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December 22, 2009

RECEIVED

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

PUBLIC SERVICE COMMISSION

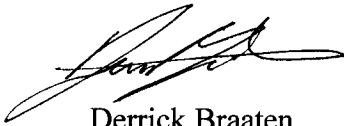
Re: Dakota Resource Council *et al.* v. GTLE Dakota Plant 1 LLC
ND PSC Case No.: RC-09-32
OAH File No.: 20090071

Dear Mr. Nitschke:

Enclosed for filing please find Complainants' Motion to Reschedule Prehearing Conference, Memorandum in Support of Motion to Reschedule Prehearing Conference, including Certificates of Service, along with 7 copies thereof. Please call with any questions.

Thank you.

Sincerely,



Derrick Braaten

Enclosures

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

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**Memorandum in Support of Motion to Reschedule
Prehearing Conference**

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,)	Case No. RC-09-32
)	
vs.)	
)	
GTLE Dakota Plant 1 LLC,)	
)	
Respondent.)	

**MEMORANDUM IN SUPPORT OF MOTION TO RESCHEDULE
PREHEARING CONFERENCE**

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt, together Complainants, by their attorneys hereby support their Motion to Reschedule Prehearing Conference (“Motion”).

I. STATEMENT OF FACT

On or about October 14, 2008, GTL Energy initiated construction of a coal “beneficiation” facility designed to process up to 300,000 tons of coal per year located at the SW1/4 of the NW1/4 of Section 20 of Township 139 North, Range 98W (“Preparation Plant”).

On October 15, 2008, Great Northern Power Development L.P. (“GNPD”) submitted an application to open a coal mine and conduct surface coal mining operations at Township 139 North, Range 98 West, Section 22 of Stark County, North Dakota. This application was for a mine intended to produce 300,000 tons of coal per year for 4 to 5 years. Before submitting this application, GNPD told Commission staff that it intended to provide the coal excavated at the Proposed Mine to the Preparation Plant.

By letter dated November 13, 2008, Commission staff notified GNPD that its mine application was incomplete and provided a list of 63 items that GNPD was required to address before the Commission would proceed with formal review of the application.

Complainants filed their Complaint on January 22, 2009, alleging, *inter alia*, that Respondent was in violation of the State Surface Mining Act, N.D.C.L. § 38-13.1-01 *et seq.* for conducting “surface coal mining operations” without a permit within North Dakota by constructing and intending to operate the 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. Complainants were informed informally by the Commission that it intended to assign an Administrative Law Judge (“ALJ”) to this case.

On March 4, 2009, the Commission assigned ALJ Al Wahl to this matter.

On March 11, 2009 Complainants filed a Motion for Prehearing Conference to set a schedule for this case. Complainants’ motion was granted by order of the ALJ and a prehearing conference was scheduled for March 27, 2009. The order included consideration of a schedule for discovery.

On March 25, 2009, counsel for Respondent requested that this prehearing conference be continued due to flooding in Bismarck. In response to this request, on March 26, 2009, the ALJ continued the prehearing conference until April 15, 2009.

On March 25, 2009, 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. Specifically, GNPD stated:

The SH lignite mine and the GTLE demonstration plant are separate and independent projects. They have different purposes and are owned and controlled by different entities. Contrary to the recent allegations, there is no "connection" between the GTLE demonstration plant and the SH

lignite mine such that they should be treated as a single project entity under the PSC regulations. In order to make clear that there is no such "connection" between the planned SH lignite mine and the GTLE demonstration plant, SHC is hereby formally withdrawing its application for a permit to construct and operate the SH lignite mine.

This withdrawal changed facts related to the Complaint to the extent that it increased uncertainty about the source of coal to be processed by the Preparation Plant. However, since Commission staff had already rejected GNPDP's coal mine application as incomplete for a large number of reasons, this withdrawal had little impact on the timing of development of a mine by GNPDP because the mere withdrawal of the permit application did not prevent GNPDP from performing development work to address the deficiencies in its withdrawn application for use in a future mine application by GNPDP. Complainants understand from Commission Staff that GNPDP continues to have an intent to develop a coal mine near South Heart in 2010.

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 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 ("Amended Complaint"). Amendment and supplementation of the Complaint was necessitated by GNPDP's withdrawal of its coal mine application, which withdrawal changed the facts alleged in the Complaint. Thus, the circumstances that required filing of the Amended Complaint, the mine permit application withdrawal, were outside of

Complainants' control and entirely within GNPD's control which appears to have acted in cooperation with Respondent.

