

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

**APPLICATION OF DUKE ENERGY
FIELD SERVICES, LP FOR APPROVAL
OF AN ACID GAS INJECTION WELL,
LEA COUNTY, NEW MEXICO.**

2006 MAR 25 PM 2 19
CASE NO. 13589

DUKE ENERGY FIELD SERVICES'

SUR-REPLY TO SECOND MOTION TO DISMISS

Duke Energy Field Services, LP ("Duke") submits its Sur-reply to Randall Smith, Dean "Beach" Snyder and AC Ranches Partnership ("Opponents") and Madison M. Hinkle, Randolph M. Richardson, Morris E. Schertz, Rolla R. Hinkle III, Oscura Resources, Inc. and R.R. Hinkle Company, Inc. ("Proposed Intervenors") Reply Pursuant to Second Motion to Dismiss. Duke should be allowed to submit this Sur-reply as new parties have been included in the Reply and new arguments have been raised to which Duke has not had the opportunity to respond.

I. DUKE COMPLIED WITH NOTICE RULES.

Duke has not only complied with the Division's notice rules, but went above and beyond those rules to provide additional notice to interested parties. Division Rule 701 provides notice be given to the owner of the surface of the land on which the injection well is to be located and to each leasehold operator within one-half mile of the well. NMAC 19.15.9.701 (2006). Duke gave notice to the surface owner, the State Land Office and leasehold operators within one mile. *See* Duke Exhibit No. 1 (Affidavit of Notice by Alberto Gutierrez). Duke also provided notice by publication. Duke further held a public meeting in February of 2006 in an attempt to notify and inform other interested parties of its application. Duke has made a good faith effort to notify all affected parties of its application. This good faith effort was made a matter of record during the hearing on Duke's application.

After the C-108 application was submitted, the Oil Conservation Division ("Division") recommended -- but did not require -- additional notice be provided to affected parties within a one mile radius of the well. *See* Duke Exhibit No. 2 (Letter from Will Jones). In fact, Mr. Gutierrez testified during the hearing that Mr. Jones had

made it clear that the additional notice was only a recommendation. *See* Tr. 195.¹ Thus, Duke was not required to give notice to the Proposed Intervenor.

The Opponents rely on *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991) in support of their argument that Duke failed to provide proper notice of this application. In *Uhden*, Amoco applied for an increase in well spacing from 160 acres to 320 acres. As the lessor in a spacing unit affected by this application, Mrs. Uhden's royalty payment for oil and gas production was directly affected by the Commission's approval of Amoco's application. This case is clearly distinguishable from *Uhden*. First, unlike Mrs. Uhden, the Proposed Intervenor in this case are not entitled to receive notice from Duke pursuant to Division rules and/or directives. The second distinguishing factor between *Uhden* and this case is that, unlike *Uhden*, neither the Opponents nor the Proposed Intervenor have shown how their interests are affected by the Commission's order.

II. INTERVENTION IS UNTIMELY AND INAPPROPRIATE.

As more fully discussed in Duke's Objection to Intervention, the Proposed Intervenor have made an untimely and inappropriate application to intervene in this matter. The Proposed Intervenor seek to be permitted to participate in a proceeding that has not only concluded but in which an order has already been issued. Division Rule 1209 gives the Commission Chairman discretion as to whether to allow late intervenors to participate. The Chairman may strike a notice of intervention if "the intervenor fails to show that the intervenor has standing, unless the intervenor shows that intervenor's participation will contribute substantially to the prevention of waste, protection of correlative rights or protection of public health or the environment." NMAC 19.15.14.1209 (2006). The Proposed Intervenor's were not entitled to notice of Duke's application and do not have standing in this case. Accordingly, their attempt to intervene now should not be entertained by the Commission. Furthermore, the

¹ Q. Let's look at Duke Exhibit Number 2, if you could take that in front of you, please. And that's the September 16, 2005, letter from Mr. Jones of the Division, addressed to you. And if you'll turn to the second page of that, first paragraph, it says, the surface lessee should also be notified.

Why wasn't that done?

