

NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.)
Renewal No. 1, Permit NACC-1302)
Revision No. 9, Permit NACC-1302)
Applications)

Case No. RC-19-189
Case No. RC-19-190

**MOTION FOR ATTORNEY’S FEES PURSUANT TO N.D.C.C. § 38-14.1-36 AND
N.D.A.C. § 69-05.2-01-07**

[1.] Coyote Creek Mining Company, L.L.C. (“CCMC”), by and through its attorneys, moves the Commission for an order requiring Casey and Julie Voigt (“Voigts”) to pay the costs and expenses CCMC has incurred in connection with Case Nos. RC-19-189 and RC-19-190. For the reasons discussed below, CCMC respectfully requests the Commission to grant the motion under N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07.

BACKGROUND

[2.] The Commission is well-apprised of the factual circumstances culminating in this motion. The Voigts own certain surface and mineral estates in Mercer County, North Dakota. In 2010, the Voigts, with the assistance of counsel, negotiated a lease covering approximately 3,508.96 acres to an affiliate company of CCMC for coal mining. This lease was recorded in Mercer County, North Dakota as Document No. 196024. “The lease addresses CCMC’s right to mine coal on the Voigt’s property, compensation for damages to crops and livestock, and repair and replacement of roadways. Administration of the lease agreement between the Voigt’s and CCMC is not within the jurisdiction of the PSC.” Case No. RC-19-189 Docket No. 60, ¶12 of Findings, Case No. RC-19-190 Docket No. 68, ¶12 of Findings.

[3.] On November 1, 2013, CCMC submitted a permit application in Case No. RC-13-850, seeking a permit to engage in surface coal mining and reclamation operations on approximately 8,091.511 acres in Mercer County, North Dakota. Case No. RC-13-850 Docket No. 1. On November 24, 2014, Casey Voigt requested a formal hearing on the permit application. Case No. RC-13-850 Docket No. 35. After three days of formal hearing, the Commission approved CCMC's application, subject to certain additional conditions, and issued permit NACC-1302. Case No. RC-13-850 Docket No. 125. The Voigts appealed the Commission's conclusions in RC-13-850 to the state district court pursuant to N.D.C.C. § 28-32-42, claiming the Commission had improperly identified and not protected alluvial valley floors allegedly on the property. Case No. 08-2015-CV-01056. The district court affirmed the Commission's decision, concluding the weight of the evidence supported the Commission's decision that no alluvial valley floor existed. Case No. 08-2015-CV-01056, Docket No. 188. The Voigts further appealed, and the North Dakota Supreme Court again affirmed that alluvial valley floor determination. *Voigt v. N.D. Public Serv. Comm'n.*, 2017 ND 76, 892 N.W.2d 149.

[4.] On December 17, 2014, CCMC filed an application in RC-14-846, where it sought to expand NACC-1302 to include acreage necessary for a haul road and a coal processing facility. Case No. RC-14-846 Docket No. 1. On May 11, 2015, Casey Voigt, through counsel, requested an informal conference on the application for revision. Case No. RC-14-846 Docket No. 15. The comments submitted requesting the informal conference expressed that the Voigts wanted to discuss dust. Case No. RC-14-846 Docket No. 15. After conducting the requested informal conference, the Commission approved the application. Case No. RC-14-846 Docket Nos. 56-58. The Voigts thereafter filed a federal lawsuit against CCMC, alleging violations of the Clean Air Act. Case No. 1:15-cv-00109. The federal district court granted summary judgment in CCMC's

favor. *Voigt v. Coyote Creek Mining Co., LLC*, 329 F. Supp. 3d. 735 (D.N.D. 2018). The Voigts appealed the federal district court's decision, which is currently pending before the Eighth Circuit Court of Appeals. *See* Case No. 18-2705.

[5.] On December 16, 2015, CCMC petitioned the Mercer County Commission to temporarily close certain roads so as to allow CCMC to conduct surface mining operations. After four days of public hearings over a few months' period, on March 16, 2016, the Mercer County Commission approved CCMC's petition. The Voigts appealed to the state district court, claiming that determination did not comply with the law and unduly restricted access to their property. Case No. 29-2016-CV-00054. The state district court affirmed the Mercer County Commission's approval of CCMC's petition, concluding the Mercer County Commission complied with the law regarding road closures and "the Voigts will have readily accessible alternative routes of travel . . . [and] the road closure does not deprive them of access to their property." Case No. 29-2016-CV-00054, Docket No. 118. CCMC and the Voigts thereafter entered into a memorandum agreement further ensuring the Voigts' road access.

