STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

APPLICATION OF PERCUSSION PETROLEUM OPERATING, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.

Case No. 20192

PRE-HEARING STATEMENT

Jalapeno Corporation ("Jalapeno") provides this Pre-Hearing Statement for the Division hearing as required by Rule 19.15.4.13B NMAC.

APPEARANCES

APPLICANT	ATTORNEY
Percussion Petroleum Operating, LLC	Michael H. Feldewert Jordan L. Kessler Adam G. Rankin Holland and Hart, LLP P.O. Box 2208 Santa Fe, NM 87504 mfeldewert@hollandhart.com jlkessler@hollandhart.com agrankin@hollandhart.com
OPPONENT	ATTORNEY
Jalapeno Corporation	Patrick A. Fort P.O. Box 1608 Albuquerque, NM 87103-1608 pfort@jalapenocorp.com

STATEMENT OF THE CASE

Percussion Petroleum Operating, LLC ("Percussion") applies for an order from the Division pooling all the uncommitted interests of Jalapeno and others across separate existing 40 acre oil spacing units into a 160 acre spacing unit being the N/2/S2

of Section 28, Township 17 South, Range 28 East, NMPM, in Eddy County, New Mexico. The applicant proposes to drill the Welch RL State No. 1H Well to test the Artesia; Glorieta Yeso Pool. The well will be a horizontal well with a surface location in Section 27 and a terminus in Section 28.

MOTION TO DISMISS

Jalapeno moves to dismiss the application to force pool it on the following grounds:

Statutory force pooling is not available or authorized against an owner in a spacing unit who has voluntarily agreed to pool its interest and to participate in its pro rata share of the cost of drilling and completing the subject well. NMSA 1978 § 70-2-17(C). Division orders pooling interests in force pooling applications routinely pool "all uncommitted interests.," See Order No. R-14053-B, application of Matador Production Co.; Case No. 15038, Application of Mewbourne, and Order R-13751, limiting the force pooling order to "all uncommitted interests." To allow a party to force pool committed interest owners would subvert the rule requiring an applicant to seek voluntary agreement as a condition of prosecuting a force pooling application.

Jalapeno and the applicant have been in communication regarding Percussion's proposed Welch RL State No. 1H Well in subject Section 28. Jalapeno has signed and mailed to Percussion an executed AFE and election letter covering the well at issue in this application. Pursuant to the election letter Jalapeno also adopted, ratified and confirmed that certain Operating Agreement effective as of August 20, 2001, by and between OXY USA WPT Limited Partnership, as Operator, and McCombs Energy, LLC, et al, Non-Operators.

Jalapeno has agreed to pool its interests and participate in the well. Since agreement between the parties exists there is no basis for force pooling Jalapeno. The application should be dismissed as to Jalapeno.

JALAPENO CONTENDS THE APPLICATION SHOULD BE DENIED

If the application is not dismissed as to Jalapeno, Jalapeno contends the application should be denied for the following reasons:

1. An order granting Percussion's application with a 200% risk penalty would likely have the effect of taking some non-consenting owners' property in violation of their constitutional rights afforded by the 5th and 14th Amendments to the United States Constitution. Many parties lack any effective means to protect those rights in this proceeding. As nonconsenting and force pooled mineral owners their property and correlative rights will be expropriated by the order that applicant requests.

2. Percussion cannot meet its burden to support its request for a 200% risk penalty. The Division is obligated to take administrative notice of the relative absence of risk in developing the proposed well in Eddy County. There is no rationale or factual justification for rewarding applicant with a risk penalty to be collected from the share of revenue to which nonconsenting parties are entitled.

3. The OCD and OCC lack authorization to impose any risk penalty in force pooling proceedings because there is no objective standard for the imposition of risk penalties. *Gadeco, LLC v. Industrial Comm.*, 812 N.W.2d 405, 2012 ND 33 (2012) ("The Commission's decision ... does not explain how it reached the conclusion that the risk penalty could be assessed ... a reviewing court needs to know the reasons ...") As Commission Chariman Catanach observed in Case No. 15363 (de novo) "If there is a method other than just the automatic imposition of 200 percent, I mean a definition of risk, what we're talking about, I would appreciate being guided to that. I haven't found it." Consequently, any assessment of a risk penalty by the Division is arbitrary and capricious.

4. OCD Order No. R-11992, which adopted Rule 19.15.1.35 NMAC (now Rule 19.15.13.8—Charge for Risks), and which in turn adopted a blanket 200% risk factor in compulsory pooling application, unlawfully (a) allows assessment of a risk penalty without requiring the applicant to support the requested penalty with evidence supporting the penalty, and (b) imposes the burden of proof on an opponent of a compulsory pooling application to justify a different risk factor. This is in violation of the legislative mandate set forth in NMSA 1978 § 70-2-17 and contrary to the standard

burden of proof rules imposed on the movant in any proceeding.

PROPOSED EVIDENCE

Jalapeno will present evidence that it has agreed to pool its interest and participate to the extent of its working interest share in the cost of drilling the proposed well. It cannot be ordered force pooled. If the application is not dismissed as to Jalapeno, Jalapeno's evidence will include data establishing that drilling of the proposed well presents minimal risk which does not justify the requested risk penalty.

WITNESSES	EST. TIME	EXHIBITS
Harvey Yates (operator/landman)	30 min.	5 approx.
Emmons Yates (practical oil man/landman)	30 min.	5 approx.

PROCEDURAL MATTERS

Jalapeno requests that this hearing be vacated and reset for another date since Percussion did not mail the application at least 20 days prior to the application's scheduled hearing date. Such envelope was postmarked December 24, 2018 and the hearing date is January 10, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record by electronic mail this 3rd day of January, 2018:

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