat Respondent's motion as a motion to dismiss, such consideration would be reversible error.

Consideration by the Commission of a motion for summary judgment is untimely because Complainants have not completed discovery. N.D.R.Civ.P. 56(f) states:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Given that Complainants have not completed discovery of information in the possession of Respondent and the information sought is essential to Complainants' claims, Complainants cannot present facts by affidavit essential to justify Complainant's opposition to a motion for summary judgment. Therefore, relief under N.D.R.Civ.P. 56(f) is appropriate and required.

The Commission should grant this motion under N.D.R.Civ.P. 56(f) as a matter of course. The standard for granting such motion was described by the North Dakota Supreme Court in Choice Financial Group v. Schellpfeffer, 2006 ND 87. The Court made clear that "[s]ummary judgment is appropriate only after the non-moving party has had a reasonable opportunity for discovery to develop his position. *Id.* at ¶ 9, citing Aho v. Maragos, 1998 ND 107, ¶ 4, 579 N.W.2d 165; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court noted that:

The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality.

Id. at ¶ 10, (quoting Johnson Farms v. McEnroe, 1997 ND 179, ¶ 27, 568 N.W.2d 920). The Court adopted the federal position that a party moving under N.D.R.Civ.P. 56(f) must “identify with specificity what particular information is sought; how if uncovered, it would preclude summary judgment; and why it has not previously been obtained.” Id. at ¶ 12, ¶ 18, (quoting Lunderstadt v. Colafella, 885 F.2d 66, 71 (3d Cir. 1989)); Dowling v. City of Phila., 855 F.2d 136, 140 (3d Cir. 1988) (internal quotations removed). It also specifically noted that, “[w]here the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course.” Id. at ¶ 15, (quoting Costlow v. United States, 552 F.2d 560, 564 (3d Cir. 1977)).

There is no fixed time for filing a motion under N.D.R.Civ.P. 56(f). Complainants have filed this motion ten days after receipt of Respondent’s motion to dismiss. Therefore, Complainants have not been dilatory in filing this motion and it is timely.

Complainants have not had a full opportunity to conduct discovery. First, only 14 weeks have passed since filing of the Complaint, only 10 weeks have passed since the Commission found the Complaint sufficient under N.D.A.C. § 69-02-02-02(4), and only seven weeks have passed since the Commission assigned an Administrative Law Judge to this matter. Further, Complainants’ discovery efforts were delayed due to continuances of the prehearing conferences and the changed circumstance caused by GNPD’s mine permit withdrawal, which changed the nature of Complainants’ forthcoming discovery requests.

The matter at issue in this proceeding is whether or not the Commission has jurisdiction over the coal preparation plant currently being constructed by Respondent. Whether or not the Commission has jurisdiction over this plant is determined by the nature of the relationships

between Respondent's coal preparation plant and the coal mine or mines that will supply it with coal.

Respondent has argued for a narrow interpretation of the law and seeks to dismiss the Complaint outright based on such interpretation. Complainants expect to prove that the Commission has jurisdiction over the coal preparation plant and that resolution of this proceeding requires an investigation and analysis of the functional, financial, and geographic relationships between the coal preparation plant and any mine or mines that will supply it with coal. Complainants claim that the nature of the relationships between Respondent's coal preparation plant and the mine or mines that will supply it with coal will demonstrate that the Respondent's coal preparation plant will be conducted in connection with a coal mine or mines such that Respondent is required by law to obtain a permit from the Commission for construction, operation, and reclamation of the coal preparation plant.

Complainants' anticipate that the meaning of the law related to this matter will be determined by the Commission in its response to a motion to dismiss, and that the Commission will therein will specifically determine the scope of the analysis required by relevant law. Assuming that the Commission issues an order denying a motion to dismiss, then such order could also shape the scope of discovery and define the law for the purposes of future possible motions for summary judgment.