[6.] In Case Nos. RC-19-189 and RC-19-190, CCMC sought a renewal and revision of NACC-1302. In Case No. RC-19-189, CCMC sought Renewal Number 1 of NACC-1302, which would extend the permit for another five years, or through October 22, 2024. In Case No. RC-19-190, CCMC sought Revision Number 9 of NACC-1302, which would update NACC-1302 CCMC's mining and reclamation plans for the renewal period according to the requests made by the Commission.

[7.] In response to Case Nos. RC-19-189 and RC-19-190, the Voigts filed seven objections as to topics including road access, fugitive dust, alluvial valley floors, cultural resource sites,

sedimentary buildup, CCMC's reclamation abilities, and CCMC's financial incentive to comply with NACC-1302. To remedy these objections to CCMC's applications, the Voigts proposed:

- (1) That the PSC require CCMC to maintain the Voigts' road access and requiring restoration of a public road;
- (2) That the PSC require CCMC to use evidence-based best available dust control technology and further require CCMC to cease haul road operations until roads can be watered if dust monitors indicate unsafe levels;
- (3) That the PSC require new alluvial valley floor determinations;
- (4) That the PSC require omitted cultural resource sites be added to CCMC's mine plans;
- (5) That the PSC require monthly monitoring of sediment buildup in Coyote Creek and further require corrective action if any buildup occurred;
- (6) That the PSC should carefully monitor CCMC's reclamation effort; and
- (7) That the PSC require CCMC's partners cede control over CCMC's mining operations and CCMC should be solely responsible for any fines associated with violations of NACC-1302.

Case No. RC-19-189, Docket No. 3; Case No. RC-19-190, Docket No. 8. The Voigts also requested an informal conference on the applications. *Id.* These objections were published for public review.

[8.] Prior to the informal conference, the Voigts moved to disqualify Crowley Fleck PLLP under N.D.R.Prof. Conduct 1.12 based the undersigned's alleged involvement in the proceedings culminating in NACC-1302. Case No. RC-19-189, Docket No. 16; Case No. RC-19-190, Docket No. 22. CCMC responded, arguing the Voigts' motion was meritless because the undersigned did not substantively participate in the previous proceedings. Case No. RC-19-189, Docket No. 24; Case No. RC-19-190, Docket No. 31. The administrative law judge agreed and denied the Voigt's motion on October 3, 2019. Case No. RC-19-189, Docket No. 26; Case No. RC-19-190, Docket No. 34.

[9.] Prior to the informal conference, the Voigts dropped issues that they initially raised in their objections. They dropped their objection requesting that the PSC require CCMC's partners cede control over CCMC's mining operations and CCMC should be solely responsible for any fines associated with violations of NACC-1302. Case No. RC-19-189, Docket No. 28; Case No. RC-19-190, Docket No. 36. However, they delayed in dropping this objection until after the Commission had published notice of the informal conference, which specifically mentioned that the Voigts raised concerns about the "Coyote Partners[]" control over Coyote Creek Mining Company." Case No. RC-19-189, Docket No. 14; Case No. RC-19-190, Docket No. 19.

[10.] Prior to the informal conference, a request to conduct an inspection of the mine area for the purpose of gathering information relative to the conference was made by the Voigts. Areas requested to be reviewed fell outside of the initial objections and comments made by the Voigts, which indicated reclamation issues in an area known by the Voigts to have been reclaimed by Mercer County, not CCMC. The administrative law judge granted the request and information gathered was attempted to be used against both the Commission and CCMC in the informal conference procedures. Case No. RC-19-189, Docket No. 17; Case No. RC-19-190, Docket No. 23.

