

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Casey and Julie Voigt,	)	Case No.: RC-23-348
)	
Complainants,	)	OAH File No. 20230291
)	
v.	)	COMPLAINANTS' ANSWER TO
	)	RESPONDENT'S MOTION FOR
Coyote Creek Mining Company, L.L.C.,	)	ATTORNEY'S FEES
)	
Respondent.)	
)	

I. INTRODUCTION

[¶1] Complainants Casey and Julie Voigt (“Voigts” or “Landowners”) submit their answer to Respondent Coyote Creek Mining Company, L.L.C.’s (“CCMC or the Mine”) motion for attorney’s fees. Voigts respectfully requests the North Dakota Public Service Commission (“PSC” or “the Commission”) again deny CCMC’s request for attorney’s fees.

[¶2] On June 8, 2023, the Voigts filed a Notice of Appeal and Specification of Errors regarding COY-035, COY-036, and COY-037 and served the PSC, CCMC, and the North Dakota Attorney General (“AG”) on that date. *See* Case No. 08-2023-CV-01338, Index ##1-4.

[¶3] On August 18, 2023, the Voigts served the PSC (through the Attorney General) and CCMC with a Notice of Appeal and Specification of Errors regarding COY-034 and filed the appeal on August 23, 2023. *See* Case No. 08-2023-CV-01964, Index ##1-5.

[¶4] On September 6, 2023, the parties filed a Stipulated Motion to Consolidate and to Extend Deadlines. *See* Case Nos. 08-2023-CV-01338, Index #115 and 08-2023-CV-01964, Index #9.

[¶5] On September 7, 2023 and September 8, 2023, the Court entered its Order to Consolidate and to Extend Deadlines. *See* Case Nos. 08-2023-CV-01964, Index #12 and 08-2023-CV-01338, Index #118.

[¶6] On September 26, 2023, the parties entered into a Stipulation and Request for Stay and the Court entered its Order for Stay. The parties agreed that the Voigts would file a complaint with the PSC asking to hold a formal hearing and address the matters raised in the appeals of the grade approvals through an adjudicative proceeding under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32 and if the PSC accepts the complaint for adjudication and holds a formal hearing, and issues a final decision adjudicating the claims, the Voigts would file a motion to voluntarily dismiss the appeal with prejudice. *See* Case No. 08-2023-CV-01338, Index ## 119, 122. The Voigts entire intent with this proposal was to give the PSC an opportunity to make a complete record and to make adjudication of this dispute more efficient and orderly for all involved. The Mine agreed to this process.

[¶7] On October 24, 2023, the Voigts served the PSC (through the Attorney General) and CCMC with a Notice of Appeal and Specification of Errors regarding COY-038 and COY-039 and filed the appeal on October 26, 2023. *See* Case No. 08-2023-CV-02561, Index ##1-5.

[¶8] The parties entered into a Stipulation and Request for Stay and the Stipulation was filed on November 8, 2023. *See* Case No. 08-2023-CV-01338, Index #123 and 08-2023-CV-02561, Index #8. The Court entered its Order Consolidating 08-2023-CV-02561 to 08-2023-CV-01338 and granted the stay. *See* 08-2023-CV-01338, Index #126 and 08-2023-CV-02561, Index #11. As with the prior stipulation, the parties agreed that the Voigts would file a formal complaint with the PSC and attempt to resolve the dispute before the agency through a formal hearing on the additional grade approvals.

[¶9] On November 22, 2023, the Voigts filed their formal complaint with the PSC, seeking redress under ch. 28-32 for failures to follow provisions of N.D.A.C. Art. 69-02. *See* Docket Number 1, ¶ 4. The PSC accepted the Voigts' complaint on November 29, 2023. *See* Docket

Number 4. A notice of formal hearing was issued on November 30, 2023 scheduling the formal hearing for December 22, 2023. *See* Docket Number 6. That notice of hearing did not state anything about a hearing being held under Chapter 38-14.1. *Id.* CCMC filed its answer to the complaint on December 12, 2023 requesting the PSC grant its attorney’s fees pursuant to N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07. *See* Docket Number 10. A formal hearing was held on December 22, 2023. The Commission issued its Findings of Fact, Conclusions of Law and Order on February 14, 2024 dismissing the Voigts complaint and denying CCMC’s request for attorney fees. *See* Docket Number 104.

