

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.
Renewal 1 to Permit NACC-1302
Application

Case No. RC-19-189

Coyote Creek Mining Company, L.L.C.
Revision 9 to Permit NACC-1302
Application

Case No. RC-19-190

March 4, 2020

ORDER ON ATTORNEY FEES

On May 20, 2019, Coyote Creek Mining Company, L.L.C. (CCMC) filed an application for Revision No. 9 (Revision 9) to Surface Coal Mining Permit No. NACC-1302. Revision 9 identifies the next five-year coal removal areas and updates the legal information, operation plans, and reclamation plans in Permit NACC-1302 for the first renewal of the permit. Revision 9 is assigned Case No. RC-19-190.

On May 22, 2019, CCMC filed an application for Renewal No. 1 (Renewal 1) to Surface Coal Mining Permit No. NACC-1302. Renewal 1 will allow CCMC to continue to engage in surface coal mining and reclamation operations within Permit NACC-1302 until October 21, 2024. Renewal 1 is assigned Case No. RC-19-189.

On August 26, 2019, Casey and Julie Voigt (Voigts) filed objections to Renewal 1 and Revision 9 and requested an informal conference. The objections were regarding the following issues: Access, dust, alluvial valley floors, omission of cultural resource sites, sediment build-up in Coyote Creek, CCMC's ability to reclaim the mine, and CCMC having no incentive to comply with the permit due to Coyote Station's partners reimbursing CCMC's environmental fines.

On September 24, 2019, the Voigts filed a Motion to Disqualify Wade Mann and Crowley Fleck, PLLP, from representation pursuant to Rule 1.12. Following subsequent filings from the parties, the Administrative Law Judge (ALJ), Timothy Dawson, denied the motion.

The informal conference was held on October 8, 2019 and the issues were discussed between the Voigts, CCMC and Commission Staff. On October 21, 2019, the Commission adopted the ALJ's Recommended Order and approved the renewal and revision subject to a special condition.

On November 20, 2019, the Voigts requested a Formal Hearing pursuant to N.D.C.C. ch. 38-14.1 citing issues presented during the informal conference, including

reclamation, dust control, water erosion, presence of an alluvial valley floor, and road closures/access issues.

On December 5, 2019, CCMC filed a Motion for Attorney's Fees (the Motion) pursuant to N.D.C.C. § 38-14.1-36 and N.D. Admin. Code § 69-05.2-01-07 alleging that the Voigts participated in the proceeding in bad faith to harass or embarrass the permittee.

On December 6, 2019, the Voigts again filed a Motion to Disqualify Wade Mann and Crowley Fleck, PLLP from the proceedings. On December 11, 2019, the ALJ, Hope Hogan, issued an Order Denying Motion to Disqualify.

The Commission held the Formal Hearing on December 16 and 17, 2019. Upon receipt of filings and responses subsequent to the hearing, the Commission issued its Findings of Fact, Conclusions of Law and Order on February 7, 2020.

Discussion

Pursuant to N.D.C.C. § 38-14.1-36, "Whenever an order is issued as a result of any administrative proceeding under this chapter . . . a sum equal to the aggregate amount of all costs and expenses, including attorney's fees as determined by the commission to have been reasonably incurred . . . may be assessed against any party as the Commission deems proper." N.D. Admin. Code 69-05.2-01-07(5)(d) provides that fees may be awarded to a permittee when the permittee demonstrates that the person initiated a proceeding under N.D.C.C. § 38-14.1-30 or participated in the proceeding in bad faith to harass or embarrass the permittee.

N.D. Admin. Code § 69-05.2-01-07 also sets forth the procedures for filing a petition for an award of costs and expenses, including attorney fees. As set forth in the administrative code, the administrative proceeding must result in a final order for fees to be awarded and sets forth what must be included with a petition, including an affidavit setting forth all costs and expenses incurred in connection with the proceeding, receipts or other evidence of costs, and evidence of hours expended, customary commercial rate for similar services in the area, and the experience, reputation, and ability of individuals performing the services.

CCMC filed the Motion pending the Formal Hearing. At the time, CCMC requested that the Voigts pay the costs and expenses incurred in connection with Renewal 1 and Revision 9 and that the claims "suffered from plain jurisdictional and factual deficiencies known to the Voigts at the time." CCMC asserts that the deficiencies, along with bringing three expert witnesses to the informal conference, only to claim in conclusion that they intended to have a "conversation" about the objections, in the totality of the conduct, indicates that they were brought in bad faith and for the purposes of harassing and embarrassing CCMC.

The Voigts responded that CCMC's Motion did not comply with N.D. Admin. Code § 69-05.2-01-07, failing to provide the requisite affidavit, detail, evidence required by

regulation, and that a final order had not been provided by the Commission. The Voigts also responded that the issues raised by the Voigts are serious concerns that are supported by evidence and squarely within the Commission's jurisdiction. The Voigts argue that the Motion is substantively baseless, but should be denied on procedural defects alone.

Despite CCMC's assertion that the law and regulations do not expressly require that the information be contemporaneously filed with the motion," N.D. Admin. Code § 69-05.2-01-07 expressly states that "[t]he petition must include . . . [a]n affidavit setting forth in detail all costs and expenses, including attorneys' fees, reasonably incurred for, or in connection with, participation in the proceeding" as well as receipts for costs and evidence of the hours expended. N.D. Admin. Code § 69-05.2-01-07 contemplates the petition being filed subsequent to issuance of a final order.

In CCMC's Reply in Support of Motion for Attorney's Fees, CCMC argues that the Commission's October 21, 2019 Order approving CCMC's Renewal 1 and Revision 9 was a final order, but for the Voigts' request for a formal hearing, and therefore the Motion was procedurally proper. However, the Motion followed the formal hearing request and the Commission's issuance of a notice of hearing. This argument only makes sense if CCMC was requesting costs and expenses solely for the informal conference, which does not appear to be the case. The timing of the Motion was misplaced.

CCMC states that the Commission should consider the Motion in abeyance if the October 21, 2019 Order is not a final order or grant the Motion and subsequently allow CCMC to submit all the required information. The following makes this unnecessary.

The Commission has the discretion to determine whether a claim is in bad faith to harass or embarrass the permittee and, upon such a determination, the Commission has discretion to award costs and expenses. CCMC asserts that the Voigts brought forth claims with jurisdictional and factual deficiencies. The Commission's agreement with this assertion can be observed in its February 7, 2020, Findings of Fact, Conclusions of Law and Order. A number of the Voigts' claims sidestepped previous jurisdictional conclusions and attempted to revisit a well-litigated issue, however several of the claims were not meritless despite a finding in CCMC's favor.

The Commission is not exercising its discretion to grant attorney fees in the present case, but continued persistence in litigation of claims with little to no merit and repetitive litigation of issues evidence bad faith and harassment. CCMC is correct when it states that a "conversation" may occur outside of the administrative process, even with the participation of the Reclamation Division. A petition for an informal conference by an interested party that is adversely affected or by the Commission's request may also be necessary. However, once a petition for formal hearing is received, particularly for parties with counsel, the Commission will expect that such claims have a reasonable basis, be supported by sufficient allegations of facts and supporting evidence, and take care to avoid relitigation of issues.


Conclusion

Accordingly, it is ORDERED that CCMC's Motion for Attorney's Fees is DENIED.

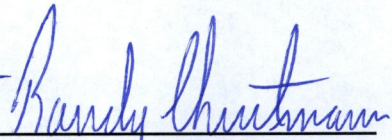
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