

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COUNTIES OF RAMSEY AND WASHINGTON

In the Matter of the Petition
for Exclusion from Solid Waste
Designation of Recomp of
Minnesota, Inc.

ORDER_ON_MOTION
FOR_PARTIAL
DISPOSITION

On October 28, 1991, Recomp of Minnesota, Inc. (Recomp) filed a Motion to exclude NRG Resource Recovery (NRGRR) as a party to this proceeding for lack of standing. Recomp argued that NSP should be the sole party to this proceeding. Because the Motion to exclude NRGRR was filed when the Administrative Law Judge was scheduled to be absent and because resolution of the Motion would require fact-specific information, the Motion was taken under advisement, pending a hearing on the exclusion from solid waste designation sought by Recomp. The record closed on December 23, 1991, upon receipt of the parties' post-hearing argument which addressed this issue.

Appearances: Kristi S. Wendorff and Harry D. McPeak, Assistant County Attorneys, Ramsey County Attorney's Office, Suite 400, 350 St. Peter Street, St. Paul, Minnesota 55102, appeared on behalf of Ramsey County; George Kuprian, Assistant County Attorney, Washington County Attorney's Office, Washington County Government Center, 14900 - 61st Street North, Stillwater, Minnesota 55082-0006, appeared on behalf of Washington County; Steven B. Young, Hillstrom, Bale, Anderson, Young, Polstein & Pearson, Ltd., Attorneys at Law, 607 Marquette Avenue, Suite 400, Minneapolis, Minnesota 55402, appeared on behalf of Recomp, Minnesota, Inc.; Geoffrey P. Jarpe, Maun & Simon, Attorneys at Law, 2200 World Trade Center, 30 East Seventh Street, St. Paul, Minnesota 55101-4904, appeared on behalf of NRG Resource Recovery (NRGRR); and Audrey Zibelman, Attorney at Law, Northern States Power Company, 414 Nicollet Mall, Minneapolis, Minnesota 55401, appeared on behalf of Northern States Power Company.

Based on the Motion, the oral and written arguments of counsel, the testimony provided at the hearing, and on all the files and records herein, the Administrative Law Judge makes the following:

ORDER

The Motion of Recomp of Minnesota, Inc. (Recomp) to dismiss NRG Resource Recovery (NRGRR) as a party to this proceeding for lack of standing is DENIED.

Dated this _____ day of December, 1991.

_s/Phyllis_A._Reha

PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

In its Motion, Recomp argues that NRGRR, a wholly-owned subsidiary of Northern States Power Company (NSP), lacks standing to participate in the above-captioned matter as a party. Recomp argues that NSP, alone, has the requisite interest to oppose the exclusion from solid waste designation sought by Recomp. The Memorandum filed by Recomp contains a general statement of the legal doctrine of "piercing the corporate veil". Recomp argues that NRGRR has no real interest in this proceeding, but is in all respects wholly controlled by NSP. It concludes that the lack of any discernable legal interest in NRGRR, separate from that of NSP, and the control exercised by NSP, should deprive NRGRR of party status. Recomp has supported its position with general statements from a text on the subject of piercing the corporate veil, Law of Corporate Groups--Statutory Law--General (Littlebrown, 1989), authored by Philip Blumberg. Some reliance has also been placed on federal case law on piercing the corporate veil, cited by Professor Blumberg in his text.

In essence, the argument of Recomp is that NRGRR lacks a sufficient interest to be a party to this pr

The Administrative Law Judge believes that the testimony in the contested case hearing affirmatively establishes that NRGRR has a direct economic interest in this proceeding and could be subject to a significant injury in fact to its interests if the requested exception were granted.

In testimony at the hearing, it was established that NRGRR is a Minnesota corporation that was formed in February, 1991. It is a wholly-owned subsidiary of the NRG Group, Inc. (NRG), a Minnesota Corporation. NRG, in turn, is a wholly-owned subsidiary of NSP. The various businesses of NRG, including operation of the Newport facility, are not regulated by the Public Utilities Commission, and consequently, the Commission has required that such businesses be operated separately from NSP's utility businesses. Therefore, NRG's operations are not subsidized by NSP's ratepayers. NRG and its related subsidiary companies such as NRGRR were operated separately from the regulated utility businesses within NSP prior to their incorporation. In addition to operating the Ramsey/Washington Resource Recovery Facility at Newport, NRGRR operates a similar facility located in Elk River, Minnesota, the majority of which is owned by NSP. (Jones Direct, Ex. D-1 at 1-2). Furthermore, NRGRR has entered into separate fuel agreements with NSP to deliver refuse-derived fuel (RDF) to NSP's generating plants at Red Wing and Mankato. (Jones Direct, D-1

at 6). Granting the proposed exclusion request of Recomp could cause NRGRR to reduce its delivery of RDF to the generating plants thus causing a deleterious impact on NRGRR's profitability. Moreover, there is a potential loss of revenues which NRGRR believed it would receive in exchange for capital investments and expenditures as the operator of the Newport facility. These impacts may or may not constitute "impairment of contracts" pursuant to Minn. Stat. § 115A.893, subd. 2. Appropriate Findings and Conclusions with respect to impairment of contract will be made using the appropriate statutory, case law and legal analysis applicable to that issue. All that is being decided herein is that the testimony in the contested case hearing affirmatively establishes that NRGRR has a direct economic interest in this proceeding and could be subject to a significant injury if the requested exception were granted.