[11.] The Commission held the informal conference requested by the Voigts on October 8, 2019. After the informal conference, the parties and the presiding ALJ submitted proposed findings of fact and conclusions of law to the Commission. Case No. RC-19-189, Docket Nos. 43-45; Case No. RC-19-190, Docket Nos. 51-53. The Commission approved CCMC's applications on October 21, 2019. Case No. RC-19-189, Docket No. 60; Case No. RC-19-190, Docket No. 68. Following that approval, the Voigts requested a formal hearing on CCMC's applications to address the Voigts' concerns about reclamation, reclamation liability, dust control, water erosion, alluvial

valley floors, and road closures and access. Case No. RC-19-189, Docket No. 64; Case No. RC-19-190, Docket No. 75. That formal hearing is currently set for December 16, 2019.

ARGUMENT

[12.] The Commission should require the Voigts to pay the costs and expenses CCMC has incurred in connection with Case Nos. RC-19-189 and RC-19-190. The Voigts' objections lodged against CCMC's applications suffered from plain jurisdictional and factual deficiencies known to the Voigts at the time. Notwithstanding those gross deficiencies, the Voigts persisted with these objections through the informal conference to which they brought three expert witnesses, only to claim in conclusion they only intended to have a "conversation" about the objections. The totality of the Voigts' conduct belies that characterization and indicates their objections were brought in bad faith and for the purposes of harassing and embarrassing CCMC. On the Voigts' bad faith opposition, the Commission should require the Voigts to pay the costs and expenses CCMC has incurred in connection with Case Nos. RC-19-189 and RC-19-190.

1. The Commission may award attorney's fees in this N.D.C.C. ch. 38-14.1 proceeding.

[13.] The Commission has the authority to award costs and expenses, including attorney's fees, in any administrative proceeding in which the Commission issues an order. N.D.C.C. § 38-14.1-36(1). This provision allows the Commission discretion to award costs and expenses when the Commission, in its discretion, deems that award "proper." That statutory authority mirrors the Commission's regulatory authority to award costs and expenses. *See* N.D.A.C. § 69-05.2-01-07(1). Any person incurring costs and expenses, including attorney's fees, in connection with a N.D.C.C. ch. 38-14.1 proceeding may petition for an award of those costs and expenses within forty-five days of receipt of the Commission's order. N.D.A.C. § 69-05.2-01-07(2). The Commission may award costs and expenses, including attorney's fees to "a permittee from any

person where the permittee demonstrates that the person . . . participated in the proceeding in bad faith to harass or embarrass the permittee.” N.D.A.C. § 69-05.2-01-07(5)(d).

[14.] The Voigts have participated in the applications for renewal and revision in bad faith to harass or embarrass CCMC. Bad faith generally occurs when a party acts without a reasonable basis and in the absence of honest intention. *Cf.* N.D.C.C. § 1-01-21; *Hartman v. Estate of Miller*, 2003 ND 24, ¶ 12, 656 N.W.2d 676; *Black’s Law Dictionary* 166 (10th ed. 2017). Harassment generally occurs when a party’s conduct, words, or actions are directed at a particular person or entity with no legitimate purpose. *Cf.* N.D.C.C. § 12.1-17-07; *Black’s Law Dictionary* 631 (10th ed. 2017). On these accepted definitions, N.D.C.C. § 38-14.1-36(1) and N.D.A.C. § 69-05.2-01-07 allow the Commission authority to award a permittee costs and expenses, including attorney’s fees, when an individual participates in a N.D.C.C. ch. 38-14.1 proceeding without a reasonable, legitimate purpose and in the absence of honest intention. That is precisely what occurred here. The “issues” raised by the Voigts in this proceeding are issues that have been exhaustively discussed, previously litigated or accusations known by the Voigts to be untrue. The Voigts brought forth no new evidence and no new information beyond what has already been previously litigated.