Complainants' discovery efforts will be intended to acquire information related to the relationships between Respondent's coal preparation plant and the mine or mines that will supply it with coal. In its Response to Complainants' Motion for Leave to Amend and Supplement Complaint, Respondent argues that Complainants misstate the law by stating that the Commission must investigate the "nature of the relationships" between the preparation plant and

coal mine. Respondent also states that jurisdiction is determined by whether or not a coal preparation plant is “operated ‘in connection with’ any particular coal mine.” Complainants assert that Respondent’s interpretation of the law is incorrect. The Commission’s jurisdiction over Respondent’s coal preparation plant must be determined by the entire definition of “surface coal mining operations” contained in N.D.C.C. § 38-14.1-02(33) and 30 U.S.C. § 1291(28), as these definitions have been interpreted by the federal courts, the Interior Board of Land Appeals, and federal regulation. The body of law related to these statutory provisions makes clear that Respondent’s interpretation of law is incorrect and that the Commission must consider a variety of factors related to the relationships of a coal preparation plant and the mine or mines that will serve it.

The Affidavit of Paul C. Blackburn, counsel for Complainants, attached, describes Complainants’ discovery needs in greater detail and provides the representations required by N.D.R.Civ.P. 56(f). Should discovery provide the information sought by Complainants and demonstrate that Respondent’s coal preparation plant is being conducted so as to require the Commission to find jurisdiction over it, then such information would preclude summary judgment for Respondent and may serve as grounds for a motion for summary judgment by Complainants.

The information sought through discovery is in the possession of Respondent, the moving party, such that the Commission should order a continuance “almost as a matter of course.” Choice Financial Group, 2006 ND 87, ¶ 13; 712 N.W.2d 855, 859. Since Respondent’s coal preparation plant is not yet operating, the source or sources of coal to be processed by the plant cannot be determined through observation, but rather may be determined only through review of

the internal records of Respondent and any coal mine operators with which Respondent intends to have or may have a coal supply arrangement.

The information sought by Complainants is exactly the type of information required to determine whether or not a coal preparation plant operator is subject to jurisdiction under mining law, this information is in the possession of Respondent, this proceeding has only recently begun, and Complainants have had no opportunity to acquire any of this information through discovery, therefore, this request under N.D.R.Civ.P. 56(f) must be granted as a matter of course.

As between whether the Commission should refuse Respondent's motion for summary judgment or continue it, Complainants assert that the appropriate relief here is refusal. Assuming Complainants' action survives a motion to dismiss (as proposed by Complainants in their Motion to Strike Respondent's Motion to Dismiss), a future motion for summary judgment could logically consider only the First Amended and Supplemented Complaint. However, Respondent's extant motion for summary judgment addresses only the original Complaint. As such, Respondent's extant motion for summary judgment would be nonresponsive. Given that Respondent's motion for summary judgment is nonresponsive to the proposed First Amended and Supplemented Complaint, the appropriate course of action is for the Commission to refuse Respondent's motion for summary judgment without prejudice to file it at a later date.

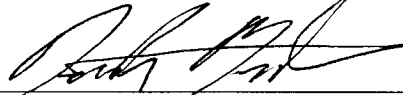
Should the Commission hear Respondent's as-filed motion to dismiss or in the alternative for summary judgment, Complainants reserve the right to fully respond to these motions on the merits.

For the foregoing reasons, Complainants respectfully request that the Commission grant its motion under N.D.R.Civ.P. 56(f) and either refuse or indefinitely continue Respondent's motion for summary judgment pending completion of discovery.

Respectfully submitted,

Dated this 23rd day of April, 2009.

SARAH VOGEL LAW FIRM, P.C.



By: Derrick Braaten (ID 06394)
Sarah Vogel Law Firm, PC
222 North 4th Street
Bismarck, ND 58501-4004
Telephone: 701-221-2911
Fax: 701-221-5842
Attorneys for Complainants

Dated this 23rd day of April, 2009.

PLAINS JUSTICE



By: Paul Blackburn (ID 06501)
Plains Justice
P.O. Box 251
Vermillion, SD 57069
Phone: 605-675-9268
Fax: (866) 484-2373
Attorneys for Complainants

**BEFORE THE PUBLIC SERVICE COMMISSION
OF NORTH DAKOTA**

Dakota Resource Council,)	
Neil and Laura Tangen,)	
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Complainants,)	Case No. RC-09-32
)	
vs.)	
)	
GTLE Dakota Plant 1 LLC)	
Respondent.)	

