

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**

RESPONSE TO MOTION FOR ATTORNEYS' FEES

December 30, 2019

INTRODUCTION

[¶1]. On December 5, 2019, Coyote Creek Mining Company (“CCMC”) filed a “Motion for Attorneys’ Fees and Costs” in these proceedings. The motion was filed by CCMC’s counsel, Wade Mann, who was previously a substantive and procedural Administrative Law Judge in two PSC cases regarding the same matters at issue in these proceedings.¹ The motion appears to be little more than a character attack on the Voigts—an attempt to sour these proceedings by painting the Voigts as litigious filers of frivolous lawsuits before the formal hearing began.

[¶2]. CCMC’s motion does not even attempt to comply with the PSC’s requirements. First, the motion does not attach the “affidavit” required by N.D.A.C. 69-05-.2-01-07. In fact, CCMC’s motion does not discuss CCMC’s fees at all, even though the PSC rules require that this

¹That such a motion would be filed by the former judge who presided over two substantially similar proceedings and now has chosen to represent CCMC—a party of those proceedings—is, frankly, extraordinary. It is a violation of the Attorney Rules of Professional Responsibility for a judge to represent a client after presiding over a case addressing the same matters. N.D.R.Prof.R. 1.12. For a former judge to file a motion for attorneys’ fees premised, in part, on the argument that certain matters raised in these proceedings have “already been previously litigated” in those related proceedings is alarming. As the Commission is aware, the Voigts have twice moved to disqualify Mr. Mann from these proceedings, and twice have been denied on procedural grounds. The situation is truly regrettable, especially because it could have been avoided. The Voigts voiced their concerns to former Judge Mann well in advance of filing their initial motion during the informal conference on this issue and would have allowed him to designate another attorney in his firm. He chose not to do so.

information be provided “in detail” in an “affidavit.” *Id.* Second, CCMC’s motion also does not attach “evidence concerning the hours expended, the customary commercial rate for similar services in the area, and the experience, reputation, and ability of the individuals performing the services,” even though this information is required by N.D.A.C. 69-05-.2-01-07(c). Third, the PSC’s rules only allow an attorneys’ fees motion if an “administrative proceeding under North Dakota Century Code chapter 38-14.1 ... **results in a final order...**” N.D.A.C. 69-05.2-01-07 (emphasis added). Here, CCMC filed its motion before the formal hearing was even held. CCMC’s motion does not attempt to identify any final order, which should come as little surprise given that a final order from this Commission does not yet exist.

[¶3]. Under the circumstances, the Voigts are unable to respond to the “fees” portion of CCMC’s motion. There is no final order in these cases, and the mine has explained neither what its fees are nor what it believes reasonable fees are, which makes it impossible for the Voigts to respond. Nor should the Voigts’ response on these issues be taken as an invitation for CCMC to file this information after-the-fact. CCMC cited N.D.A.C. 69-05.2-01-07 in its motion and therefore was aware of these requirements and chose to ignore them. Due to these procedural defects alone, CCMC’s motion must be denied. Moreover, the motion is substantively baseless.

[¶4]. Unfortunately, though, there are additional concerns raised by CCMC’s motion that require a response. Based on the plainly improper timing of this motion long before any “final order,” *see* N.D.A.C. 69-05-.2-01-07, and the fact that the motion did not even attempt to collect attorneys’ fees by providing the information required by the N.D.A.C. 69-05-.2-01-07, there appears to be a significant possibility that CCMC had at least two ulterior motives for filing its motion. First, CCMC’s motion allowed it to file seventeen pages of written argument with the PSC before the formal hearing began—giving it an opportunity to provide extensive argument (and to attack the Voigts’ character) prior to the formal hearing. This would not have otherwise been

allowed. Second, by framing CCMC's motion as a motion for "fees," CCMC may have been attempting to silence the Voigts by frightening them into not airing their concerns at all.²

[¶5]. In CCMC's motion, the mine raised two categories of argument. First, CCMC essentially argued that the Voigts have a history of filing meritless litigation. Second, CCMC tried to argue that *these* proceedings fit that pattern and are similarly without merit. Now that the formal hearing has been held, it should be clear that CCMC's attacks were little more than a false and shameful attempt by a major coal company to silence the Voigts.

PRIOR CASES

[¶6]. Because CCMC's motion omitted a number of material facts in an apparent attempt to attack the Voigts' character, the Voigts will take this opportunity to briefly provide additional information regarding the prior suits and proceedings between the parties. Nearly all of these proceedings were necessary for the Voigts to protect their interests. First, the Voigts requested a formal hearing on the initial approval of CCMCs' surface coal mining permit (permit # NACC-1302). PSC Case No. RC-13-850. That hearing resulted in the addition of several conditions to the permit that were favorable to the Voigts. PSC Case No. RC-13-850, Doc. 125, at p. 17. The Voigts respectfully disagreed with the Commission's alluvial valley floor findings in that hearing, and ultimately appealed to the North Dakota Supreme Court on that issue. Had this litigation been frivolous, CCMC could have (and presumably would have) recovered its fees in that action. In truth, the Supreme Court of North Dakota, and the district court below it, accorded deference to the Commission after recognizing that both sides presented reasonable arguments on the issue. *See generally Voigt v. North Dakota Pub. Serv. Comm'n*, 2017 ND 76, 892 N.W.2d 149.

