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PUBLIC SERVICE COMMISSION

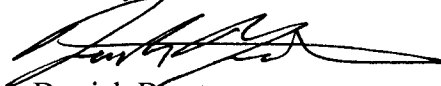
Darrell Nitschke
Executive Director
NORTH DAKOTA
PUBLIC SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

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 Complainants' Response to Motion for Protective Order and our Certificate of Service, along with 7 copies thereof. Please call with any questions.

Thank you,



Derrick Braaten

Encl.

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

39 RC-09-32 Filed: 12/10/2009 Pages: 11
Complainant's Response to Motion for Protection
Order

Dakota Resource Council

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**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,)
)
vs.)
)
GTLE Dakota Plant 1 LLC)
Respondent.)

Case No. RC-09-32

RESPONSE IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt, together Complainants, by their attorneys hereby oppose GTLE Dakota Plant 1 LLC's ("Respondent") MOTION FOR PROTECTIVE ORDER ("Motion"). Respondent's Motion contains only unsupported conclusory statements and fails to include any particular or specific arguments or facts that demonstrate that Respondent is entitled to relief such that Respondent has failed to meet its burden of proof under N.D. R. Civ. P. 26(c) ("Rule 26(c)"). Therefore, the Motion must be denied as a matter of law. Further, Respondent has requested a complete stay on all discovery proceedings until resolution by the North Dakota Public Service Commission ("Commission") of Respondent's MOTION TO DISMISS THE FIRST AMENDED AND SUPPLEMENTED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT ("Motion to Dismiss"). Such complete stay would unnecessarily delay this proceeding and is unnecessary in light of the fact that less draconian procedures exist under the North Dakota Rules of Civil Procedure ("Rules") that would protect Respondent's

interests, to the extent they are legitimate, and allow the Commission to identify and resolve particular discovery disputes thereby promoting an efficient and speedy resolution of this case.

I. THE BURDEN OF PROOF UNDER N.D. R. CIV. P. 26(C)

Respondent moves for a protective order pursuant to Rule 26(c)(1). In relevant part, Rule 26(c) states:

“Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court [or agency] in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that discovery not be had; . . .

Emphasis added.

It does not appear that a published decision of the Supreme Court of North Dakota or other North Dakota court has described the “good cause” standard that administrative agencies and district courts are required to use when deciding whether or not to grant a protective order under Rule 26(c). Respondent cites *Kouba v. State*, 2004 ND 186, ¶ 16; 687 N.W.2d 466 and *Kramer v. Kramer*, 2006 ND 64, ¶ 15; 711 N.W.2d 164, respectively, for the propositions that protective orders may be granted where dispositive motions are outstanding and where discovery seeks irrelevant material. In addition, the Supreme Court considered whether or not to uphold a denial of a protective order in *Smith v. State*, 389 N.W.2d 808, 811 (N.D. 1986). These decisions describe only the standard used by the Supreme Court itself in its review of district court protective orders. They do not describe a moving party’s burden of proof under the “good cause” standard contained in Rule 26(c).

With regard to the appropriateness of a protective order when dispositive motions are pending, the *Kouba* decision states that a protective order to stay discovery may be an

appropriate exercise of discretion when a dispositive motion is pending, but it does not generally describe when the existence of a dispositive motion constitutes “good cause” to stay discovery. *Id.* It does not find that a stay of discovery is generally granted when dispositive motions are outstanding. *Id.*

Therefore, it appears that the North Dakota courts have not described a moving party’s burden of proof under Rule 26(c). Where the North Dakota courts have not ruled on a matter related to Rule 26(c), such as the meaning and application of the Rule 26(c) “good cause” standard, great deference should be given to federal case law. *Kouba*, 2004 ND 186, ¶ 16; 687 N.W.2d 466.

Under federal law, the party seeking a protective order has the burden to show good cause for it. *Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000). Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. *See e.g., United States v. Garrett*, 571 F.2d 1323, 1326, n.3 (5th Cir. 1978) (requiring “a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements”); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981); *General Dynamics Corp. v. Selb Mfg. Corp.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986); *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 U.S. Dist. LEXIS 215, 1998 WL 9181 at *8 (N.D. Ill. 1998) (conclusory statements of hardship are not sufficient to show good cause); *AG Equip. Co. v. AIG Life Ins. Co.*, 2008 U.S. Dist. LEXIS 65372 (N.D. Okla. 2008); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2035. Thus, mere conclusory statements and broad allegations of harm cannot form the basis for granting a protective order under federal law.