On April 10, 2009, two days after Complainants emailed their Motion to Amend Complaint to Respondent, 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, yet in these motions Respondent did not refer to Complainants' outstanding Motion to Amend Complaint.

On April 13, 2009, the Administrative Law Judge issued an order that "continued the prehearing conference indefinitely pending the determination of the parties' motions now before the Commission."

On April 20, 2009, Respondent filed its Response to Complainants' Motion for Leave to Amend and Supplement Complaint opposing such amendment.

On April 23, 2009, Complainants filed a Motion to Strike Respondent's Motion to Dismiss ("Motion to Strike"), and a Motion Pursuant to N.D.R.Civ. P. 56(f) to Refuse or Continue Respondent's Motion for Summary Judgment ("First Rule 56(f) Motion"). Among other things, the Rule 56(f) Motion stated:

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 (sic) 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.

In response to the foregoing motions, on May 19, the ALJ referred determination of all outstanding motions to a vote of the Commissioners.

On June 24, 2009, over two months after Complainants filed their motion to amend the Complaint, the Commission voted to allow amendment of the Complaint. On June 30, 2009, the

ALJ issued his order granting Complainants leave to amend the Complaint and dismissing Respondent's Motion to Dismiss and Complainants' motions in response thereto.

On July 17, 2009, Complainants filed their First Amended and Supplemented Complaint ("Amended Complaint").

On July 29, 2009, the Commission found that the Amended Complaint stated a *prima facie* case. Commission staff served the Amended Complaint on Respondent on July 30, 2009.

On August 12, 2009, Respondent filed its Answer to the Amended Complaint, as well as a Motion to Dismiss Complaint or in the Alternative, Motion for Summary Judgment ("Second Motion to Dismiss"), together with a brief in support thereof.

On August 31, Complainants filed their Response in Opposition to Motion to Dismiss containing Complainants' arguments of law and fact for why Respondent's Second Motion to Dismiss should be denied. On this same day, Complainants also filed a second Rule 56(f) Motion to Refuse or Continue Respondent's Motion for Summary Judgment ("Second Rule 56(f) Motion"). Among other things, the Rule 56(f) Motion states:

Complainants have not had a full opportunity to conduct discovery. Complainants' discovery efforts have been delayed due to continuances of the prehearing conferences, the changed circumstance caused by GNPD's mine permit withdrawal, which changed the nature of Complainants' forthcoming discovery requests, and an understanding that discovery would proceed once the Commission ruled on a motion to dismiss as such motion could either clarify the scope of discovery or resolve this matter.

* * *

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 specifically determine the scope of the analysis required by relevant law.

* * *

Should the Commission deny this motion for relief under N.D.R.Civ.P. 56(f), Complainants reserve the right to fully respond to respond to the Motion for Summary judgment on the merits.

On September 14, 2009, Respondents filed their reply to Complainants' response to Respondent's Second Motion to Dismiss.

On September 30, 2009, the ALJ issued a Memo of Procedure for Further Proceedings in which he referred the Motion to Dismiss and the Rule 56(f) Motion for decision by a vote of the Commissioners. At about this time Commission Staff informed Complainants that the Commission intended to schedule a work session for this case.

On October 14, 2009, the Commission scheduled a work session to discuss this case (“First Work Session”). The Commission did not develop or issue a written agenda for the First Work Session. The Commission was not able to schedule the Work Session until December 1, 2009, six weeks later.

On November 19, 2009, Complainants served their First Discovery Request on Respondents.

In response to Complainants’ First Discovery Request, on November 25, 2009, Respondents filed their Motion for Protective Order seeking to stay all discovery activities pending resolution of its Second Motion to Dismiss. In response, Complainants filed their Response in Opposition to Motion for Protective Order asserting that Respondents had completely failed to meet the burden of proof required for issuance of protective orders and that discovery should proceed so that the Commission and parties could identify and resolve any discovery objections.

On December 1, 2009, the Commission held its First Work Session to discuss procedural issues related to Respondent’s Motion to Dismiss. During the First Work Session, Commission Staff answered questions from the Commissioners related to procedural matters and the standards for decisions on motions to dismiss and motions for summary judgment. The parties were not allowed to participate in the Work Session other than as observers. In the First Work Session, the Commission did not discuss the merits of Respondent’s Motion for Protective Order

or discovery procedures. The Commissioners and Commission Staff did express concern about the length of time this case has taken.

