

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

ORDER GRANTING
RESPONDENT'S MOTION
TO DISMISS

Preliminary Statement

By letter dated July 28, 2008, GTL Energy (USA) Limited ("GTL Energy") requested a jurisdictional determination from the Commission pursuant to North Dakota Century Code Chapter 38-14.1 regarding a proposed coal beneficiation facility to be located near South Heart, North Dakota. It was stated in the letter that GTLE Dakota Plant 1 LLC ("GTLE") would be formed to operate the beneficiation facility.

As stated in the letter, coal will be brought from mines around the United States and around the world to the facility to test the effectiveness of GTL Energy's beneficiation technology on a commercial scale. If the test proved successful, GTLE would license the technology.

That the facility will test coals from around the world is not disputed.

By letter dated August 5, 2008, the Reclamation Director of the Commission stated in part that GTL Energy did not have to obtain a surface coal mining permit, since the facility will

not be operated “in connection with” a proposed coal mine near South Heart nor any other coal mine, and thus is not a “surface coal mining operation” under the NDCC Chapter 38-14.1.

Initially, the Complainants (“DRC”) filed a Complaint dated January 22, 2009, alleging that GTLE was conducting unauthorized surface coal mining operations, asserting that the beneficiation facility under construction would be operated contrary to NDCC Chapter 38-14.1.

The DRC asserted that the coal beneficiation facility would be operated “in connection with” a proposed mine located near South Heart, North Dakota, to be developed by Great Northern Power Development (“Great Northern”) pursuant to an application that it filed with the Commission on October 15, 2008. Subsequently, by letter dated March 25, 2009, Great Northern withdrew its application for the proposed mine.

After leave by this Commission, the DRC filed its Amended and Supplemented Complaint (“Amended Complaint”) dated July 17, 2009, asserting that notwithstanding the withdrawal of the mining application of Great Northern, that GTLE would still operate its coal beneficiation facility in violation of NDCC Chapter 38-14.1; alleging in part that the coal beneficiation facility would be operated “in connection with” one or more unknown coal mines.

That there is no coal mine in the vicinity of the beneficiation facility is not disputed, nor is there an application filed with this Commission for any such coal mine.

GTLE answered both the Complaint and Amended Complaint denying the allegations, and asserting the Reclamation Director correctly determined its coal beneficiation facility will not be operated “in connection with” a coal mine and, therefore, it does not need a surface coal mining permit.

By Motion and Brief dated August 12, 2009, and filed with the Commission on August 13, 2009, GTLE sought either dismissal of the Amended Complaint for failure to state a claim upon which relief can be granted, or in the alternative, summary judgment.

The DRC has resisted GTLE's motions.

On November 19, 2009, the DRC served upon GTLE a Request for Discovery consisting of 11 pages of instructions, definitions, interrogatories, requests for admissions and document requests. GTLE responded to the request for discovery by bringing a motion for protective order pursuant to North Dakota Rules of Civil Procedure 26(c)(1). By Protective Order dated December 31, 2009, the Temporary Administrative Law Judge assigned to this case granted the request, pending a ruling by this Commission on GTLE's motion to dismiss or in the alternative, motion for summary judgment.

Issue

Whether the DRC's Amended Complaint should be dismissed under Rule 12(b)(vi) of the North Dakota Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Analysis

Coal mining in North Dakota is regulated by this Commission pursuant to the authority granted by North Dakota Century Code Chapter 38-14.1. The following statute defines "surface coal mining operations" to mean:

- (a) Activities affecting the surface of the land in connection with a surface coal mine. Such activities include extraction of coal from coal refuse piles, excavation for the purpose of obtaining coal, including such common methods as contour strip, auger, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, and loading of coal at or near the mine site, except that such activities do not include coal exploration subject to Chapter 38-12.1, or the extraction of coal incidental to reclamation operations under Chapter 38-14.2.

- (b) The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas also include any adjacent land, the use of which is incidental to any such activities, all adjacent lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

NDCC § 38-14.1-02(33)(emphasis added).

If the pleadings disclose with certainty the impossibility of proving a claim upon which relief can be granted, dismissing the complaint for failure to state a claim is permissible if an administrative agency cannot discern a potential for proof to support the claim. *Voigt vs. State*, 759 N.W.2d 530, 532 (N.D. 2008).

