



RICHARD P. MIDDLETON, ESQ.
Legal Department
(313) 235-3647

May 12, 2006

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909-7721

Re: In the matter of THUNDER BAY GATHERING COMPANY's Application
for authority to increase transportation rates on its THUNDER BAY pipeline
MPSC Case No. U-14672

Dear Ms. Kunkle:

Attached for electronic filing is Thunder Bay Gathering Company's Response to Motion
to Compel along with a Proof of Service.

Very truly yours,
**Richard P.
Middleton**
Richard P. Middleton

Digitally signed by Richard P.
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RPM/kbt
Attachments
cc: Service List

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of THUNDER BAY	)	
GATHERING COMPANY's Application for	)	
authority to increase transportation rates on its	)	Case No. U-14672
THUNDER BAY pipeline.	)	
_____	)	

**THUNDER BAY GATHERING COMPANY'S
RESPONSE TO MOTION TO COMPEL**

I. INTRODUCTION

Thunder Bay Gathering Company ("Thunder Bay") opposes the Motion to Compel Discovery filed by Dominion Midwest Energy, Inc., Dominion Reserves, Inc., HRF Exploration and Production, Inc., Petroleum Development Corporation, Quicksilver Resources, Inc., Sampson Resources Company, Trendwell Energy Corporation and Jordan Development ("Intervenors"). Intervenors seek an order requiring Thunder Bay to produce "any and all studies, investigation, or analysis undertaken by Complainant (sic) or its affiliates or the respective agents, including but not limited to DTE Energy Company and its subsidiary DTE Gas & Oil Co, in the past five (5) years of the Antrim Reserves in the territory dedicated to the Thunder Bay pipeline.¹" Thunder Bay answered the discovery question by indicating the only such analysis Thunder Bay possesses is contained in its direct case.

Essentially, Intervenors now seek an order requiring Thunder Bay to produce documents not in its possession or control but perhaps documents in the possession and control of a non-party. For the reason set forth below, the motion has no merit and should be denied.

¹ Intervenors have mislabeled Thunder Bay as a "Complainant". R 460.17101(c) defines complainant as "one who files a complaint pursuant to these rules." Thunder Bay is properly characterized as an applicant pursuant to R 460.17101(a).

II. INTERVENORS' MOTION IS DEFECTIVE

Intervenors move pursuant to MCR 2.313(A) for an order to compel discovery after having submitted interrogatories and requests for production of documents and after Thunder Bay had answered the interrogatories and requests for documents. Intervenors' motion is defective. Intervenors acknowledge that MCR 2.309(C)² provides that a party submitting interrogatories may move for an order under MCR 2.313(A) with respect to an objection or other failure to answer an interrogatory. Intervenors overlook the fact that MCR 2.309(C) also states:

The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

Intervenors' motion fails to comply with this requirement of MCR 2.309(C). Intervenors' motion contains no such statement. Furthermore, Intervenors could not make such a statement because Intervenors have failed to comply with this precondition to filing a motion to compel.

Because the motion to compel is defective the motion must be denied.

III. INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS ARE LIMITED TO DISCOVERY AMONG PARTIES NOT NON-PARTIES

Intervenors' motion is additionally defective because Intervenors seek to compel production of documents or information from a non-party. Reliance on MCR 2.309 which governs interrogatories to parties is inappropriate because it is limited to "parties".

MCR 2.309(B)(1) provides:

[t]he answers must include such information ***as is available to the party served*** or that the party could obtain from his or her employees, agents, representatives, sureties, or indemnitors." (Emphasis added.)

See also, *Kirshschner v Process Design Associates, Inc.*, 459 Mich 587, 597 (1991).

² Intervenors also rely on MCR 2.310(C) (3) in moving for an order compelling discovery. MCR 2.310(C)(3) contains the same requirement that a motion to compel must state the movement has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

The use of interrogatories does not extend to requiring information from non-party corporate affiliates. See also, *Jones v New York Central R Co*, 8 Mich App 575, 584 (1967).

MCR 2.310 may be used to require parties to produce documents properly discoverable. This rule may not be used to compel a party to produce documents not within its possession, custody or control. MCR 2.309 is inapplicable to non-parties as is MCR 2.310(C). Those rules expressly apply only to parties. See, *Lehman v Kornblau*, 206 F Rd 345 (2001).

Intervenors have failed to and cannot make a case that Thunder Bay has any documents within its control or possession that Intervenors' seek. There should be no order to compel in this case because Intervenors' discovery cannot be used to produce non-party information.

Intervenors have an alternate means to attempt to obtain third party documents. Cf. *Taylor v SS Cresge Co.*, 332 Mich 65 (1952). Michigan provides discovery mechanisms for obtaining third party information. Intervenors have failed to avail themselves of these mechanisms. Intervenors have not propounded a request to DTE Gas & Oil Co. pursuant to the Michigan court rules which permit discovery of information possessed by third parties. Had Intervenors done so, DTE Gas & Oil Co. would be able to represent itself in responding to the discovery request. DTE Gas & Oil Co. is a legally separate and distinct entity from Thunder Bay and there is no basis in this record to disregard their separate corporate existences.

Consequently, because Thunder Bay cannot be compelled to produce documents it does not have, the motion to compel must be denied. Because the interrogatories and request for production of documents propounded by Intervenors are inappropriate for and have not been served on third parties, the motion to compel must be denied.