On December 10, 2009, the Commission scheduled a second work session for January 11, 2010 (“Second Work Session”). Although no agenda has been produced for this later work session, Complainants understand that the purpose of this work session is to discuss whether or not to hold an oral hearing on the Second Motion to Dismiss and Second Rule 56(f) Motion.

II. ARGUMENT

A. The ALJ May Re-Schedule the Prehearing Conference

Complainants’ requested a prehearing conference pursuant to N.D.C.C. § 28-32-29 and N.D.A.C. § 69-02-03-03, to discuss, among other things, a discovery schedule. By Notice of Prehearing Conference dated March 17, 2009, the ALJ granted this motion and included discussion of a discovery schedule as a purpose of the prehearing conference. However, by Order dated April 13, 2009, the ALJ continued the prehearing conference indefinitely “pending the determination of the parties’ motions now before the Commission.” Since the prehearing conference was continued and the ALJ has not vacated his order, the grant of a prehearing conference continues to exist.

B. The Amount of Time Required for this Case Is the Result of Actions Taken by Respondent and GNPD and as a result of Commission Process, and Not Due to Delay by Complainant

Upon service of the First Complaint by Commission and assignment of an ALJ, Complainants promptly requested a prehearing conference. Due to flooding in Bismarck, counsel for Respondent requested a continuance, which delayed this case. At almost the same time, GNPD withdrew its rejected mine permit application to assist Respondent in this case. This change in facts was not within the control of Complainants, but it did require Complainants to

amend their Complaint, otherwise they would have been forced to defend a complaint that included facts no longer in existence and that did not include new relevant facts.

Two days after Complainants filed their Motion to Amended Complaint and emailed it to Respondent, Respondent filed its First Motion to Dismiss the Complaint that Complainants sought to amend. Respondent did not acknowledge the Motion to Amend Complaint in its First Motion to Dismiss. Thus, GNPD intentionally changed facts relevant to this proceeding for the purpose of assisting Respondent and then Respondent sought to dismiss the Complaint based on these changed facts. Further, Respondent opposed amendment of the Complaint. The law does not allow a party to change facts and then seek to dismiss a complaint based on these changed facts without the courts affording the complaining party to amend or supplement the complaint. *See Griffin v. County School Board*, 377 U.S. 218, 226 (1964). Accordingly, Complainants opposed the First Motion to Dismiss only on procedural grounds by means of a Motion to Strike Motion to Dismiss and First Rule 56(f) Motion.

The existence of these four motions (Motion to Amend Complaint, First Motion to Dismiss, Motion to Strike, and First Rule 56(f) Motion) caused the ALJ to continue the prehearing conference indefinitely.

None of these four motions were necessitated by an action of Complainants. Rather, Complainants' Motion to Amend Complaint was necessitated by an unpredictable action of GNPD, which itself stated that it took this action specifically to assist Respondent in this case. Likewise, Complainants' Motion to Strike and First Rule 56(f) Motion were in response to Respondent's intentional filing of its improperly-timed Motion to Dismiss, which was filed two days after Complainants' emailed the Motion to Amend Complaint to Respondent's counsel. This filing of the mistimed First Motion to Dismiss resulted in substantial delay in this

proceeding for no good reason. Thus, actions of Respondent and GNPD resulted in delay of the prehearing conference and this case.

Ultimately, the Commission granted Complainants' Motion to Amend Complaint, denied the Motion to Dismiss, and acted in accordance with the procedure propounded by Complainants in their pleadings and not those propounded by Respondent. However, it took over two months for the Commission to rule in favor of Complainants, even though the timing of Respondent's Motion to Dismiss was procedurally improper.

Once the Commission granted the Motion to Amend Complaint, Complainants promptly filed their Amended Complaint. The Commission found that the Amended Complaint stated a prima facie case on July 30, 2009, and Respondent filed its Answer to the Amended Complaint as well as a Second Motion to Dismiss on August 12, 2009. Thus, from the time that Complainants filed their Motion to Amend Complaint and Respondent answered the Amended Complaint, over three months passed, none of which delay was initiated by Complainants or the result of a delay by Complainants in taking any action.

Once the Commission resolved the first round of pending dispositive motions, it would have been appropriate for the ALJ to reschedule the prehearing conference and set a discovery schedule. However, Respondent filed their Second Motion to Dismiss on August 12, 2009, at the same time they filed their answer, with the result that potentially dispositive motions similar to those that resulted in the ALJ's April 13, 2009 continuance order were again immediately pending. Complainants understood at that time that a request then to schedule a prehearing conference would likely result in a further continuance, just as happened in April.

