

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

OAH File No. 20090071

Dakota Resource Council, *et al.*, Complainants,

vs.

Case No. RC-09-32

GTLE Dakota Plant 1 LLC, Respondent.

**PROTECTIVE ORDER**

**Summary of Proceedings Relevant to Motion for Protective Order.**

In accordance with a memorandum of procedure for further proceedings filed October 2, 2009 (Docket No. 36), there are before the Commission for its consideration the Complainants' first amended and supplemented complaint, together with the Respondent's answer and motion to dismiss the amended and supplemented complaint or, in the alternative, motion for summary judgment. The Respondent's motion is pending the Commission's determination and order. (For convenience, the Complainants are together referred to as "DRC" and the Respondent as GTLE)

GTLE's motion is supported by a brief, exhibits and the affidavit of Robert R. French.

DRC responded to resist GTLE's motion by a reply to the motion to dismiss and a motion pursuant to N.D.R.Civ.P. 56(f) to refuse or continue GTLE's alternative motion for summary judgment pending discovery to obtain facts necessary to respond to the motion. DRC's motion is supported by a memorandum and the affidavit of Paul C. Blackburn.

GTLE has responded to reply to DRC's motion.

On November 19, 2009, DRC served upon GTLE a request for discovery consisting of 11 pages of instructions, definitions, interrogatories, request for admissions, and document requests (together amountING to 67 separate requests). GTLE timely responded to the request for discovery by its motion for a protective order pursuant to N.D.R.Civ. P. 26(c)(1) that, for good cause shown, the requested discovery not be had for various reasons which together are taken to allege an undue burden upon and expense to GTLE.

GTLE's motion for a protective order was met with a reply by DRC contending that GTLE had not shown good cause in accordance with the requirement of the rule for a protective order that the requested discovery not be had.

GTLE responded to DRC's reply by filing a rebuttal brief to assert that in the circumstances of the pending proceedings DRC's Rule 56(f) motion and GTLE's Rule 26(c) motion are "interrelated," and upon that assertion offered an argument in support of its motion to dismiss (or, alternatively, its motion for summary judgment—presumably, as the Commission may find applicable) and against DRC's Rule 56(f) motion. It is inferred that the necessary extension of the argument is that DRC's complaint must be dismissed, that its requested discovery is therefore unnecessary and a waste of time and money (*i.e.*, in the words of the rule, an undue burden and expense), and, therefore, GTLE's motion for a protective order denying the requested discovery should be granted.

Obviously thinking it necessary to respond to GTLE's argument, DRC filed a "surreply" to argue against GTLE's motion to dismiss or, alternatively, for summary judgment, and in favor of its Rule 56(f) motion, and offered further argument and additional authority that GTLE's Rule 26(c) motion fails to show good cause as required by the rule.

**Discussion.**

I have not considered the record of this case for the determination of the pending motions. I have reviewed the record of this case for my advice to the Commission for the procedure for further proceedings to be had for the disposition of this case. It is my impression that the threshold question may be whether the Commission's determination, by the Director of the Reclamation Division, that GTLE does not have to obtain a surface coal mining permit from the Commission for its proposed coal beneficiation facility is correct in accordance with relevant facts and applicable law. Further, it is my impression that there may be sufficient material facts of record about which there can be no genuine dispute which would require the Commission to confirm that decision in accordance with applicable law and, accordingly, compel a decision granting GTLE's motion to dismiss DRC's amended and supplemental complaint or, alternatively, perhaps, GTLE's motion for summary judgment. In any event, as a matter of administrative efficiency, that seems to me to be the Commission's first inquiry upon the pending motion.

If upon its consideration of GTLE's motion the Commission finds that it lacks specific factual information to decide the motion, it may choose various alternatives to obtain that information for further proceedings. For example, it may request such documentation as will provide the information it requires for its further consideration of GTLE's motion, or it may grant DRC's Rule 56(f) motion or allow both parties limited discovery to search for and obtain the information, or, of course, it may conclude that the information it requires is better obtained by testimony and documentary evidence, deny GTLE's motion, and schedule an evidentiary hearing for a date which will allow the parties reasonable time for preparation, including appropriate discovery.

While I did not find either GTLE's or DRC's arguments of the merits of GTLE's motion to dismiss DRC's amended and supplemented complaint and DRC's Rule 56(f) motion helpful for my consideration of GTLE's Rule 26(c) motion, I think that the Commission would find those

briefs helpful for its consideration of those motions. The Commission may also wish to request counsel's oral argument to expand upon the more significant contentions made by their respective briefs and to answer the Commissioners' questions.

Considering GTLE's Rule 26(c) motion, I conclude that it is unnecessary and inefficient for DRC to proceed with comprehensive discovery proceedings pending the Commission's consideration of GTLE's motion to dismiss DRC's amended and supplemented complaint or, alternatively, for summary judgment. While DRC's reasoned argument against GTLE's Rule 26(c) motion is not without merit, in the particular procedural circumstances of this case the inefficiency of proceeding with a comprehensive discovery request in the absence of any evident necessity for the information sought pending the Commission's consideration of GTLE's motion constitutes an undue burden upon and expense for not only GTLE but all of the parties and the Commission, and is good cause in accordance with the requirement of N.D.R.Civ.P. 26(c)(1) to prohibit the discovery proposed by DRC in this case pending the consideration of GTLE's motion by the Commission and its determination. Further reason to grant GTLE's motion to prohibit DRC's proposed discovery pending the Commission's consideration of GTLE's motion to dismiss DRC's supplemented and amended complaint or, alternatively, for summary judgment, is that there is no reason to think that the facts sought by DRC's proposed discovery would affect the resolution of the motion. *See Kouba v. State of North Dakota, et al.*, 2004 ND 186, ¶ 15.

**Order.**

The discovery proceedings proposed by the Complainants in the particular procedural circumstances of this case constituting an undue burden upon and expense to the parties as well as the Commission, good cause therefore being shown, it is

Ordered, that no discovery shall be had by the Complainants pending the Commission's consideration of the Respondent's motion to dismiss the Complainant's amended and supplemented complaint or, alternatively, for summary judgment, and the order of the Commission.

Dated December 31, 2009.

State of North Dakota  
Public Service Commission

By:

  
Al. Wahl, Temporary Administrative Law Judge

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**CERTIFICATE OF SERVICE**

The undersigned certifies that complete and correct copies of the **PROTECTIVE ORDER** to which this certificate of service is annexed were served today by e-mail, addressed as follows:

Mr. Derrick Braaten  
Sarah Vogel Law Firm, PC  
derrick@svogellaw.com

Mr. Paul Blackburn  
Plains Justice  
pblackburn@plainsjustice.com

Mr. Brian R. Bjella  
Crowley Fleck PLLP  
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Ms. Illona Jeffcoat-Sacco, General Counsel  
North Dakota Public Service Commission  
ijs@nd.gov

A copy of the protective order was filed today by e-mail addressed to Mr. Darrell Nitschke, Executive Director, North Dakota Public Service Commission, dnitschk@nd.gov.

Dated December 31, 2009.

OFFICE OF ADMINISTRATIVE HEARINGS

  
Al. Wahl