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PUBLIC SERVICE COMMISSION

December 16, 2009

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

Dear Mr. Nitschke:

In re: Dakota Resource Council, et al.
vs. GTLE Dakota Plant 1 LLC
Case No. RC-09-032
Our File No. 41-638-001 (28878)

Enclosed for filing are the original and seven copies of GTLE Dakota Plant 1, LLC's Reply to Complainant's Opposition to Motion for Protective Order.

Very truly yours,



BRIAN R. BJELLA

bw
Enc.

cc: Derrick Braaten
Paul Blackburn
Al Wahl
Illona A. Jeffcoat-Sacco

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Reply to Complainant's Opposition to Motion for Protective Order

GTLE Dakota Plant 1 LLC

Brian Bjella, Crowley Fleck, PLLP

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-09-032

RESPONDENT'S REPLY
TO COMPLAINANTS' OPPOSITION
TO MOTION FOR PROTECTIVE
ORDER

COMES NOW, the Respondent, GTLE Dakota Plant 1 LLC ("GTLE"), for its reply to Complainants' Response in Opposition to Motion for Protective Order, dated December 10, 2009.

There is presently pending before the Public Service Commission GTLE's Motion to Dismiss the Amended and Supplemented Complaint of the Complainants', or in the Alternative, Motion for Summary Judgment ("Determinative Motions").

In response to the Determinative Motions, the Complainants ("DRC") not only opposed such motions, but also filed their own motion pursuant to North Dakota Rules of Civil Procedure 56(f) to have the Determinative Motions denied or continued pending an opportunity for discovery.

The DRC also served what is labeled "First Discovery Requests" on GTLE dated November 19, 2009.

GTLE has resisted the DRC's discovery request by filing its Motion for Protective Order pursuant to Rule 26(c) dated November 25, 2009, seeking a stay of discovery until the Determinative Motions have been decided by the Public Service Commission.

As a result, DRC's Rule 56(f) Motion and GTLE's Rule 26(c) Motion are interrelated.

The DRC asserts in its motion that GTLE has failed to show that good cause exists for a protective order staying discovery; and also failed to make a case of hardship or inequity. GTLE submits that the law with respect to its Rule 26(c) Motion is not so limited.

As noted by GTLE in its Rule 26(c) Motion, the DRC's discovery requests are intrusive in the extreme, and go well beyond facts related to its allegation that the Reclamation Director of the Public Service Commission erred in deciding that GTLE's coal beneficiation facility did not constitute a mining operation and therefore did not need a mining permit. This issue is the substance of GTLE's Determinative Motions; the DRC is advocating an untenable extension of state mining law which cannot be justified or supported by law. As established in GTLE's briefs in support of the Determinative Motions, there is no mine in the vicinity of its beneficiation facility, and the facility will process coals from around the world. The determination of the Reclamation Director that GTLE's beneficiation facility did not need a mining permit was based in part on established precedent in two prior cases before the Public Service Commission. It is a question of law for the Commission to determine if the mining law, and in particular the phrase "in connection with", extends to mines from around the world. As a result, there is an "improbability of fact" issue that must be addressed by the Commission; it is improbable that the discovery requested by the DRC will raise or address any fact relevant to the question of law before the Commission in the Determinative Motions.

Courts in a number of cases have held that a party opposing a motion for summary judgment may not prevail by arguing that it needs discovery of facts and information within the exclusive possession or knowledge of the other party, when it is improbable that the fact issues about which discovery is being sought will ever ripen into a relevant issue. The DRC wants to delay the Commission's decision on the Determinative Motions by arguing that it needs time to discover facts that are irrelevant as a matter of law. In such cases, a Rule 56(f) affidavit is not sufficient reason to defer a ruling on a summary judgment motion. 47 ALR Fed. 206, "Sufficiency of Showing, under Rule 56(f) of the Federal Rules of Civil Procedure, of Inability to Present by Affidavit Facts Justifying Opposition to Motion for Summary Judgment," § 6(a) (2009).

A request under Rule 56(f) for the opportunity to conduct discovery may be denied if it is improbable that fact issues will ever be developed. 73 Am.Jur.2d, "Summary Judgment," § 30 (2009). In addition, mere assertion of exclusive knowledge in the possession of the opposing party is not sufficient unless it is accompanied by a statement demonstrating how the acquired information will be helpful in opposing the motion for summary judgment. *Id.* In its request for discovery, the DRC seeks volumes of information totally unrelated to the legal question presented by state mining law and the "in connection with" standard. If DRC cannot get over that legal hurdle, there is simply no basis or reason to engage in any discovery; particularly the very onerous discovery requests propounded by the DRC which will almost surely result in months of legal wrangling over what information DRC is entitled to review.

In a federal district court case arising out of North Dakota, the court denied a Rule 56(f) motion for additional time to complete discovery, because it was a declaratory judgment action in which the dispositive issue was the interpretation of an insurance policy, which interpretation

is a question of law for the court to decide. *Centre Insurance Company vs. Blake*, 370 F.Supp. 2nd 951, 954 (D.N.D. 2005). In another federal case, the Court of Appeals held that a district court did not abuse its discretion in denying a motion for further discovery under Rule 56(f), finding that denying discovery did not deprive the party seeking discovery of a fair chance to respond to a pending summary judgment motion. The Court of Appeals stated that the issue to be resolved was a question of federal law, and that discovery would not assist in that determination. *Nord v. Kelly*, 520 F.3rd 848, 852 (8th Cir. 2008).

Similarly, another federal court recognized that under Rule 56(f) a party must file an affidavit describing what facts are sought and how these facts are reasonably expected to raise a genuine issue of material fact. The court affirmed a denial of the request for further discovery, finding that the party requesting discovery did not explain how the materials sought could reasonably be expected to raise a genuine issue of material fact regarding the question of law before the court (whether the court had subject matter jurisdiction). *Johnson v. United States*, 534 Fd.3rd 958, 965 (8th Cir. 2008).