Just as it did in its First Motion to Dismiss, Respondents included an untimely motion for summary judgment in the Second Motion to Dismiss, thereby once again adding substantial procedural confusion to this proceeding. A motion for summary judgment is untimely at such an

early procedural stage, only 12 days after service of an amended complaint based on substantially different facts.

Briefing related to the Second Motion to Dismiss was completed on September 14, 2009. Complainants' expected that the Commission would promptly rule on the outstanding dispositive motions. By Memorandum dated September 30, 2009, the ALJ in fact referred the pending motions to the Commission for resolution by vote. In response to the ALJ's Memorandum, on October 14, 2009, the Commission ordered a Work Session, but did not schedule it until December 1, 2009, eleven weeks after completion of briefing on the outstanding motions. Due to the Commission's October 14 decision to not hold its informal Work Session until December 1, Complainants understood that resolution of the Motion to Dismiss would not be formally resolved until sometime after December 1, and such decision was unlikely to occur in 2009. The fact that the Commission has scheduled a subsequent work session for January 11, 2010, means that the Commission will likely not resolve the Motion to Dismiss until at least February 2010. Thus, Commission process to resolve the Second Motion to Dismiss has already consumed over three months and will likely require at least two more months. All told, Commission process on the first and second rounds of potentially dispositive motions alone has consumed over six months of time and is likely to consume at least two more.

Complainants have requested that a prehearing conference be scheduled because it is now clear that the Commission has not promptly resolved the pending dispositive motions and because Respondent has opposed any advancement of discovery pending resolution of these motions. Complainants request for a prehearing conference to establish a hearing schedule is intended to help expedite this case.

C. Establishment of a Schedule in a Prehearing Conference Will Address Commission Concerns about the Length of this Proceeding and Serve the Interests of Justice

In the First Work Session, the Commission expressed concern that this case has taken substantial time. Complainants' share this concern and are fully supportive of accelerating the speed of this case. Complainants point out that they have timely filed all required pleadings and have not themselves undertaken any action that delayed this case. Further, Complainants have made good faith efforts to prosecute this action in a timely fashion. However, Complainants have been forced to respond to intentionally mistimed motions by Respondent, as well as to actions by GNPD acting to benefit Respondent. Should the Commission desire to accelerate the rate of this case, the most effective way to do so would be to establish a schedule for this case, to promptly deny procedurally improper motions, and to resolve in a timely fashion dispositive motions properly before it.

In response to Commissioner concerns, and because Complainants have a right to be heard on the merits of this case in a timely fashion, Complainants request that the ALJ reschedule the prehearing conference and set a schedule for this case so that the parties and the Commission have a clear understanding of the timing of resolution of this matter and so that the Commission may proceed more efficiently than it has done in the past.

It is Complainants' understanding that while the Commission is charged with the final resolution of this matter, including decisions on the substantive merits of dispositive motions, the ALJ is charged with setting the schedule for this matter and for procedural decisions, including the timing motions, including dispositive motions, the order in which motions, including dispositive motions, must be decided, and dismissal of mistimed or improper motions, including dispositive motions. Thus, Complainants request that the prehearing conference include discussion of the role of the ALJ in making procedural decisions about dispositive motions.

Continued ad hoc scheduling of this case will likely result in continued delay, uncertain procedure, an increase in expense, and an unjustly long process. Thus, justice requires that the ALJ schedule a prehearing conference to establish a schedule for this case.

D. Inclusion of a Schedule for Action on the Motion to Dismiss and a Schedule for Discovery in the Prehearing Conference Is Appropriate Because a Decision on the Motion to Dismiss Will Define the Scope of Discovery

Twice in its pleadings Complainants have stated that resolution of a Rule 12(b) motion to dismiss would allow the Commission to determine the meaning of the State Mining Law, which meaning is central to the scope of discovery in this matter. It will not be possible for the Commission to resolve discovery disputes related to relevancy without reference to the definitions of “coal preparation” and “coal preparation plant,” N.D.A.C. § 69-05.2-01-02, and most importantly the definition of “surface coal mining operations,” N.D.C.C. § 38-14.1-02(33), which definitions lie at the heart of this case. Thus, it is appropriate for the Commission to rule on a Rule 12(b) motion to dismiss before it rules on discovery objections. This being said, as Complainants argued in their Response in Opposition to Motion for Protective Order, the Commission should not stay all discovery proceedings rather should proceed with discovery at least to allow the parties identify and attempt to resolve Respondent’s particular objections to the discovery requests. The alternative is to wait to start all discovery process until after a decision on the Motion to Dismiss and this would substantially delay this case.