2. *Many of the Voigts’ objections in this proceeding lack any reasonable, legitimate purpose because the Commission clearly lacked jurisdiction.*

[15.] The standards under which the Commission was to consider CCMC’s applications are clear. Chapter 38-14.1, N.D.C.C., provides the Commission with its authority to issue coal mining permits and renewals or revisions of the same. These N.D.C.C. ch. 38-14.1 proceedings afford the Commission certain defined jurisdiction to consider discrete issues. Because of that limited jurisdiction, this Commission previously rejected the Voigts’ attempts to have the Commission consider issues such as road access and air quality within N.D.C.C. ch. 38-14.1 proceedings. Case

No. RC-13-850 Docket No. 125 (concluding the “closure of county roads in the vicinity of the CCMC Mine is under the jurisdiction of the Mercer County Commission, not the Public Service Commission.”); Case No. RC-14-846 Docket Nos. 38, 56 (concluding the Department of Health, now the Department of Environmental Quality, “has exclusive jurisdiction over permitting of air quality in North Dakota.”). The Voigts did not appeal these conclusions.

[16.] These clear legal conclusions notwithstanding, the Voigts once again lodged objections to CCMC’s applications regarding road access and air quality issues. Case No. RC-19-189, Docket No. 3; Case No. RC-19-190, Docket No. 8. In a nearly verbatim conclusion, the Commission rejected the Voigts’ request for the Commission to add a permit condition requiring CCMC to maintain road access and requiring restoration of a public road. Case No. RC-19-189, Docket No. 60 at ¶ 13 (concluding “the closure of county roads in the vicinity of the CCMC Mine is under the jurisdiction of the Mercer County Commission”); Case No. RC-19-190, Docket No. 68 at ¶ 13 (same). In a nearly verbatim conclusion, the Commission rejected the Voigts’ request to require CCMC use certain dust control techniques. Case No. RC-19-189, Docket No. 60 at ¶ 67 (concluding the “DEQ has exclusive jurisdiction over permitting of air quality in North Dakota”); Case No. RC-19-190, Docket No. 68 (same). These are, literally and substantively, the same conclusions the Commission previously reached in proceedings involving the Voigts. And furthermore, these are conclusions that several courts of law previously reached in proceedings involving the Voigts.

[17.] Left for the imagination is how the Voigts reasonably believed the Commission had jurisdiction to consider these issues based upon the Commission’s prior conclusions. The passage of time did not somehow remedy the lack of jurisdiction this Commission identified nearly four years ago with respect to these same issues. The Voigts could not reasonably expect that

repeatedly submitting the same issues to the Commission would end in a different result. *See Njos v. United States*, CIVIL ACTION NO. 3:14-CV-1960, 2015 WL 5965227 at *9 (M.D.Pa. Oct. 13, 2015); *Wallace v. Colvin*, 193 F. Supp. 3d. 939, 941 (N.D.Ill. 2016) (same). The Voigts had no reasonable, legitimate basis for believing the Commission had jurisdiction to consider the road access and air quality issues, but nonetheless required CCMC to incur the time and expense of having to again address those issues. That is exactly the bad faith, harassing behavior from which N.D.C.C. § 38-14.1-36(1) and N.D.A.C. § 69-05.2-01-07 seek to protect permittees. The Commission should award CCMC costs and expenses for having to defend against the Voigts' objections over which this Commission clearly had no jurisdiction.

3. *The Voigts failed to substantiate the objections over which the Commission had jurisdiction so that they could reasonably hope to prevail on those objections.*

[18.] To the extent the Commission had jurisdiction to consider the Voigts' objections, the Voigts failed to support their objections with any factual basis on which a reasonable person could hope to prevail. As the party opposing renewal of NACC-1302, the Voigts had the burden of proving why CCMC was not entitled to a renewal of NACC-1302. N.D.C.C. § 38-14.1-22(2). Despite that burden, the Voigts supported their objections with opinions based upon nothing more than speculation and conjecture. CCMC will address these objections' failings in turn.

a. The Voigts failed to provide any evidence an alluvial valley floor exists.

[19.] In Objection (3), the Voigts requested the Commission require a new alluvial valley floor ("AVF") determination prior to approving CCMC's applications. To support that objection, the Voigts alleged that certain drilling holes have indicated the presence of groundwater in the rooting zone of the Voigts' alfalfa crops and they have lost alfalfa production since CCMC began mining. To remedy that objection, the Voigts requested a completely new AVF analysis be completed.

Case No. RC-19-189, Docket No. 3; Case No. RC-19-190, Docket No. 8.