A North Dakota state district court denied a request for discovery under Rule 56(f), finding that the party requesting discovery did not present a “material” issue of fact on an element essential to his case. As a result, good cause did not exist to permit discovery. *Lucas v. Riverside Park Condominiums Unit Owners Association*, Civil No. 08-07-C-913, 2007 Westlaw 6560994 (N.D. Dist. 2007).

In another North Dakota case, the North Dakota Supreme Court sustained a denial of discovery under Rule 56(f). The plaintiffs had asserted that the defendant defrauded them into investing in certain limited partnerships. The Court found that facts to support such an allegation, if they exist, should be within the knowledge of the plaintiffs. The Court stated it was

difficult to imagine, how giving the plaintiffs additional time would result in them discovering relevant evidence to support their claims. More significantly, the Court stated, “it is simply not enough to make unsupported, conclusory allegations,” in a Rule 56(f) motion and affidavit. *Luallin v. Koehler*, 644 N.W.2d 591, 600 (N.D. 2002).

Similarly, in this case, the DRC’s discovery request is premised upon an unsupported conclusory assertion regarding the reach of state mining law. Thus, the issue to be determined is a question of law respecting the reach of state mining law, and the DRC needs no additional facts or information from GTLE to properly address that issue. The DRC has within its knowledge all of the facts and information it needs to address the questions of law presented in the Dispositive Motions. Therefore, good cause exists to stay discovery pending ruling on the Dispositive Motions.

There are other reasons to deny DRC’s request to delay ruling while they conduct unrelated discovery. For example, in another case the North Dakota Supreme Court affirmed the denial of further discovery in similar circumstances, finding that the plaintiff failed to present “facts essential to justify” a continuance. *Riemers v. Grand Forks Herald*, 688 N.W.2d 167, 172 (N.D. 2004). The same is true in this case. The discovery requests by the DRC are a fishing expedition seeking to find a cause of action. This also demonstrates good cause to stay discovery.

The North Dakota Supreme Court has also recognized that there are limits when relief under Rule 56(f) should be granted. It stated that “for instance, when further discovery would not involve an issue which is the subject matter of the summary judgment motion, a trial court does not abuse its discretion on deciding the motion without granting the Rule 56(f) request.” The Supreme Court found that the district court did not abuse its discretion in deciding a

summary judgment motion without granting the request for further discovery, as the dispositive issues in the summary judgment proceeding involved potential liability and not damages. *Perry Center, Inc. vs. Heitkamp*, 576 N.W.2d 505, 509 (N.D. 1998). Also, in *Hopfauf vs. Hieb*, 712 N.W.2d 333, 335 (N.D. 2006) the Court affirmed a grant of summary judgment and refused to grant additional time for discovery even though the parties seeking discovery listed in an affidavit several issues it sought to further investigate; as such facts were not the subject matter of the summary judgment motion and would thus be irrelevant. The same is true in this case; discovery should be stayed until it is determined if state mining law extends to mines around the world.

More significantly, the North Dakota Supreme Court in a Rule 56(f) case noted that a trial court can cut off discovery prior to ruling on a summary judgment motion, when the record indicates that further discovery will not likely produce facts necessary to defeat the motion. The Court went on to state that “even if factual disputes exist between the parties, summary judgment is appropriate if the law is such that the resolution of the factual dispute will not change the result.” *Continental Casualty Company vs. Kinsey*, 513 N.W.2d 66, 69 (N.D. 1994). Thus, even though a factual dispute may exist, denial of discovery and the granting of a summary judgment are appropriate if the resolution of the factual dispute will not change the result. In this case, the DRC seeks to discover o proprietary information regarding GTLE’s beneficiation process, and also to inquire into what mines the facility may process coal from. There is no mine anywhere in proximity to the GTLE beneficiation facility. GTLE has long acknowledged that it will process coal from mines around the U.S. and around the world, as set forth in the Affidavit of Robert French. Thus, this factual matter is not disputed, and will not change the result with respect to the Dispositive Motions.

As stated by the United States Supreme Court, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to specific facts essential to the other side's case, to demand sworn averments of those facts before the lengthy process of litigation continues. General allegations of injury in an affidavit do not fulfill this requirement. The object of the rule is not to replace the conclusory allegations of the complaint with conclusory allegations of an affidavit. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (U.S. 1990).

It is undisputed that no mine exists at South Heart and that the beneficiation facility will test coals from around the world. It is further undisputed that GTLE intends to operate the plant as soon as construction is finished, despite there being no mine at South Heart. It must first be determined, by ruling on the Determinative Motions, whether state mining law extends to mines around the world. It is improbable that any fact issue will ever be developed to support DRC's allegations in its Amended and Supplemented Complaint. As a result, good cause exists to stay the DRC discovery requests until GTLE's Dispositive Motions have been ruled upon. GTLE respectfully requests that its Rule 26(c) Motion for a Stay of Discovery pending the Public Service Commission's ruling on the Dispositive Motions be granted.

Dated this 16th day of December, 2009.

CROWLEY FLECK PLLP
Attorneys for Respondent,
GTLE Dakota Plant 1 LLC
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By 
BRIAN R. BJELLA (#03549)

CERTIFICATE OF SERVICE

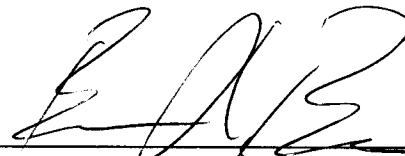
I hereby certify that a copy of the foregoing document was on the 16th day of December, 2009, mailed to the following:

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