Commission staff expressed a concern that Complainants have initiated discovery late in this process. Complainants did not serve discovery requests earlier because: (1) the Amended Complaint resulted in a substantial change in the scope of discovery; (2) it was apparent from Respondent’s response to the First Rule 56(f) Motion that Respondent would object to any advancement of discovery and that resolution of objections would require decision by the Commission on the meaning of the State Mining Law which would likely be decided through a

motion to dismiss; (3) the Commission would likely defer scheduling a prehearing conference to schedule discovery until after resolution of the second round of dispositive motions; and (4) Complainants anticipated that the Commission would render a decision on the Motion to Dismiss more expeditiously than it has.

The Complaint was based on evidence collected from Commission files showing, among other things, that GNPD was developing a coal mine to supply Respondent's adjacent Preparation Plant, and that Respondent would acquire at least a majority of its coal from GNPD, alone. The Amended Complaint addressed the fact that the source or sources of coal to be processed by Respondent were made less certain by GNPD's decision and were unknown to Complainants and the Commission, such that discovery was necessary to identify these sources of coal, and once they were identified, to analyze the relationship between the Preparation Plant and these sources of coal according to the methodology required by federal law. The Commission cannot base its decision in this matter on a lack of knowledge of Respondent's sources of coal. Thus, the scope of discovery under the Amended Complaint is substantially different from that under the first Complaint.

If Complainants had served discovery sooner, Complainants reasonably anticipated that Respondent would have objected to any advancement of discovery until resolution of its First and Second Motions to Dismiss. In fact, that is what Respondent ultimately did in its Motion for Protective Order. Further, Complainants have twice stated that final resolution of discovery objections should wait until after resolution of a Rule 12(b) motion to dismiss, as such resolution would define the scope of discovery. In the mean time, discovery can proceed with regard to identification of objections and response to requests to which Respondent does not object.

Complainants have not delayed this proceeding by waiting to initiate discovery until after briefing on the Motion to Dismiss the Second Amended Complaint. Complainants' decision to

wait to file discovery is entirely reasonable given the process to date. In light of the fact that the Commission is unlikely to issue an order on the Motion to Dismiss until February, the timing of Complainants' discovery has not delayed this proceeding. Moreover, should the Commission delay all discovery proceedings until after a final decision on the Motion to Dismiss, then the timing of service of the First Discovery Request would be entirely irrelevant to the pace of this proceeding.

E. The Schedule Must Clarify that a Commission Decision on the Motion for Summary Judgment Must Wait Until After a Decision on the Rule 56(f) Motion and, if the Rule 56(f) Motion is Denied, a Briefing on the Merits of Summary Judgment

During the First Work Session, Commission Staff failed to state that the Commission must make a decision on the Second Rule 56(f) Motion before the Commission takes action on a motion for summary judgment, and if it denies the Second Rule 56(f) Motion, the Commission must allow opportunity for briefing on the merits of summary judgment. Any schedule for this case must make clear that a decision on the merits of a motion for summary judgment under Rule 56(f) is not at present timely for the reasons stated in the Rule 56(f) Motion and because a decision on the Rule 56(f) Motion itself is pending. The Commission must first rule on Complainants' Rule 56(f) Motion, and then if it denies the Rule 56(f) Motion, the Commission must allow Complainants 30 days to respond to the merits of the motion for summary judgment. A decision by the Commission denying the Rule 56(f) Motion and simultaneously granting the motion for summary judgment would not afford Complainants an opportunity to oppose a motion for summary judgment on the merits and thereby violate due process of law which would be reversible error.

CONCLUSION

For the foregoing reasons, Complainants request that the Commission grant its Motion to Reschedule Prehearing Conference to address the matters included in such motion.

Dated this 21st day of December, 2009.

Respectfully submitted,

SARAH VOGEL LAW FIRM, P.C.



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Dated this 21st day of December, 2009.

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CERTIFICATE OF SERVICE

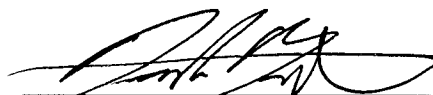
I hereby certify that a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO RESCHEDULE PREHEARING CONFERENCE** was on December 22, 2009, served via U.S. mail on the following:

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