[20.] Whether an AVF existed was the subject of extensive dispute in Case No. RC-13-850. After three days of hearing and testimony from three expert witnesses on the subject, the Commission found no such AVF existed, a conclusion confirmed by the state district court and the North Dakota Supreme Court. The North Dakota Supreme Court highlighted the extensive work that previously went into the determination that there was no AVF present on the Voigts' property. The court noted that "[o]n the basis of the various studies and voluminous data collected, both Dr. Bickel and Beechie, the Commission's expert, opined that no subirrigation is occurring. Additionally, Moos testified regarding the lack of subirrigated soils, and Flath testified that soils, rather than subirrigation explain the difference in productivity between Voigt's upland and lowland alfalfa fields." *See Voigt v. N.D. Pub. Ser. Comm. and Coyote Creek Mining Co., L.L.C.*, 2017 ND 76, ¶36. Despite those conclusions, the Voigts sought to relitigate that issue under the pretense that new evidence possibly impacted whether the AVF existed.

[21.] At the informal conference, the Voigts had Mr. Lance Loken testify. Mr. Loken is not an AVF expert and admittedly not familiar with SMCRA requirements for an AVF, yet at the hearing he opined that there was an alluvial valley floor beneath the Voigts' alfalfa fields. Mr. Loken confirmed that he based this opinion solely on the information he gathered four days before the informal conference on Friday October 4, 2019, which was the core samples he took from the Voigts' fields.

[22.] Mr. Loken admitted that he reviewed none of the extensive amount of AVF information referenced by the supreme court. He did not examine any of the prior AVF evaluation reports or any of the testimony from the three expert witnesses on AVF at the initial permit hearing. Ignoring this information and relying entirely on the limited data from the four cores he took on October 4, 2019, Mr. Loken concluded that an AVF existed. Mr. Loken's testimony provided no new

information relating to the existence of an AVF, but rather, was an absurd display of the frivolous manner in which the Voigts treat such proceedings.

[23.] Far from showing the necessity of again addressing the AVF determination, the evidence presented only reinforces the Commission's conclusion. CCMC's ground water monitoring wells have indicated water levels in the Voigts' alfalfa fields have not significantly changed since CCMC began its coal removal operations. Contrary to Mr. Loken's testimony, 99.5% of the soils in the Voigts' alfalfa fields were straw loam soils, which is not a sub-irrigated soil. Further contrary to the Voigts' representation regarding the presence of the AVF, the evidence before the Commission established that Coyote Creek supplies the water in the alluvium inclusive of the Voigts' alfalfa fields, meaning fluctuations in the Coyote Creek would likewise cause fluctuations in that alluvium. On that information, and the lack of any competent evidence by the Voigts showing to the contrary, the Commission concluded the Voigts did not demonstrate an AVF exists. Case No. RC-19-189, Docket No. 60 at ¶ 50; Case No. RC-19-190, Docket No. 68 at ¶ 50.

[24.] On the evidence and testimony submitted, the Voigts provided the Commission with no new information on which the Commission could have relied in revisiting its previous AVF determination. All other evidence and testimony presented directly contradicted Mr. Loken's testimony and the Voigts' suggestion that Coyote Creek's mining operations negatively impacted their alfalfa production. Underscoring the frivolity of their objection, CCMC repeatedly noted that, even if an AVF existed, CCMC would not be mining through that AVF. The AVF issue is settled—the Voigts cannot try to relitigate the same under the thinly-guised pretenses presented to the Commission. The Voigts had no reasonable, legitimate purpose in seeking to revive the AVF issue, and the Commission should award CCMC all costs and expenses occurred in again disproving the Voigts' meritless and frivolous attempt to do so. The only way this can be

interpreted is that the Voigts once again brought forward the AVF matter in an attempt to harass CCMC.

b. The Voigts failed to provide any evidence CCMC caused sedimentary buildup.

[25.] In Objection (5), the Voigts alleged CCMC had caused sedimentary buildup in Coyote Creek. To support that objection, the Voigts alleged the sedimentary buildup originated from CCMC's retention ponds. To remedy that issue, the Voigts requested the Commission require CCMC to monitor any sedimentary buildup, notify the Commission of any buildup, submit a corrective plan to the Commission, and take any necessary corrective action. Case No. RC-19-189, Docket No. 3; Case No. RC-19-190, Docket No. 8.