It is undisputed that there is no coal mine anywhere in the vicinity of GTLE's coal beneficiation facility, nor is there a permit pending with this Commission for a coal mine in the vicinity. As a result, it becomes a question of law for this Commission to determine if the mining law, and particularly the phrase "in connection with" extends to mines anywhere in the United States and around the world. As this is a question of law for this Commission to determine, we do not believe any additional facts or information are required for us to address this issue.

The federal Office of Surface Mining Reclamation Enforcement (OSM) adopted what is known as the Final Rule set forth in the *Federal Register* at 53 F.R. 47378 and 53 F.R. 47384 (November 22, 1988) by offering guidance as to what activities are deemed to be in connection with a coal mine.

In the Final Rule, OSM stated that "it continues to believe that the ability of mine operators, or coal handlers directly serving such operators to have control of processing

operations is essential to establishing that a processing plant is being operated in connection with a coal mine.” Final Rule at 47385. OSM went on to state that it is “only requiring regulatory authorities to extend their permit requirements as far into the stream of commerce as those activities over which mine operators and coal handlers who directly serve them, such as coal processors, have or could have control of operations.” *Id.* OSM also stated that “it is valid to consider whether a facility has a useful life independent of a specific mine or mines which it serves, in determining if the facility is operating in connection with a coal mine . . .” *Id.* at 47389.

OSM did note that the term “in connection with” is not defined. It did not want to define the phrase such that it would unduly restrict the discretion the regulatory authority must have in order to make valid decisions about the applicability of the law. *Id.* at 47385.

The federal Surface Mine Control and Reclamation Act is found at 30 USCS 1201, et seq. (“SMCRA”). OSM clarified “there is nothing in the Act or in its history that implies that SMCRA was meant to apply nationwide to all industrial facilities that process coal irrespective of whether or not they are operating in connection with a mine.” *Id.* at 47387. Rather, OSM “wishes to appropriately limit and concisely state the jurisdiction provided in (SMCRA) over coal preparation which results from or is incident to an activity “in connection with” a coal mine. *Id.* at 47388.

GTLE’s facility is closely linked to ultimate end users, being those facilities which desire to obtain a process to beneficiate their coal to meet environmental requirements. As GTLE’s facility will test coals from mines in the United States and around the world, it would have a useful life independent of any specific mine. OSM’s discussions in the Final Rule indicate that coal processing facilities which are for the purpose of the end user, are not “in connection with”

a surface coal mining operation. *Pacificorp vs. Office of Surface Mining Reclamation and Enforcement*, IBLA 95-175, 143 IBLA 237 (1998).

With respect to mining support facilities, OSM stated in the Final Rule that it “would expect the economic dependence of a facility on a mine to be a critical element in determining the degree to which a facility results from or is incident to regulated mining activity.” Final Rule at 47381. With respect to GTLE’s facility, there is no mine in the vicinity so there is no mine to be dependent upon and no mine operator to control it.

In *National Wildlife Federal vs. Hodel*, 832 Fed.2d 674, 745 (Cir. D.C. 1988), the Court of Appeals held that “some type of limiting principle of proximate causation” is very significant in determining what support facilities are subject to SMCRA. The most likely “proximate cause” is that the processing facility depends upon a particular mine’s requirements. The court considered the language of 30 USC § 1291 (28)(B) indicating that “surface coal mining operations” could apply to activities on adjacent land “resulting from or incident to such activities.” The court felt that this language indicated an intent by Congress to suggest a causal connection, otherwise every support facility would be considered a “but for” result of a surface coal mining operation and subject to regulation under SMCRA. The court noted that the language “resulting from or incident to” connotes an element of proximity to the activity, and that proximity is used as a guiding principle in a flexible implementation of SMCRA.

In a case from the Interior Board of Land Appeals, it was also noted that the Final Rule indicates that use of the words “resulting from or incident to” connotes an element of proximity. The Board quoted with favor from the Final Rule in which OSM stated it will address three factors when deciding whether a facility is properly considered to result from or be incident to a surface coal mining activity: (1) whether the facility is geographically proximate to the

producing mine, (2) whether the facility is functionally tied to that particular mine in question, and (3) whether the facility is economically dependent upon that particular mine. *Citizen's Coal Council, et al.*, 142 IBLA 33, 37 (1997). The Board held that such support facilities must have a direct and meaningful connection to a surface coal mine, as to hold otherwise would bring facilities within the ambit of SMCRA regulation that are not functionally and/or economically tied to a regulated surface coal mining activity. *Id.* at 38.