IV. THUNDER BAY MAY NOT BE COMPELLED TO PRODUCE NON-PARTY DOCUMENTS IT DOES NOT CONTROL OR HAVE A RIGHT TO DEMAND

In its answer to the interrogatories propounded by Intervenors, Thunder Bay has indicated it does not have in its custody or possession the documents or information Intervenors seek. Since there was nothing of its to protect, Thunder Bay did not seek a protective order in this instance. Intervenors' contend that DTE Gas & Oil Co, an affiliate of Thunder Bay, has documents Intervenors want. DTE Gas & Oil Co is not a party to this proceeding by virtue of its affiliate relationship with Thunder Bay. As noted above, Intervenors may not use interrogatories to obtain information from a non-party.

Intervenors assert in their motion that calculation of reserves is industry standard practice but offer no affidavit in support of this factual assertion. Intervenors also assert that entities such as DTE Gas & Oil Co is under common control with Thunder Bay through the ownership of DTE Energy Company. Michigan rules provide for the production of documents and evidence which are within the "control" of the opposite party. It is necessary to make a proper showing that the documents are within the control of the opposite party and that the party seeking production is not embarking upon a fishing expedition into the papers and documents of the opposite party. *Jones, supra*.

The fact that the two corporations are sisters does not, however, automatically permit inference of control. See, *Penwalt Corp v Plough, Inc.*, 85 F Rd 257, 263 (D. Del. 1979). There the court refused to order production of the non-party sister corporation's document absent a showing of identical boards of directors or deeply intertwined corporate structure. Thunder Bay may not be compelled to cause DTE Gas & Oil Co. simply as an outcome of the affiliate relationship. Intervenors have failed to make a case that Thunder Bay has control or a right to demand the information from another.

Courts have held that documents are deemed to be within the possession, custody or control of a party if the party has “actual possession, custody or control of the materials or has the legal right to obtain the documents on demand.” See *National Fire Insurance Co v Midland Bankcor Inc.*, 159 F Rd 562, 566 (D. Can., 1994). It is undisputed in this case that Thunder Bay does not have actual possession of the documents requested nor does it have a legal right to obtain those documents. The mere affiliate relationship between Thunder Bay and DTE Gas & Oil Co. does not rise to the level that purported documents of DTE Gas & Oil Co, a non-party to this proceeding are within the possession or control of Thunder Bay. Common ownership through an ultimate parent does not mean that Thunder Bay can compel DTE Gas & Oil Co. to produce documents.

As shown in annual reports filed with the MPSC, Thunder Bay and DTE Gas & Oil Co. are distinct legal entities and their common ownership is essentially remote. DTE Energy Company owns DTE Enterprises, Inc. which owns three utilities, Michigan Consolidated Gas Company (“MichCon”), Citizens Gas Fuel Company and Southern Missouri Gas Company and nonregulated subsidiaries. MichCon is owned by MichCon Holdings, Inc. which ultimately owns Thunder Bay. In contrast, DTE Enterprises, Inc. owns DTE Gas & Oil Co. and other non-regulated business enterprises through MCN Energy Enterprises, Inc. Neither Thunder Bay nor DTE Gas & Oil Co. share officers. Nor do the entities act in concert nor are they permitted to do so, particularly with respect to the information sought by Intervenors.

Intervenors’ assertion that Thunder Bay failed to produce DTE Energy Company’s reserve calculations is asserting a right through discovery to a party in an effort to obtain information held by a third party. Intervenors’ position is particularly problematic when the Commission’s code of conduct applicable to Thunder Bay, precludes information sharing among

affiliates absent contemporaneous disclosure to competitors such as Intervenor. Most certainly, the code of conduct eschews any claim that Thunder Bay has control or a right to demand documents of a non-regulated affiliate.

The documents sought by Intervenor in this case are not within Thunder Bay's possession, custody or control and therefore fall outside the scope of discoverable material. Neither of the corporations have interlocking management structure and do not control any business activity exercised by the other. Fundamentally, there is not and cannot be close coordination between them. The separate corporations have not and can not act as one in any transaction at issue in this case. In this case, the corporate structures are separate and there is no connection to the transaction issues. In this case, DTE Gas & Oil Co. will not benefit from an award in this case and in fact, if relief is granted to Thunder Bay, DTE Gas & Oil Co. will be adversely affected just as Intervenor.

V. CONCLUSION

MCR 2.313(A)(5)(b) provides:

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion, or both, to pay to the person who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Because the Intervenor's motion to compel is defective on its face and an improper attempt to obtain third party documents through discovery procedures intended for use among parties, the Administrative Law Judge should deny the motion and recommend that the Commission issue an order granting an award of expenses to Thunder Bay.

THUNDER BAY GATHERING COMPANY

Richard P.

Middleton

By: _____

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of THUNDER)
BAY GATHERING COMPANY's Application)
for authority to increase transportation) Case No. U -14672
rates on its THUNDER BAY pipeline)

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

JENNIFER EVANS, being duly sworn, deposes and says that on the 12th day of May, 2006 she served a copy of Thunder Bay Gathering Company's Response to Motion to Compel, along with a Proof of Service upon the parties listed on the attached service list via electronic mail.

Jennifer
Evans

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JENNIFER EVANS

Subscribed and sworn to before
me this 12th day of May, 2006.

Kimberly A.
Krasnodemski

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Notary Public

SERVICE LIST
MPSC CASE NO. U-14672
As of May 12, 2006

ADMINISTRATIVE LAW JUDGE

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