Recomp also argues that it is appropriate to pierce the corporate veil in this case and conclude that NRGRR is no more than a legal fiction required by the Public Utilities Commission that should be entirely disregarded for purposes of this proceeding. In Matter of Hibbing Taconite Co., 431 N.W.2d 885 (Minn. App. 1988), the court held that even a wholly owned subsidiary may be a proper party to an administrative proceeding involving issues related to the environment without mandatory participation by a parent corporation. In that case, the court stated:

We believe that a separate parent corporation does not come under the definition of "person" as provided in Minn. Stat. § 115.01, subd. 10. A parent corporation is not the managing body of its subsidiary which is part of the joint venture. Minn. Stat. § 302A.201, subd. 1 (1986) states that the business and affairs of a corporation shall be managed by, or under the direction of, a board of directors. The standard rule of corporate organization is that the board of directors is the managing body, which normally carries out its function by delegating to and supervising the corporation's officers. See, 2W Fletcher, Cyclopedia of the Law of Private Corporations, § 505 (rev. perm. ed. 1982). A parent corporation is the stockholder of a subsidiary, and not the manager of the corporation's affairs. Each subsidiary corporation has its own board of directors which manages a subsidiary's affairs.

431 N.W.2d 85 (Minn. App. 1988)

In Hibbing Taconite Co., supra, the court did recognize that under some circumstances it may be appropriate to treat the subsidiary and the parent corporation as one single entity. The court cites Victoria Elevator Co. v. Meriden Grain Co., Inc., 283 N.W.2d 509 (Minn. 1979). In that case, the Minnesota court stated the circumstances under which it is appropriate to pierce the corporate veil to impose individual liability on a shareholder. The court notes a significant number of factors related to the issue of whether the

control of the corporation is so significant that it should not be considered a

separate entity. The court also, however, requires not only that a number of these factors be present, but also that there be an element of injustice or fundamental unfairness in recognizing a separate corporate existence.

Victoria

Elevator Co. v. Meriden Grain Co., Inc., 283 N.W.2d 509, 512 (Minn. 1979).

In

Chergosky v. Crosstown Bell, Inc., 454 N.W.2d 659, 657-58 (Minn. App. 1990), *rev. on other grounds*, 463 N.W.2d 522 (1991), the court restated the factors involved in determining whether to pierce the corporate veil as follows:

Courts have also relied upon the "alter ego" or "instrumentality" theory to impose liability on an individual shareholder. . . . Factors considered significant in the determination include: insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely facade for individual dealings.

The court also stated the requirement of injustice as follows:

Thus, there is a two-prong test to determine whether the corporate veil should be pierced. Under the first part of the test, focusing on the shareholder's relationship with the corporation, eight factors are considered. Under the second prong of the test, focusing on the relationship of the plaintiff to the corporation, an element of injustice or fundamental unfairness is necessary. "To satisfy [the second prong] of the test, 'proof of strict common law fraud is not required, but, rather, evidence that the corporate entity has been operated as a constructive fraud or in an unjust manner must be presented.'" *White v. Jorgenson*, 322 N.W.2d 607, 608 (Minn. 1982) (quoting *West Concord Conservation Club v. Chilson*, 306 N.W.2d 893, 898, n. 3 (Minn. 1981).

454 N.W.2d at 658.

Hence, the separate corporate existence of NRGRR should be disregarded only if it is necessary to prevent a manifest injustice. *Paynesville Farmers Union Oil Co. v. Ever Ready Oil Co., Inc.*, 379 N.W.2d 186 (Minn. App. 1988), *rev. den.*, *Braun Bros. Equipment Co. v. State*, 51 Mich. App. 448, 215 N.W.2d 591 (Mich. App. 1974); *Glanzer v. St. Joseph Indian School*, 438 N.W.2d 204 (S.D. 1989).

The testimony in the contested case hearing affirmatively establishes that

NRG and its related subsidiary companies such as NRGRR have some separate existence from NSP. NRGRR is certainly a separate corporation, and its earnings are accounted for differently because it is unregulated. Because NRGRR's operations are not regulated by the Commission, its operations are not

subsidized by NSP's ratepayers. In addition, the officers, employees and businesses of NRGRR are separate and distinct from the NSP utility businesses.
(Jones Direct, Ex. D-1 at 1, 6-7).

Even if, however, one were to conclude that the relationship between the parent and the subsidiary is so close that piercing the corporate veil should be considered, Recomp must demonstrate some equitable reason

Recomp has not demonstrated why it would be substantially unfair to recognize the separate economic interest of NRGRR stated above. Recomp has not and, apparently, cannot demonstrate prejudice to its position resulting from the participation by NRGRR as a party. Participation by NRGRR did not unduly burden the record or broaden the issues litigated. The interests of Recomp were protected because NSP was granted intervenor status in this proceeding. This case, unlike Matter of Hibbing Taconite Co., 431 N.W.2d 885 (Minn. App. 1980), is not a case in which a lack of participation by the parent corporation prejudices some present or potential public interest. On the contrary, in this case both the parent and the subsidiary have participated. The public interest has been fully protected.

In the current posture of this proceeding, with participation both by the parent and the subsidiary corporation, each of which has a direct economic interest in the subject matter, the Administrative Law Judge concludes that both the parent and subsidiary are appropriate parties. There is no injustice worked or even attempted by NRGRR's participation that would require piercing the corporate veil.

P.A.R.