Moreover, the existence of a potentially dispositive motion generally does not result in a stay of discovery. *See e.g., Integrated Systems and Power v. Honeywell Int'l*, 2009 U.S. Dist. LEXIS 78476; 2009-2 Trade Cas. (CCH) P76,750 (S.D. NY 2009) (It is well-settled that the issuance of a stay of discovery pending the outcome of a motion to dismiss is "by no means automatic."); *Chesney v. Valley Stream Union Free Sch. Dist. No. 24*, 236 F.R.D. 113, 115 (E.D. NY 2006) ("It, of course, is black letter law that the mere filing of a motion to dismiss the complaint does not constitute "good cause" for the issuance of a discovery stay."); *D.B. v. Lafon*, 2007 U.S. Dist. LEXIS 20609, *5-6 (E.D. Tenn. 2007) (moving party not shielded from engaging in discovery simply by virtue of a pending motion for summary judgment; rather such unsupported claim is a type of conclusory statement which does not manifest good cause for a protective order); *Samson Resources Co. v. J. Aron & Co.*, 2009 U.S. Dist. LEXIS 47867, *2 (N.D. Okla. 2009) (stays of discovery pending the outcome of a dispositive motion are not routinely granted in the Tenth Circuit); *TSM Assocs. v. Tractor Supply Co.*, No. 08-CV-230-JHP-FHM, 2008 U.S. Dist. LEXIS 45784, *2 (N.D. Okla. June 11, 2008) ("Staying discovery during the pendency of a motion to dismiss is not the usual course. Unless some compelling reason is presented, in the usual case discovery is not stayed . . ."); *Kutilek v. Gannon*, 132 F.R.D. 296, 297-98 (D. Kan. 1990) ("The general policy in this district is not to stay discovery even though dispositive motions are pending."). Where a potentially dispositive motion is pending, the party seeking a protective order must show that good cause exists for a protective order staying discovery by "making out a clear case of hardship or inequity," *TSM Assocs.*, 2008 U.S. Dist. LEXIS 45784, *2, and by providing "particular and specific demonstrations of fact" that support its claim. *D.B. v. Lafon*, 2007 U.S. Dist. LEXIS 20609, *5-6.

II. RESPONDENT HAS FAILED TO MEET ITS BURDEN OF PROOF UNDER RULE 26(C) AND ITS MOTION MUST BE DENIED AS A MATTER OF LAW

In its Brief In Support of Its Motion for Protective Order (“Brief”),¹ Respondent notes that its Motion to Dismiss may be dispositive, describes North Dakota case law holding that a protective order staying discovery may appropriate, fails to describe the “good cause” standard it must meet for obtaining a protective order, and then states only the following – and no other – arguments and allegations specific to this case in support of its motion:

The onerous discovery requests are intrusive in the extreme and go well beyond the Complainants original claim that the PSC erred in its determination that the GTLE coal beneficiation and research plant did not constitute a mining operation and therefore a 'mining permit' was not required. Attached hereto as Exhibit 1 is the Complainant's First Discovery Request to GTLE Dakota Plant 1 LLC, dated November 19, 2009.

Brief p. 1.

The discovery requests submitted by Complainants are extreme in breadth and it would take GTLE enormous time, resources and expense to prepare responses. GTLE submits that good cause exists in this case due to the pendency of its dispositive Motions, which if granted, would eliminate the need to respond to these onerous discovery requests.

Brief p. 2.

GTLE submits that good cause exists to grant its motion for a protective order to stay discovery due to the pendency of its dispositive Motions before the Commission.

Brief p. 3. As such, Respondent merely characterizes Complainants’ discovery requests, makes conclusory statements, and “submits” that good cause exists for a protective order only because dispositive motions are pending.

