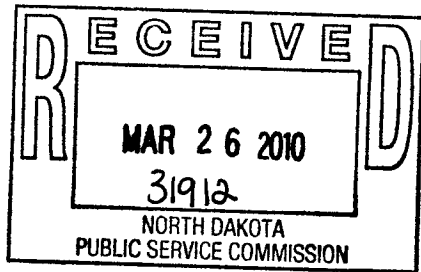


SCANNED

Date 3-26-10

File GTLE-32510-App Amended-pet-recon (31912)

CROWLEY FLECK PLLP



March 25, 2010

Brian R. Bjella
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FROM DIRECTOR - RECLAMATION DIV.

Date: \_\_\_\_\_
Action: \_\_\_\_\_
Info. Only: \_\_\_\_\_
Info & File: \_\_\_\_\_

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
Response in Opposition to Complainant's Amended Petition for Reconsideration.

Very truly yours,

[Signature]
BRIAN R. BJELLA

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

56 RC-09-32 Filed: 3/26/2010 Pages: 6
Response in Opposition to Complainants Amended
Petition for Reconsideration

GTLE Dakota Plant 1 LLC
Brian Bjella, Crowley Fleck

BEFORE THE PUBLIC SERVICE COMMISSION  
OF NORTH DAKOTA

Dakota Resource Council,	)	Case No. RC-09-032
Neil and Laura Tangen,	)	
Myron and Nancy Eberts,	)	
and Frank and Lucy Hurt,	)	
	)	
Complainants,	)	RESPONDENT'S RESPONSE
	)	IN OPPOSITION TO
vs.	)	COMPLAINANT'S AMENDED
	)	PETITION FOR RECONSIDERATION
	)	
GTLE Dakota Plant 1 LLC,	)	
	)	
Respondent.	)	

COMES NOW the Respondent, GTLE Dakota Plant 1 LLC ("GTLE") for its response to the Amended Petition for Reconsideration filed by the Complainants ("DRC").

GTLE opposes the Amended Petition for Reconsideration and requests that it be denied.

The DRC sites no new law and no new relevant facts. GTLE's coal beneficiation facility has been constructed, and there is no coal mine in the vicinity nor is a permit pending with the Public Service Commission ("Commission").

DRC sites a zoning application and newspaper article as "evidence" that a coal mine will soon exist. As the Commission is well aware, it takes years to first permit and then construct a coal mine. Meanwhile, GTLE will continue to operate its coal beneficiation facility.

Thus, the DRC is asking this Commission to rule on pure speculation. In essence, the DRC is asking this Commission to rule on a hypothetical case. However, just as the courts are not allowed to issue advisory opinions, nor is the Commission. The North Dakota Supreme Court has stated that an issue is not ripe for review if it depends on future contingencies which,

although they might occur, necessarily may not, thus, make addressing the issue premature. *Bies v Obregon*, 558 N.W.2d 855, 858 (N.D. 1997).

The DRC cites no new law but merely restates the law from their prior briefs in seeking to convince this Commission to overturn its decision granting the Motion to Dismiss.

Interestingly, DRC seems to make much of the fact of whether this will be a “commercial” operation. However, GTLE, as stated in its Answer to the Amended Complaint and other pleadings, has constructed this coal beneficiation facility to test its coal beneficiation process on a commercial scale. If a particular mine’s coal proves amenable to the process, GTLE will license the technology to a third party. Thus, it is proving of the technology which results in licensing the technology which is the main “commercial” aspect of this facility.

The actual mining extraction of coal by strip mining is clearly a permitted activity under North Dakota’s mining law. However, for other facilities to require permits, they must be “in connection with a surface coal mine.” NDCC § 38-14.1-02(33)(a). The phrase “in connection with” is not defined in the law, but is left to the discretion of the administrative agency to determine on a case-by-case basis. The Commission has made its determination in this case and nothing presented in the Amended Petition for Reconsideration presents any substantive reason for change.