AFFIDAVIT OF PAUL C. BLACKBURN

I, Paul C. Blackburn, solemnly swear and affirm that the following is true:

1. I am over the age of 18 and am a staff attorney for Plains Justice, P.O. Box 251, Vermillion, SD 57069, one of the attorneys of record for Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt, together Complainants, in this action. I am admitted by temporary license 06501 to the Bar of the State of North Dakota.
2. I make this Affidavit pursuant to N.D.R.Civ.P. 56(f) in response to Respondent's Motion to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment. I possess personal knowledge and am competent to address the specific factual matters related to Complainants' motion under N.D.R.Civ.P. 56(f).
3. This Affidavit presents facts to support Complainants' motion under N.D.R.Civ.P. 56(f) for additional time to conduct discovery, in the event that the North Dakota Public Service Commission ("Commission") treats Respondent's Motion to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted, or in the Alternative, Motion for Summary

Judgment, as a motion for summary judgment. Complainants request that the Commission refuse Respondent's motion for summary judgment, or in the alternative, continue such motion until completion of discovery in the ordinary course of this hearing. This request is based on the following:

PROCEDURAL HISTORY AND ISSUES OF TIMING

4. Complainants filed their Complaint on January 22, 2009, approximately 14 weeks (three months) ago. The Complaint claimed that Respondent had initiated construction of a coal preparation plant near South Heart, North Dakota, which plant is intended to process coal, and that state and federal law require that Respondent obtain a permit for the construction, operation, and reclamation of this coal preparation plant. On February 11, 2009, the Commission found that the Complaint was sufficient under N.D.A.C. § 69-02-02-02(4) and served Respondent. On March 3, 2009, the Commission assigned an Administrative Law Judge to this matter and a prehearing conference was scheduled for March 27, 2009. The order for this prehearing conference included the establishment of a schedule for discovery.

5. On March 25, 2009, counsel for Respondent requested that this prehearing conference be continued due to flooding in Bismarck. The Commission continued the prehearing conference until April 15, 2009.

6. On March 25, 2009, Great Northern Project Development LLC ("GNPD") sent a letter to the Commission informing it that GNPD was withdrawing its application for a 300,000 ton per year mine. GNPD stated in this letter that its purpose in doing so was to assist Respondent in the present action. This withdrawal changed facts related to the Complaint.

7. In a newspaper article published on March 26, 2009, in the Dickinson Press, Robert French, who is identified as the “chief executive” of Respondent, is reported to have stated, “We appreciate GNPD’s action of withdrawing its small mine permit to help demonstrate that our (coal-drying) plant is not operationally or financially dependent on any single source of coal. . . . This should resolve any remaining issues brought before the (Public Service Commission) by the Dakota Resource Council.”

8. On April 8, 2009, Complainants filed their Motion for Leave to Amend and Supplement Complaint and Memorandum in Support Thereof, which contained a proposed First Amended and Supplemented Complaint. Complainants seek to amend and supplement their complaint due to a change in factual circumstances outside of Complainants’ control, specifically those related to GNPD’s withdrawal of its mine application.

9. On April 10, 2009, Respondent filed its Motion to Dismiss the Complaint for Failure to State a Claim upon Which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment.

10. On April 11, 2009, the Administrative Law Judge issued an order continuing the prehearing conference indefinitely.

11. On April 20, 2009, Respondent filed its Response to Complainants’ Motion for Leave to Amend and Supplement Complaint, in which it opposed Complainants’ motion, made various arguments of mixed law and fact, and asserted that its motion to dismiss and in the alternative for summary judgment responded to Complainants’ motion for leave to file its amended and supplemented complaint.

12. The Commission has not yet ruled on Complainants’ Motion for Leave to Amend and Supplement Complaint.

13. By motion filed contemporaneously with this Affidavit, Complainants have moved for relief from Respondent's motion for summary judgment under N.D.R.Civ.P. 56(f).

14. Complainants cannot present by affidavit facts essential to justify their opposition to Respondent's motion for summary judgment and will be unable to do so until Complainants have conducted further discovery regarding the relationships between Respondent's coal preparation plant and the mine or mines that will supply it with coal.