[¶10] The agreement made by the Voigts to have a formal complaint filed and heard in front of the PSC was a compromise in order to accommodate and reduce time and attorney’s fees for the PSC and the Mine. CCMC is now taking advantage of the Voigts’ compromise by demanding attorney’s fees, after its attorney’s fees have already been denied in the Commission’s prior order and would not have been available but for the Voigts’ attempt to save the Mine and PSC time and resources (i.e. had the Voigts simply proceeded with the prior appeals).

II. ARGUMENT

A. The Commission has already denied the Mine’s request for attorney’s fees.

[¶11] The Mine’s request for attorney fees has already been decided and denied. In the Commission’s Findings of Fact, Conclusions of Law and Order, the Commission stated “The Commission declines to assess fees pursuant to N.D.C.C. § 38-14.1-36.” *See* Docket Number 104, pg. 14. Pursuant to N.D.C.C. § 38-14.1-36(2),

The court, **in issuing any final order** pursuant to chapter 28-32 in review of commission proceedings under this chapter may assess costs, including attorney’s fees against any party whenever the court determines such award is appropriate.

N.D.C.C. § 38-14.1-36(2) (emphasis added). The Commission has already ruled on the attorney fees request from the Mine. Now, the Mine has decided to take one last attempt at its attorney fees by ignoring the Commission’s order and filing a “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”. See Docket Number 124.

B. The Mine has not filed its request for attorney’s fees correctly pursuant to the rules it cites and its motion should be dismissed.

[¶12] The Mine’s motion for attorney’s fees should be dismissed due to failure to properly file the request as a petition pursuant to N.D.A.C. 69-05.2-01-07. The Mine has filed its request for attorney’s fees as a motion. Pursuant to N.D.A.C. § 69-05.2-01-07,

Any person may file a **petition for an award of costs and expenses**, including attorneys' fees, reasonably incurred as a result of participation in any administrative proceeding under North Dakota Century Code chapter 38-14.1 or this article, which results in a final order being issued by the commission.

The petition **must include** the name of the person from whom costs and expenses are sought, and: a. An affidavit setting forth in detail all costs and expenses, including attorneys' fees, reasonably incurred for, or in connection with, participation in the proceeding; b. **Receipts or other evidence of those costs and expenses; and c. Where attorneys' fees are claimed, 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.**

N.D.A.C. § 69-05.2-01-07 (*emphasis added*).

[¶13] CCMC did not follow N.D.A.C. § 69-05.2-01-07 when filing its motion. CCMC’s motion should be dismissed due to failure to file it as a petition instead of a motion and failure to file its motion pursuant to the rules in N.D.A.C. § 69-05.2-01-07.

C. **The Mine's authority for the Commission to grant fees does not apply in this proceeding.**

[¶14] “To issue a valid order or judgment, a[n adjudicative body] must have both subject matter and personal jurisdiction. *Cont'l Res., Inc. v. Counce Energy BC #1, LLC*, 2018 ND 10, ¶ 6, 905 N.W.2d 768 (citations omitted). “Issues involving subject matter jurisdiction cannot be waived and can be raised by the parties or the [adjudicative body] at any time.” *Id.*

[¶15] On November 22, 2023, the Voigts filed a request for a hearing regarding soil respread issues on their property. Docket Number 1. The Voigts specifically cited and sought relief “pursuant to Chapter 28-32 of the Administrative Agencies Practice Act (“AAPA”) and Article 69-02 of the Administrative Code.” *Id.*, at ¶ 4. Nowhere in their Complaint did the Voigts make their claims under Chapter 38-14.1. *Id.* The Commission’s Notice of Formal Hearing did not cite to Chapter 38-14.1. Docket Number 6.

[¶16] Simply put, this formal hearing was something that was done following a proposal by the Voigts to create a more orderly process given that the PSC’s decisions on appeal were issued in an informal manner without a formal hearing or adjudication. Recognizing this, the Voigts proposed consolidating all of the challenged grade approvals and filing a complaint with the Commission and giving the Commission an opportunity to create a record and adjudicate the issue formally before any further judicial proceedings. *See Decl. of Derrick Braaten*, ¶2. This did and still does make good sense and is an efficient way to handle this proceeding. The Mine has now taken advantage of the Voigts’ proposal to try to shoehorn in an argument that it now has an entitlement to fees under provisions in Chapter 38-14.1. But this is not a proceeding for a mine permit revision or renewal under the Chapter, and the Mine’s accusations of harassment and abuse of process direct attention away from what the Mine itself is attempting here with its latest motion. The

bottom line is that the authority the Mine cites as authority for an award of fees in inapposite and does not apply to this proceeding.