It is ludicrous to assert that constructing and operating a coal beneficiation facility can somehow be “in connection with” a coal mine for which a permit has not even been filed, let alone a mine opened. Clearly, if a third party wants to open a coal mine in the vicinity of South Heart it will first have to file a permit with the Commission. The Commission will have jurisdiction. However, this case concerns GTLE’s coal beneficiation facility, and the Commission has correctly determined that it is not operating in connection with a coal mine as

none exist at South Heart and as the purpose of the facility is for the benefit of the ultimate end users.

The DRC has asserted what it calls the “NACCO Coal” decision as previously decided by this Commission in Case No. RC-07-686 as not being precedent for this case. However, GTLE asserts that the NACCO Coal decision presents an even closer call for jurisdiction as the coal beneficiation facility in that case was to be jointly owned by the power plant owner and also by the owner of the coal mine. In addition, the coal mine was open and operating. In this case there is no coal mine to even factor into the equation. DRC states in part on page 22 of the brief that “(h)ere there is no existing or planned user of the coal to be processed for commercial scale by Respondent anywhere near the Preparation Plant.” This proves GTLE’s point, that this case does not present even as close a call as did the facility in the NACCO Coal decision. In NACCO Coal, the coal mine, the beneficiation facility and the end-user are all in close proximity. Here, there is no coal mine, and the “end-users” of GTLE’s coal beneficiation technology are obviously a great distance away.

The DRC states on page 17 of their brief that “federal law makes crystal clear that only preparation plants located ‘at the point of ultimate coal use’ are exempt from SMCRA. Pacificorp, 143 IBLA 237.” The DRC misstates the law when it asserts that only preparation plants “at the point of ultimate coal use” are not considered to be “in connection with” a coal mine. DRC asserts that if a preparation plant is not at the point of ultimate use of the coal, then it is not exempt from jurisdiction. GTLE submits that this is not the status of the law and that this statement is misleading. The Pacificorp case did find that a preparation plant located at the point of ultimate coal use was not “in connection with” a coal mine, and thus exempt from jurisdiction under the mining law. However, the Interior Board of Land Appeals in Pacificorp did not state

that this was the only exemption. The Office of Surface Mining Reclamation and Enforcement in its Final Rule as set forth in the Federal Register at 53 F.R. 47384 (Nov. 22, 1988) sets forth the true guidance. For example, OSM points out in the Final Rule that facilities at the docks of ports which crush and size coal for shipment may be conducting coal preparation, but they are not activities that are “in connection with” a coal mine or that SMCRA was intended to regulate activities at such facilities. Final Rule at 47385. Obviously, a crushing facility at a port is not at the site of the ultimate user, but an intermediate point. But more significantly, OSM goes on to state that “the purpose of this rule is to recognize that there are processing facilities other than those at the point of ultimate use that are not in connection with a coal mine, and to ensure that jurisdiction is extended only to preparation plants operating in connection with the coal mine.” Final Rule at 47387. Thus, clearly, a facility such as GTLE’s coal beneficiation facility does not have to be located at the point of the ultimate user in order to be found not “in connection with” a coal mine. Just as the shipping facilities which are exempt from jurisdiction, so too are GTLE’s facilities which process the coal and then return it to the ultimate user to determine if the coal is so improved that the ultimate user would want to license the technology.

The DRC is requesting this Commission to issue an advisory opinion which it cannot do. The Commission was correct in finding that they have failed to state a claim for which relief may be granted pursuant to Rule 12(b) of the North Dakota Rules of Civil Procedure.

GTLE respectfully requests that DRC’s Amended Petition for Reconsideration be denied and dismissed. The DRC has also requested oral argument on its Amended Petition. GTLE objects to this request as both unnecessary and as not provided for by NDCC § 28-32-40 or NDAC § 69-02-06-02.

Dated this 25<sup>14</sup> day of March, 2010.

CROWLEY FLECK PLLP  
Attorneys for Respondent,  
GTLE Dakota Plant 1 LLC  
P.O. Box 2798  
Bismarck, North Dakota 58502

By   
BRIAN R. BJELLA (#03549)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 25<sup>th</sup> day of March, 2010, mailed to the following:

Derrick Braaten  
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Paul Blackburn  
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Honorable Al Wahl  
Temporary Administrative Law Judge  
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Illona Jeffcoat Sacco  
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BRIAN R. BJELLA