² This type of tactic is commonly referred to as "Strategic Litigation Against Public Participation," or a "SLAPP" motion, which is a frivolous motion or lawsuit intended to silence and intimidate critics. Thirty states (but not North Dakota) have anti-SLAPP laws in place to penalize this type of behavior.

[¶7]. When the mine sought to add acreage to its surface coal mining permit for a lengthy coal haul road, the Voigts requested an informal conference to request additional dust control measures based upon provisions in the Code of Federal Regulations. PSC Case No. RC-14-846. Judge Mann presided as a substantive administrative law judge in those proceedings and issued findings of fact and conclusions of law that the Commission lacked jurisdiction to grant the specific relief requested (however, he left open the possibility that the Commission could grant relief for wind erosion and attendant air pollution, which the Voigts had not raised in those proceedings). PSC Case No. RC-14-846, Doc. 56, at pp. 4-7. The Voigts did not seek a formal hearing on this determination, nor did they appeal it.

[¶8]. The Voigts also filed a Clean Air Act lawsuit against CCMC. That suit was the only procedural option available to the Voigts to obtain a more stringent Clean Air Act permit. The North Dakota Department of Health did not notify the public that it was considering CCMC's air quality construction permit and did not put that permit out for public comment. *Voigt v. Coyote Creek Mining Co., LLC*, No. 1:15-CV-00109, 2016 WL 3920045, at *13 (D.N.D. July 15, 2016) (order of court denying motion to dismiss case). By the time the Voigts learned of the permit, it had already been granted by the Health Department. The issuance of that permit was based upon what the Voigts believed was an erroneous interpretation of law. At the absolute minimum, the Voigts should have been allowed to provide their feedback to the agency. Judge Miller of the United States District Court for the District of North Dakota agreed that the Voigts' arguments were "plausible" but ultimately deferred to the state's original permitting decision as a "tie-breaker." *Id.* at pp. 763, 783. Judge Miller indicated that the case was such a close call that "the conclusion upon appeal might very well be that the only one who has failed in properly interpreting and applying [the law] is the undersigned" (i.e., Judge Miller). *Id.* at FN 16. That case was far from frivolous and is now on appeal.

[¶9]. When CCMC petitioned Mercer County to close the public road that runs through the heart of the Voigts' Ranch, the Voigts participated (with counsel) in proceedings before the Mercer County Commission. This resulted in Mercer County requiring additional protections for the Voigts as well as numerous neighbors who used the road that CCMC was closing. Those protections never would have been put in place if the Voigts had not advocated for those protections. However, because the protections obtained through the proceedings with the County required the Voigts to comply with mine safety rules (including onerous MSHA training requirements), the Voigts appealed, eventually to the North Dakota Supreme Court. *See generally* Case No. 29-2016-CV-00054 (District Court); Case No. 20170025 (Supreme Court). While CCMC tries to cast these proceedings as a loss in court for the Voigts, in truth the case settled while on appeal and resulted in an access agreement that ensured the Voigts had some additional available access. This was immeasurably better than the original proposal that CCMC presented to Mercer County, which was simply a plan to close the road and mine it. Because of the involvement of the Voigts, plans were created to allow *four* alternative access routes for the Voigts and their neighbors, and road reconstruction was ensured. *See* PSC Case No. RC-19-190, Doc. 124, Section 1.2.8 (Portion of CCMC's Revision 9 Application for Permit NACC-1302 containing Mercer County Agreement).

[¶10]. The Voigts should not have to take the Commission's time by providing the above information, but the Voigts have little choice because CCMC's fees motion discussed these prior proceedings in an apparent attempt to argue that the Voigts' current case before the Commission is without merit and frivolous.

THESE PROCEEDINGS

[¶11]. Turning to the current proceedings before the Commission, CCMC essentially argued that the issues raised by the Voigts are without merit and frivolous. The hearing has been

held, and the Voigts' concerns are not at all frivolous but, rather, are serious concerns that impact their everyday lives and are squarely within the jurisdiction of this Commission. The Voigts will provide additional detail about each of the issues before the Commission in these proceedings in their closing arguments. Briefly, however, the Voigts will discuss each of the five issues that they raised in these proceedings:

[¶12]. Regarding wind erosion and attendant air pollution / dust at CCMC, the Voigts presented extensive evidence of these problems at CCMC. Further, the photo and video evidence provided by the Voigts shows this has been a recurring problem every single year the mine has been in operation. Julie Voigt testified that she has to clean out her horse's water tank every single day, something she has never had to do. The tank itself is essentially a crude monitor for dust – it contains soil eroded by wind from the mine. Mr. Welch, one of the PSC's inspectors for CCMC, explained that the dust shown in the Voigts' photographs is the worst he has ever seen at a North Dakota coal mine. Once again, the Voigts' concerns are very real and are far from baseless. The fact that CCMC would file a motion for attorneys' fees on this issue, especially after the PSC already granted the Voigts partial relief after the informal conference by adding a permit condition requiring CCMC to "maintain detailed records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution" suggests little more than an attempt to silence the Voigts from bringing their concerns directly to the Commission.³ PSC Case No. RC-19-190, Doc. 71 (special condition).