There is no mine in the vicinity of South Heart. There clearly is no proximity, functional tie or economic dependence where there is no mine. The DRC asserts that the coal beneficiation facility will be operated "in connection with" coal mines anywhere in the United States and around the world which may provide coals to the facility for testing. We find no basis for such a broad interpretation of the law. In fact, a contrary intention is shown. For example, we note that North Dakota Century Code § 38-14.1-02(33)(a) provides in part that for coal loading facilities to be "in connection with" a coal mine, such facilities must be located "at or near the mine site."

OSM clarified "that it is valid to consider whether a facility has a useful life independent of the specific mine or mines which it serves, in determining if the facility is operating in connection with a coal mine . . ." Final Rule at 47389. As the GTLE facility will process coals from around the world, it will have a useful life independent of any specific mine.

This Commission has ruled on similar issues in two prior cases. In *Schulte Coal, Inc.*, Case No. RC-1070-92-936 dated November 10, 1992, the plant operator, Schulte Coal, bought its coal from the nearby Center Mine; and at its plant crushed, screened and sized coal for retail sales. We found that because Schulte Coal also had the ability to purchase coal from other mines, its coal preparation plant was not operating in connection with the Center Mine or any other mine, and that no mine permit was needed.

In a more recent case, we found that a proposed coal beneficiation facility to be constructed near the Falkirk Mine was not being operated “in connection with” the coal mine. Case No. PU-07-686. Even though there was an existing coal mine operating in close proximity to the proposed coal beneficiation facility, which coal mine would supply coal to the facility, and the facility was to be owned in part by the parent company of the mine operator; we found that no surface coal mining permit was needed because the coal beneficiation facility was to be operated for the benefit of the end user - the nearby power plant.

In both of these prior cases, there was a coal mine in proximity to the facility, yet we found the mining law did not apply in either case. In this case, DRC acknowledges there is no coal mine anywhere near the GTLE facility. Thus, this case does not present even as close a question as did the prior cases.

On page 18 of their Response Brief, the DRC states “(t)he meaning of the term ‘in connection with a surface coal mine’ is central to this proceeding . . .” In addition, it is stated at page 41 of the Response Brief that “(e)ven if the (GTLE) facility ultimately acquires commercial quantities of coal from another mine, such as the BNI Center Mine, then the facility would be dependent upon such other mine as well as or instead of the South Heart Mine.” The DRC is essentially asserting that this Commission would have jurisdiction over any mine located either in the United States or around the world simply because it provides coal to the facility for testing purposes. This interpretation ignores the “geographical proximity” factor and is inconsistent with our prior decisions.

Also instructive to us is the Protective Order issued by the Temporary Administrative Law Judge, dated December 31, 2009. On page 3 he stated in part:

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.

Protective Order at page 3.

The Temporary Administrative Law Judge went on to state:

Considering GTLE's 26(c) Motion, I concluded 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 recent argument against GTLE's Rule 26(c) Motion is not without merit, in the particular procedural circumstance of this case the inefficiency of proceeding with the 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 not only for GTLE but all of the parties and the Commission . . .

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 vs. The State of North Dakota, et al.*, 2004 (N.D.) 186, ¶ 15.

Protective Order at page 4 (emphasis added).

This Commission concurs in the aforementioned statements of the Temporary Administrative Law Judge. The determination by the Reclamation Director is in accord with relevant facts and applicable law.

While both parties submitted affidavits with respect to pending motions, we have not utilized them in our determination as we do not believe they are germane to the legal question presented.

For this Commission to find that GTLE's facility is a surface coal mining operation would, in effect, require us to assert jurisdiction over every mine that supplies coal to it, wherever located in the United States or around the world.

We find that the law with respect to the term "in connection with" a surface coal mine is central to our determination whether to grant GTLE's Motion to Dismiss. There is no mine in the vicinity of the coal beneficiation facility, nor is there an application pending for any such coal mine. GTLE's facility will have a useful life independent of any one coal mine and will operate primarily for the benefit of end users. GTLE's facility is not operated in connection with a surface coal mine and no permit is required.

Order

We affirm the decision of the Reclamation Director, and grant the motion of GTLE to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted.

Dated this ___ day of _____, 2010.

Tony Clark
Commissioner

Kevin Cramer
Chairman

Brian P. Kalk
Commissioner