D. CCMC has spent approximately 42.3 hours on its motion for attorney's fees.

[¶17] CCMC has spent approximately \$16,092.50 on drafting its motion for attorney's fees after the Commission has already decided to deny its request for attorney fees in its Findings. *See* Docket Number 124, pgs. 25-26 of the pdf. This amounts to approximately 28% of the entire invoice submitted by CCMC for the formal complaint proceeding. Preparation of the hearing amounted to approximately 50.1 hours. *Id.*, pgs. 24-25 of the pdf. N.D.A.C. § 69-05.2-01-07 provides that the attorney's fees that are *...reasonably incurred as a result of the participation in any administrative proceeding...* It is not reasonable to spend approximately 42.3 hours on a motion for attorney's fees, especially when preparation of the hearing was approximately 50.1 hours, and therefore CCMC's motion should be denied.

[¶18] CCMC feels the need to spend at least five pages bringing up over 10 years' worth of litigation between the parties. The PSC has already denied CCMC's request for attorney's fees in the past litigation. There is no need to bring up years of litigation in this motion as it does not pertain to the formal complaint on the grade approvals that were granted in 2023.

E. The Congressional intent of SMCRA does not support an award of attorney's fees to CCMC.

[¶19] The Mine complains about the prior actions in which the Voigts did participate in proceedings pursuant to Chapter 38-14.1. When the Voigts have requested informal conferences and formal hearings on mine permit revisions renewals, those are indeed proceedings under Chapter 38-14.1, and are also proceedings under North Dakota's version of "SMCRA," the federal surface mining reclamation law. *See, e.g.*, N.D.C.C. § 38-14.1-02(5) (stating Commission is state

regulatory authority for Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.]). The participation by the Voigts in these proceedings is not “harassment” of the Mine, it is precisely the kind of landowner involvement and participation these proceedings were created to *encourage*.

[¶20] In 1977, the Nation’s legislators well understood the fundamental economic principle that, “[f]or any market to operate, enforceable property rights are necessary,” and the nature of coal surface mining requires a balancing of those rights against the country’s need for coal as an energy resource. 30 U.S.C. §§ 1201, 1202(b) and (i); Joseph P. Tomain and Richard D. Cudahy, *Energy Law in a Nutshell*, 18 (2016). Congress expressed this intent in pertinent part with the passage and enactment of § 1202 “Statement of Purpose [of SMCRA]” which expressly provides that:

It is the *purpose* of this Act to –

...

(b) assure that the *rights of surface landowners* and other persons with a legal interest in the land or appurtenances thereto are *fully protected* from such operations; [and to]

...

(i) *assure that appropriate procedures are provided for the public participation* in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary *or any State* under this Act;

...

(Emphasis added).

[¶21] Congress furthermore expressed support for public and landowner participation in State proceedings with debate on the House and Senate floor. 128 Cong. Rec. 12617-15862 (1977). As just one example among many, Rep. Philip Ruppe (R-MI), stated before his elected colleagues that “[l]andowners, the public, and residents adjacent to mine areas should be protected. They deserve and have the right to the environmental standards we have in this legislation.” *Id.*, at 12638. And, while others proposed or promoted informal hearing processes rather than formal proceedings,

none suggested that landowners directly affected by coal surface mining ought to be excluded from governmental processes relating to their rights. *Id.*, at 12617-15862.

[¶22] Even industry executives testifying during debate promoted the idea of landowner participation in hearings before State administrative bodies. *Id.*, at 15589-90. Lloyd Baker, an industry representative invited to offer testimony on his views of SMCRA stated before the Senate that “[p]articipation in the hearings called for concerning permitting and mining plans *should be limited to property owners in the area concerned.*” *Id.* (emphasis added).