[26.] Trying to substantiate their allegations, the Voigts provided the testimony of Mr. Bofto. Mr. Bofto opined CCMC's sediment pond caused the sedimentary buildup along the box culvert depicted in photographs presented to the Commission. Mr. Bofto, however, admitted he had not physically inspected the site and had based his opinion on photographs provided by the Voigts.

[27.] CCMC presented substantial evidence that CCMC was not the primary source of the sedimentary buildup. That evidence established that sedimentary buildup at the box culvert location likely came from sources upstream of the mine. Specifically, the sedimentary buildup was occurring on creek sides not adjacent to any mine activity and the sedimentary buildup partially consisted of scoria likely deposited from upstream sources. CCMC identified the most likely and substantial upstream source of that sediment—the erosion as a result of the failure of the diversion structure east of the Voigt's house. CCMC presented evidence that nearly 10,000 cubic yards of creek channel have eroded because of the Voigts' upstream actions. This evidence established that the Voigts themselves likely caused the sedimentary buildup about which they now complain. On the information presented, the Commission concluded CCMC's mining

practices did not result in the sedimentary buildup at issue in the Voigts' Objection (5). Case No. RC-19-189, Docket No. 60 at ¶ 59; Case No. RC-19-190, Docket No. 68 at ¶ 59.

[28.] Despite being the likely primary source of that sedimentary buildup, the Voigts' persisted in alleging CCMC was that source. The evidence presented to the Commission plainly indicates that no reasonable person could have expected to prevail on Objection (5) based upon the evidence the Voigts presented. Being the likely primary source of the sedimentary buildup about which they complain, the Voigts asserted Objection (5) without a reasonable, legitimate purpose and in the absence of honest intention by faulting CCMC for the Voigts' own misdeeds. That is the definition of harassment. The Commission should award CCMC all costs and expenses occurred in disproving the Voigts' vapid attempt to shift blame onto CCMC.

c. The Voigts did not present evidence of CCMC's inability to reclaim the mine.

[29.] In Objection (6), the Voigts alleged that CCMC's recent efforts at reclamation of a small tract of land within the permit area caused them serious concern about CCMC's ability to reclaim the mine. To support that allegation, the Voigts cited to CCMC's purported attempt to reclaim land directly adjacent to the County Road 25 bridge located in Section 31, T143N, R88W. On that allegation, the Voigts represented that CCMC was ill-equipped to reclaim the mine at large. To remedy that objection, the Voigts requested the Commission to carefully monitor CCMC's reclamation efforts. Case No. RC-19-189, Docket No. 3; Case No. RC-19-190, Docket No. 8.

[30.] Like much of the Voigts' objections, this objection is based upon conduct and circumstances grossly taken out of context. Contrary to the Voigts' representations, Mercer County, not CCMC, conducted the reclamation efforts cited by the Voigts. The Voigts knew full well that this reclamation was conducted by Mercer County and CCMC only assisted Mercer County in seeding and mulching the area in accordance with their specifications, yet the Voigts

raised this allegation in their public comments fully knowledgeable that CCMC was not responsible. As to those portions of the Voigts' property on which CCMC is actually conducting reclamation activities, the evidence presented indicated CCMC's reclamation efforts remain ongoing. The evidence presented indicated that the state of the reclaimed property was not atypical for its stage of reclamation. The evidence presented indicated CCMC had multiple avenues through which it could achieve the required reclamation, and it was premature to determine whether CCMC had met those standards. On the evidence presented, the Commission concluded the performance standards and the reclamation and revegetation process did not warrant any modifications to CCMC's permits.

[31.] On the evidence presented, the Voigts provided no evidence on which the Commission could have concluded modifications were necessary to CCMC's permits. The evidence presented to the Commission plainly indicated that CCMC's reclamation efforts were and remain ongoing, meaning it is simply too early to tell whether CCMC would satisfy the necessary performance standards. Despite that established prematurity, the Voigts insisted on addressing the issue, again requiring CCMC to rebut the Voigts' unsubstantiated claims. The Commission should award CCMC costs and expenses for having to address the Voigts' woefully premature complaints.

e. The Voigts abandoned their claim CCMC had no incentive for regulatory compliance.