15. Complainants have not yet had an adequate opportunity to conduct discovery, and in fact have not commenced discovery due to:

- a. the early procedural stage of this matter;
- b. the short time that has passed between the filing of this Affidavit and the Complaint (14 weeks), the finding of sufficiency of the Complaint by the Commission (10 weeks), and assignment of an Administrative Law Judge to this matter (seven weeks);
- c. delay of the prehearing conference, which Complainants expected would establish a discovery schedule, due to flooding in Bismarck; and
- d. the withdrawal by GNPD on March 25th, 2009, of its application for a mine at South Heart, which withdrawal changed the nature of this proceeding and required Complainants to amend their complaint and modify their plans for discovery.

Further, Complainants anticipate that resolution of the scope of discovery allowed by the Commission will not be clear until after resolution of a motion to dismiss by Respondents. As such, no discovery schedule has been established by the Commission and Complainants have not submitted any document requests, interrogatories, or requests for admission, or taken any depositions, issued any subpoenas, or otherwise conducted discovery.

EXAMPLES OF DISCOVERY NOT YET TAKEN

16. This affidavit will provide illustrative examples of the discovery that has not yet been taken in this case, but which is likely to lead to admissible evidence that would preclude summary judgment in favor of Respondent. These examples are not comprehensive, nor can they be at this stage, because Complainants have not served interrogatories, requests for admission, or other discovery inquiries. Accordingly, at this early stage, Complainants cannot fully detail specific depositions that they may wish to take, specific documents they may seek to have produced, or specific interrogatories they will propound. Moreover, at this preliminary stage, Complainants cannot state with precision exactly what proper discovery will uncover.

17. Discovery not yet taken includes, but is not limited to, document requests, requests for admissions, interrogatories, depositions, subpoenas, and other discovery inquiries related to:

- a. information that describes how the coal preparation plant will physically process coal, including but not limited to retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, crushing, briquetting, removal of any contaminants from, or other processing or preparation of coal.
- b. information showing the equipment to be contained in the coal preparation plant and the functioning of this equipment.
- c. information showing the physical characteristics of coal processed by the coal preparation plant before and after the coal is processed.
- d. information that shows how and where coal “beneficiated” or processed by the coal preparation plant will be loaded for shipment to customers or end users of the coal, as well as the mode (*e.g.*, railroad or truck) of transportation used for such shipments.

- e. information showing or tending to show that the coal preparation plant will “beneficiate” or process coal from coal mines, including but not limited to information showing transportation of coal from coal mines to the coal preparation plant or documents showing the amount of coal from coal mines to be processed by the coal preparation plant.
- f. information showing or tending to show the sources of coal processed by the preparation plant for sale to end users.
- g. information that shows quantities and sources of coal to be “beneficiated,” processed, or tested in the coal preparation plant, as well as the disposition of the coal after it is tested.
- h. information regarding written, oral, or informal agreements or contracts to “beneficiate,” process, or test coal in the coal preparation plant.
- i. information related to agreements and negotiations and relevant correspondence and memoranda between Respondent and all suppliers of coal contacted by Respondent as potential suppliers of coal to the coal preparation plant and all potential customers of the coal preparation plant.
- j. information that shows or tends to show that Respondent and GNPD cooperated in planning for development of the coal preparation plant and a mine near South Heart, North Dakota.
- k. information sent to GNPD by Respondent or received from GNPD by respondent related to the development or future operation of the coal preparation plant and a mine near South Heart, North Dakota, including but not limited to plans, designs, development schedules, construction schedules, cost, financing, ownership, management, or control, of the coal preparation plant or a mine.

- l. information showing or tending to show the identity of persons, partnerships, corporations, or other entities, that have had or currently have an ownership interest in or participate in control of Respondent or the coal preparation plant.
- m. information showing or tending to show past, existing, or intended ownership of or financial interest in the coal preparation plant or Respondent by coal mine owners or operators, or other companies, persons, or entities with financial interests in coal mines or coal reserves.
- n. information showing or tending to show past, existing, or intended control of the coal preparation plant or Respondent by coal mine owners or operators, or other companies, persons, or entities with financial interests in coal mines or coal reserves.
- o. information related to participation in the management of Respondent or the coal preparation plant by companies, persons, or entities.
- p. information related to agreements, contracts, memoranda of understanding, letter agreements, informal arrangements, or oral agreements between Respondent and owners of coal mines, owners of interests in coal reserves, or wholesale or retail suppliers or distributors or transporters of coal.