[¶23] It is notable that Mr. Baker, a coal mining representative with significant interest in the expansion and vitality of the coal mining industry, expressly called for the inclusion of landowner voices such as the Voigts’ in the administrative process. *Id.* Mr. Baker could have sought their exclusion, but he did not. *Id.* He could have sought to minimize their participation, but he did not. *Id.* He could have sought for the bill to contain the kind of punitive measures that CCMC seeks here, but he did not. *Id.* Rather, Mr. Baker chose to expressly include landowners like the Voigts, who live in the middle of CCMC’s strip mine, in the public hearing process. *Id.*

[¶24] SMCRA was enacted with § 1202(b) and (i) expressly providing that “any State” must observe the “purpose” of SMCRA to “assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations,” and to do so in pertinent part by “assuring that appropriate procedures are provided for the public participation.”

[¶25] Despite that clear and unambiguous intent, CCMC seeks to use an administrative rule as a cudgel against the Voigts for their participation in North Dakota’s adaptation of SMCRA. The United States Congress identifies persons such as the Voigts and singles them out as individuals who *should* have their voices heard by “any State” administrative bodies regarding their concerns

relating to coal mining and property rights, yet CCMC would see them punished for just that participation. Unlike the express language and legislative intent of SMCRA, CCMC takes the divergent view that the Voigts and those similarly situated should have their voices silenced, their rights chilled, and their name publicly tarnished with allegations of “bad faith.”

F. The Commission lacks jurisdiction to rule on this motion

[¶26] Parties aggrieved by a decision of the Public Service Commission may either appeal to the appropriate court or seek the Commission’s reconsideration under N.D.C.C. § 28-32-40. The Mine did not seek reconsideration from the Commission, though its motion is at best considered as such. There is an appeal of this matter pending in the district court. Index #1, Case No. 08-2024-CV-00694. Jurisdiction has transferred to the district court. The Commission does not have jurisdiction, which is why it is now “[t]he court)” that “may permit amendments or additions to the record filed by the administrative agency in order to complete the record” and it is the court that has jurisdiction to order the Commission to adduce additional evidence, as just two examples. *See* N.D.C.C. §§ 28-32-44(8) & 28-32-45. Under the latter provision, “the court may order that the additional evidence be taken, heard, and considered by the agency on terms and conditions as the court may deem proper.” N.D.C.C. § 28-32-45. The reason “the court may order” this is because it is the court, and not the Commission, that has jurisdiction over this dispute now.

III. CONCLUSION

[¶27] The Commission has already denied the Mine’s request for attorney fees. The Mine’s current request has no basis in law and the Commission is without jurisdiction to grant it regardless. The Voigts respectfully request that the PSC deny the Mine’s request for attorney fees.

Dated: May 2, 2024.

Respectfully submitted,

/s/ Derrick Braaten

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Casey and Julie Voigt,)	Case No.: RC-23-348
)	
Complainants,	)	OAH File No. 20230291
)	
v.	)	DECLARATION OF ATTORNEY
	)	DERRICK BRAATEN
Coyote Creek Mining Company, L.L.C.,)	
)	
Respondent.)	
)	

[¶1] I am the attorney of record for Casey and Julie Voigt, the Complainants in this matter.

[¶2] The formal hearing was something that was done following a proposal by the Voigts to create a more orderly process given that the PSC’s decisions on appeal were issued in an informal manner without a formal hearing or adjudication. Recognizing this, the Voigts proposed consolidating all of the challenged grade approvals and filing a complaint with the Commission and giving the Commission an opportunity to create a record and adjudicate the issue formally before any further judicial proceedings, especially because I believed the result of litigation may have been to simply remand the matter for the agency to create the record after briefing anyway.

I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 2nd day of May, 2024 at Bismarck, North Dakota, United States.



Derrick Braaten

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Casey and Julie Voigt,	)	Case No.: RC-23-348
)	
Complainants,	)	OAH File No. 20230291
)	
v.	)	DECLARATION OF SERVICE
)	
Coyote Creek Mining Company, L.L.C.,)	
)	
Respondent.)	
)	

[¶1] I hereby certify that true and correct copies of the following documents:

- **Complainants’ Answer to Respondent’s Motion for Attorney’s Fees;**
- **Declaration of Attorney Derrick Braaten; and**
- **Declaration of Service.**

were, on the 2nd day of May, 2024, electronically served and placed in the US Mail to:

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I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on this 2nd day of May, 2024 at Bismarck, North Dakota.



Desirae Zaste