[32.] In Objection (7), the Voigts alleged CCMC has no incentive to comply with NACC-1302 because other parties have the ultimate authority over CCMC's mining plans, and those parties reimburse CCMC for environmental fines incurred for violating NACC-1302. In support of that objection, the Voigts allege CCMC has a cost-plus contract with its partners, under which the partners can accept or reject CCMC's mining plans and will pay any fines incurred by CCMC for failing to abide by NACC-1302. To remedy that objection, the Voigts requested the Commission

require CCMC to certify its partners had rescinded control over CCMC and that those partners would no longer pay CCMC's environmental fines.

[33.] Objection (7) was published for public view. Case No. RC-19-189, Docket No. 14; Case No. RC-19-190, Docket No. 19. After publication, the Voigts informed the Commission they would no longer pursue their objection. Case No. RC-19-189, Docket No. 28; Case No. RC-19-190, Docket No. 36. By including Objection (7) but declining to pursue the same, the Voigts all but admitted they had no valid basis for asserting the Objection in the first instance. Indeed, the Voigts cited no statutory or regulatory basis under which such circumstances were relevant to the pending applications. Yet, the Voigts' assertion caused this baseless objection to be published for public view. With no supporting factual basis, and with its dilatory withdrawal, Objection (7) served no purpose other than to embarrass CCMC by leading the public to believe falsities about CCMC. The Voigts cannot make baseless objections, have those objections published, then withdraw those objections without consequence, as such conduct is the epitome of harassment and conduct calculated for embarrassment. The Commission should award CCMC costs and expenses for having to address the Voigts causing unfounded allegations against CCMC to be published.

f. The Voigts all but admitted their Objections were baseless.

[34.] The Voigts requested the October 8, 2019 informal conference after asserting serious objections against CCMC. The Voigts presented at that hearing, offering the testimony of three retained experts. After a five-hour hearing in which CCMC rebutted each and every objection lodged by the Voigts and points made by their experts, the Voigts' counsel concluded by representing the Voigts only wanted to have a "conversation" about their concerns. A "conversation" can be had between the parties at any time, without incurring the costs and expenses of preparation for and conduct of, an informal conference. The totality of the Voigts' conduct over

the previous five years generally and the totality of the Voigts' conduct regarding CCMC's applications belie that self-serving characterization. That the informal conference went poorly enough the Voigts' counsel had to downplay the hearing's importance underscores the complete lack of evidence substantiating the Voigts' objections. The allowance of costs and expenses afforded by N.D.C.C. § 38-14.1-36(1) and N.D.A.C. § 69-05.2-01-07 protects permittees from having to defend against parties using the administrative process to harass the permittee. That is exactly what the Voigts' opposition to CCMC's applications sought to obtain, as the Voigts' unsupported objections did nothing more than cause CCMC to incur unnecessary fees and to harass and embarrass CCMC in a public setting.

CONCLUSION

[35.] The objections lodged by the Voigts represent their latest attempt to preclude or impede CCMC from exercising the contractual rights the Voigts conveyed to CCMC by entering into a surface and coal lease, while fully represented by an attorney, in 2010. The proceedings on the applications before the Commission are limited to the discrete topics allowed by N.D.C.C. ch. 38-14.1. Notwithstanding those clear limitations, the Voigts attempted to morph this proceeding into a forum to air every grievance they may have with respect to the adverse determinations they have incurred over the past approximately six years. The Commission correctly denied that invitation by again concluding the Commission lacked jurisdiction over many of the Voigts' objections and the Voigts had otherwise failed to properly substantiate their other objections. The totality of the circumstances indicates the Voigts did not participate in this N.D.C.C. ch. 38-14.1 proceeding with a reasonable, legitimate purpose and in the absence of honest intention. The Voigts' bad faith participation in this proceeding only served to drive up CCMC's expenses and costs by requiring responses to topics that served no purpose other than harassing and embarrassing CCMC. On the

foregoing, CCMC requests that the Commission award CCMC its costs and expenses, including attorney's fees, under N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07.

Dated this 5th day of December, 2019.

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