A. Very simply, I spoke to Mr. Jones, after I got this letter, about the notice procedures specifically. And I asked him, you know, about these notices. **And he said, well, I want to make clear that these are recommendations, that you don't have to do these notices.** (emphasis added).

Proposed Intervenor have not shown that they have anything to present to the Commission that would contribute substantially to any of the issues before the Commission. They have also failed to show that extraordinary circumstances exist that should allow them to intervene at this late date.

Furthermore, whether or not the Commission took the Second Motion to Dismiss under consideration before it issued its order is irrelevant. The Commission's order in this case approving the application of Duke has rendered moot the Proposed Intervenor's motion to dismiss and it is now an inappropriate procedural avenue to raise before the Commission.

III. INTERVENORS' INTERESTS WERE CONSIDERED AT HEARING.

The effect on oil and gas production in the area was considered during the hearing. As discussed in Duke's Objection to the Notice of Intervention, issues of trespass were argued by counsel for certain opponents (the same counsel which now represents the Intervenor). Duke presented testimony and evidence that the proposed injection formation is an ideal acid gas reservoir that has good porosity and permeability and a good geologic seal. *See Tr.* at 163. Although the reservoir is located below oil and gas production, Duke showed there was little to no potential production in the area. *See Tr.* at 155. The Commission agreed with Duke's testimony and evidence and issued its order granting Duke's application.

As to the potential for sub-surface trespass, the Commission specifically found in its Order that if other property rights were impacted in the future, it would not be a matter for the Commission to adjudicate anyway. Order R-12546 (Paragraph 26).

IV. AN AFTER THE FACT EFFORT TO OBTAIN STANDING SHOULD NOT BE ALLOWED AS A MATTER OF POLICY.

In its Response to the Opponent's Second Motion to Dismiss, Duke argued that the Opponent does not have standing to raise claims regarding the sufficiency of the notice provided to other mineral interest owners. To remedy lack of standing, one day after Duke filed its Response, counsel for Opponent entered his appearance for those other mineral interest owners. These parties also filed a Notice of Intervention and joined in the Second Motion to Dismiss. After all this procedural maneuvering, Opponent and the Proposed Intervenor now assert they have standing to object to the

notice provided of Duke's application. See Reply at ¶ 2 ("The Applicant's objections to the standing of the parties has been obviated by the Notice of Intervention...").

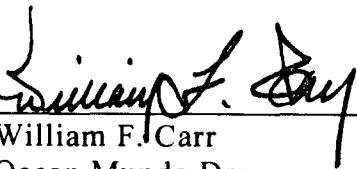
Duke submits that the Commission would be setting dangerous precedent if it allows this attempt to intervene after the Commission has ruled on the merits of this case and then entertains this Motion to Dismiss. If this intervention and Motion to Dismiss are granted, any time a party is dissatisfied with the outcome of a hearing, it can attempt to locate other "affected parties" in hopes of circumventing the hearing process and getting another opportunity to argue its case in an attempt to obtain a different outcome.

As shown in Duke's Objection to Notice of Intervention filed contemporaneously with this Sur-reply, the Proposed Intervenors do not have standing in this case. They have failed to show how approval of Duke's application will harm their interests and the harm they seem to allege is speculative and tentative at best. Opponents do not have standing to assert the lack of notice to the Proposed Intervenors and the Proposed Intervenors do not have and cannot show that they had any right to notice of Duke's application under the rules or directives of the Oil Conservation Division or Commission. The notice issues raised by the Opponents and by the Proposed Intervenors are factually and legally without merit and do not give them standing to seek dismissal of this application.

For these reasons, Opponents and Intervenors Second Motion to Dismiss should be denied.

Respectfully submitted,

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**ATTORNEYS FOR DUKE ENERGY FIELD
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CERTIFICATE OF SERVICE

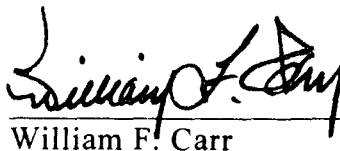
I certify that on May 25, 2006 I served a copy of the foregoing document to the following by

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