The foregoing statements fail to contain a particular and specific demonstration of fact and fail to make out a clear case or hardship or inequity and instead contain only “stereotyped

¹ Respondent’s Motion itself contains no argument or fact.

and conclusory statements" such that Respondent has not met its burden of proof and its motion must fail as a matter of law. Respondent alleges that Complainants' discovery requests are "onerous," "intrusive in the extreme," and "go well beyond Complainant's original claim," and "are extreme in breadth and it would take GTLE enormous time, resources and expense to prepare responses," and attaches Complainants' First Discovery Request to GTLE Dakota Plant 1 LLC. Yet, Respondent fails to identify any particular interrogatory, request for admission, or document request that it finds objectionable. It does not describe how any requests are "onerous" or "intrusive" nor does it describe how any of the requests are irrelevant to the claims in the Amended Complaint, or describe how any of the requests are "extreme in breadth." Further, Respondent does not provide any facts supporting its allegation that response to the requests would require an "enormous" effort on its part. Moreover, Respondent provides no argument or facts related to why all discovery should be stayed pending resolution of its Motion to Dismiss, apparently presuming that merely because dispositive motions are pending that all discovery should cease, even though the "good cause" standard applies to decisions about whether to stay discovery under Rule 26(c)(1). Therefore, Respondent has merely characterized Complainants' discovery requests with unsupported conclusory statements and has failed to make any specific demonstration of fact with regard to the need for a protective order.

Given Respondent's failure to make particular arguments about any specific discovery request or to provide any facts to support its Motion, it is not possible for the Commission to understand anything particular about Respondent's objections or to rule on the merits of Respondent's motion. It is also not possible for Complainants' to respond to particular concerns about their discovery requests or proceeding with discovery, other than by developing hypothetical arguments that Respondent might make and then responding to these. However,

imposing such burden on Complainants would violate Rule 26(c) by shifting the burden to them, and it would not be reasonable or fair to require Complainants' to develop such hypothetical arguments and respond to them and thereby violate due process standards. If Respondent in fact has reasoned arguments about particular requests or should it want to argue that all discovery is inappropriate in these particular circumstances or should it want to demonstrate that it would be unduly burdened, it is required by law to describe with specificity such reasons, arguments, and facts.

Should the Commission grant a protective order based on Respondent's mere characterizations or only because of the mere fact that dispositive motions are outstanding, it would violate Rule 26(c)'s "good cause" standard and deny Complainants due process of law. Such decision would be reversible error. Given Respondent's reliance on unsupported conclusory statements, the Commission must deny Respondent's Motion as a matter of law.

III. N.D.R.CIV.P. 33, 34, AND 36 PROVIDE ADEQUATE PROTECTIONS FOR RESPONDENT'S INTERESTS

Complainants have propounded discovery pursuant to Rules 33 (interrogatories), 34 (document requests), and 36 (requests for admissions). Each of these rules permits Respondent to object to particular discovery requests. Rule 37 provides for resolution of discovery disputes. These Rules provide adequate protection for Respondent's interests.

Even if little is clear from Respondent's motion for a protective order, it has made unsupported conclusory statements related to relevancy and undue burden. Respondent may raise such concerns in a response to Complainants' discovery requests via particular objections. This would allow the Commission and Complainants' to understand and respond to Respondent's objections in a meaningful fashion.

Should the Commission deny Respondent's Motion, Respondent would be required to identify its particular objections in accordance with the requirements of Rules 33, 34, 36, and 37. Such identification would allow the Commission and the parties to identify and resolve particular discovery disputes while the Commission considers the Motion to Dismiss and Complainants' opposition thereto. While it is possible that a decision on the Motion to Dismiss could be dispositive of this proceeding, it is equally possible that the Commission will deny it. Requiring Respondent to answer Complainants' discovery requests through specific objections and responses to requests that Respondent does not deem burdensome would not unduly burden Respondent but would allow the Commission to make progress on resolution of discovery disputes. A failure by the Commission to allow discovery to proceed would result in yet further delay of this proceeding, deny Complainants' a timely resolution of this matter, and be inequitable.

CONCLUSION

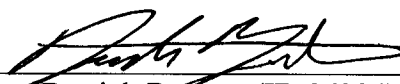
For the foregoing reasons, Respondent's Motion for Protective Order must be denied as a matter of law. Further, the Commission should proceed with the discovery process so that it may resolve likely disputes in a timely fashion.

Complainants request an oral hearing on this motion.

Respectfully submitted,

Dated this 10th day of December, 2009.

SARAH VOGEL LAW FIRM, P.C.



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Dated this 10th day of December, 2009.

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CERTIFICATE OF SERVICE

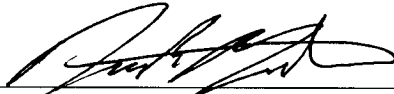
I hereby certify that a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER** was on December 10, 2009, served via U.S. mail on the following:

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

With courtesy copies emailed to:

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



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