[¶13]. Regarding the sedimentation in Coyote Creek at CCMC's facilities, the Voigts presented verbal testimony, photographic evidence, and evidence from an expert. This testimony all indicated that the sedimentation issues, which are at CCMC's facilities, are being caused by or

³ As the Commission is aware, during the informal conference, the Commission was not allowed to consider evidence or hear argument from the parties directly.

contributed to by CCMC's operations. Once again, the PSC's own inspector, Mr. Welch, agreed that this was a concern, and explained that he had asked the mine to install new concrete matting to control erosion he saw being deposited into the Creek.

[¶14]. Regarding the Voigts' indication prior to the formal hearing that they had additional evidence to provide the PSC regarding the existence of an alluvial valley floor at the location of their two alfalfa fields, the Voigts did exactly that at the formal hearing. The Voigts provided evidence from core drilling on their fields. This core drilling indicated the depth to groundwater on those fields, and also showed evidence of water rising through the soil via the action of capillary rise, one of the hallmarks of subirrigation. This information was not previously available to the Commission. The Voigts also provided verbal testimony, as well as photograph evidence that their fields have been flood irrigated and mechanically irrigated over the years, which was also new evidence that the Commission did not have before it when it made its prior determination. Providing new evidence bearing directly on an issue of extreme importance to the Voigts during a renewal and revision proceeding for the mine that overlaps their ranch is not frivolous – it is precisely the appropriate venue set out by the Century Code and the Commission's rules for the Voigts to express these concerns.

[¶15]. Regarding the Voigts' concern that the CCMC's Revision 9 / Renewal 1 permit application lacked mandatory information to explain how and when 17th St. SW (or County Road 25 on Google Maps) will be reopened, the Voigts provided this evidence to the Commission as well. Specifically, Ms. Unruh, the mine's own witness, testified that the mine has not obtained an easement to relocate this road. This was concerning because the North Dakota Department of State Trust Lands had indicated via written correspondence that it would not allow an easement in the original location of the road. While CCMC submitted a later letter to Mercer County indicating that the Department of Trust Lands would be open to allowing such an easement, CCMC did not

disclose this information at the informal hearing; and regardless, it remains a concern that no such easement (or application for one) is in place at the time of the application renewal. The Commission has direct jurisdiction over this issue pursuant to N.D.A.C. 69-05.2-09-07, which requires CCMC to “describe” in its “application” the “measures” it will take to “ensure the interests of landowners and the public are protected” due to the “[r]elocat[ion] of a public road.”

[¶16]. Finally, the Voigts raised concerns regarding reclamation that has taken place on their ranch thus-far. Previously, the Voigts had no opportunity at all to inspect their ranch and the ongoing reclamation occurring at CCMC. The Voigts only learned about these reclamation issues after the Voigts requested an inspection pursuant to procedures afforded to them in the informal conference process. PSC Case No. RC-19-190, Doc. 23. CCMC objected to this inspection by raising a baseless argument that the inspection would delay the PSC’s re-issuance of CCMC’s permit (this was false—the inspection was held before the informal conference and had no bearing at all on the timing of the informal conference). PSC Case No. RC-19-190, Doc. 25. The Voigts presented this evidence to the Commission. The evidence indeed indicated that one of the Voigts’ fields was full of weeds, which suggests that the field was not properly managed this year. While the Voigts did raise concerns about a different parcel of land in their original comments, this was merely as an illustration of *why* they had concerns about reclamation; concerns that were borne out by the inspection of other areas that were in the midst of the reclamation process.

CONCLUSION

[¶17]. The reality is that the Voigts are saddled with a coal lease that they never wanted and did not ask for. While the Voigts signed the lease, they did so under what they perceived as intense pressure from the mine and the threat of litigation if they did not. In the Voigts’ opinion, they have repeatedly tried to mend their relationship with the mine, but they have been unable to do so. CCMC’s motion for fees appears to be merely an attack on the Voigts for publicly expressing

their concerns and availing themselves of the public input processes created for precisely that purpose. While it may be the case that CCMC would prefer to have no public criticism lodged against its operations, it is entirely inappropriate for the mine to use a motion for attorneys' fees as a vehicle for its intimidation tactics. The Voigts were well within their rights to request a formal hearing, and as they will explain in detail in their closing arguments, the Voigts continue to believe that the mine permit needs the reasonable additional conditions that the Voigts have requested.

Dated this 30th day of December, 2019.

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