18. The discovery of the types of information listed above would produce evidence that shows the commercial and functional relationships between the coal preparation plant and one or more coal mines. Such evidence is required to determine the Commission's jurisdiction over this matter under N.D.C.C. § 38-14.1-02(33) and 30 U.S.C. § 1291(28), as these definitions have been interpreted by the federal courts, the Interior Board of Land Appeals, and federal regulation, as well as under other relevant provisions of state and federal surface coal mining law. Discovery should encompass all evidence relevant such law. Should such discovered

evidence show or tend to show that the coal preparation plant is being conducted such that jurisdiction must be found, Respondent's motion for summary judgment would fail and Complainants may obtain evidence sufficient to support a motion for summary judgment by Complainants. Complainants expect to fully brief the Commission on its jurisdictional limits in a response to a motion to dismiss, the resolution of which should also provide a framework for discovery.

AVAILABILITY OF EVIDENCE


19. Since Respondent's coal preparation plant is not yet operating, the source or sources of coal to be processed by the plant cannot be determined through observation, but rather may be determined only through review of the internal records of Respondent and any coal mine operators with which Respondent has had discussions seeking a commercial or financial relationship, or with which Respondent has or intends to have a coal supply arrangement. Further, most if not all of the information to be produced by the discovery described above is not available except from Respondent or coal mine operators. Without discovery Complainants do not have access to this information and cannot prepare affidavits in response to Respondent's motion for summary judgment.

CONCLUSION

20. Additional discovery is necessary before the Commission could grant Respondent's summary judgment motion. The necessary discovery, particularly described in part above, has not yet been taken due to the fact that this proceeding is in an early stage. Evidence produced by discovery could show that Respondent's coal preparation plant is a "surface coal mining

operation" under N.D.C.C. § 38-14.1-02(33) and 30 U.S.C. § 1291(28), as these definitions have been interpreted by the federal courts, the Interior Board of Land Appeals, and federal regulation, which showing would preclude summary judgment in favor of Respondents. Complainants therefore respectfully request that Respondent's motion for summary judgment be refused, or in the alternative, continued until the completion of discovery in the ordinary course of this hearing.

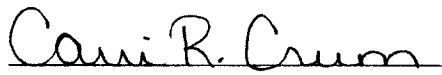
I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on April 22, 2009, in Vermillion, South Dakota.


Paul C. Blackburn

Notary Clause

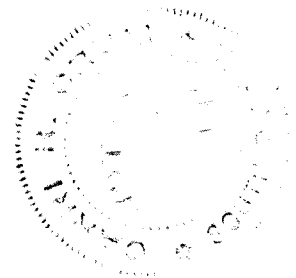
Paul C. Blackburn is personally known to me or presented satisfactory proof of identity to me. After being duly sworn and while under oath, Paul C. Blackburn stated that he was acting voluntarily, had read and understood the preceding document, and that the contents were true. The Affiant then signed the document in my presence.

Subscribed and sworn before me on April 22nd, 2009.


Notary Public

(Notary Seal)

My Commission Expires 2-28-11



CERTIFICATE OF SERVICE

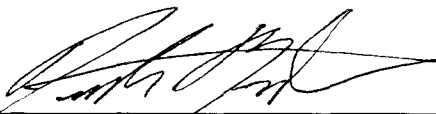
I hereby certify that a true and correct copy of the foregoing **MOTION PURSUANT TO N.D.R.CIV.P. 56(F) TO REFUSE OR CONTINUE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF** with attached **AFFIDAVIT OF PAUL C. BLACKBURN** was on April 23, 2009, mailed and emailed to the following:

Brian Bjella
Crowley Fleck, PLLP
P.O. Box 2798
Bismarck, ND 58502

With courtesy copies mailed and emailed to:

Al Wahl
Administrative Law Judge
138 East Edmonton Drive
Bismarck, ND 58503-0384

Illona Jeffcoat-Sacco
ND Public Service Commission
600 E Boulevard Ave., Dept. 408
Bismarck, ND 58505



Derrick Braaten
Sarah Vogel Law Firm, P.C.