BEFORE THE

OIL CONSERVATION DIVISION

NEW MEXICO DEPARTMENT OF ENERGY AND MINERALS

IN THE MATTER OF THE APPLICATION OF
BURLINGTON RESOURCES OIL & GAS COMPANY
FOR COMPULSORY POOLING AND A NON-STANDARD
GAS PRORATION AND SPACING UNIT, SAN JUAN
COUNTY, NEW MEXICO

CASE NO. 11808
CASE NO. 11809
(Consolidated)
DE NOVO

TOTAL MINATOME'S SECOND MOTION FOR STAY OF ORDERS R-10877 and R-10878

Total Minatome Corporation ("Total") by and through its undersigned counsel moves that the Commission enter its order staying Division Orders No.s R-10877 and R-10878 entered on September 12, 1997. The grounds for staying the Division's compulsory pooling orders are as follow:

The parties are in fundamental disagreement over the operation of the participation election provisions of the Division's compulsory pooling orders. Recently, Total tendered its share of estimated well costs to Burlington Resources Oil and Gas Company ("Burlington") for the specific purpose, among others, of exercising its rights under the terms of the Division's pooling orders to avoid the statutory risk penalty assessment. This week, Burlington improperly rejected Total's payment without justification and seeks to impose the 200% penalty against Total's share of pooled production. As a consequence, Burlington has contravened the express terms of the Division's pooling orders in derogation of Total's rights.

On October 28, 1997, counsel for the compulsory pooling applicant, Burlington Resources Oil and Gas Company advised that Burlington was refusing to accept Total's tender of its

proportionate share of estimated well costs under Order R-10878 which pooled Total's interests for Burlington's Marcotte's No. 2 well in Section 8, T-31-N, R-10-W. (See copy of W. Thomas Kellahin's correspondence dated October 28, 1997, Exhibit A). Total tendered its share of estimated well costs pursuant to the terms of decretal paragraph 4 of Order No. R-10878 on a timely basis in order to avoid the assessment of the risk penalty charge. (See the undersigned's October 16, 1997 transmittal correspondence to W. Thomas Kellahin and Alan Alexander, Exhibits B and C, attached.) Total's election to participate pursuant to the terms of the compulsory pooling order was done in both a timely and proper manner. Burlington has taken a contrary position, contending that Total's election was conditional. By rejecting Total's payment and disregarding Total's election under the terms of the compulsory pooling order, it is clear that Burlington seeks the imposition of the statutory risk penalty assessment against Total's share of production.

Burlington's rejection is inappropriate and contrary to both the custom and practices of the industry and the New Mexico Oil Conservation Division's administration of its compulsory pooling orders. Accordingly, the Commission should enter its interim order staying Order No.s R-10877 and R-10878 pending the Commission's resolution of the *de novo* proceeding on Burlington's compulsory pooling applications.

BACKGROUND

Burlington's October 28, 1997 rejection of Total's election to participate is preceded by a previous rejection of an earlier effort by Total to voluntarily participate in Burlington's proposed well:

On April 22, 1997, Burlington made its proposal to drill the Marcotte No. 2 well to Total and a number of other interest owners in Section 8. Accordingly, on May 23, 1997, Total provided its consent to participate in the Marcotte No. 2 well under the terms of a pre-existing land contract (the GLA-46 Agreement) between Total's predecessor and Burlington's predecessor. Total's May 23, 1997 consent under the GLA-47 Agreement, was done is a manner consistent with a number of earlier well proposals made by Burlington and its predecessors in which Total elected to participate under the GLA-46. Surprisingly, Burlington subsequently advised that it regarded Total's consent to voluntarily participate in the well under the GLA-46 Agreement as being ineffective. Burlington, disavowing the GLA-46 Agreement, then proceeded to force pool Total's interests. In view of Total's election to participate under the terms of its pre-existing land contract with Burlington, Total quite naturally resisted Burlington's compulsory pooling applications. The consolidated applications in Case No.s 11808 for the Scott No. 24 well in Section 9 and Case No. 11809 for the Marcotte No. 2 well in Section 8 proceeded to hearing before the Division's examiner on July 10, 1997. On September 12, 1997, the Division entered its Orders No.s R-10877 (Scott No. 24) and R-10878 (Marcotte No. 2).

Soon thereafter, on September 15, 1997 the Eleventh Judicial District Court hearing the appeal of Order R-10815 promulgating 640-acre spacing for sub-Dakota formation wells in the San Juan Basin issued a bench ruling staying the effect of the 640-acre spacing order to those interest owners who had not received notice of the spacing proceeding.[1] Because the 640-acre spacing order was stayed as to some but not all interest owners, it was correctly perceived that significant

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[1]Timothy Johnson, Trustee for Ralph A. Bard, Jr., et al. vs. Burlington Resources Oil and Gas Company, 11th Judicial District Case No. CV-97-57-3.

practical and legal difficulties would arise in the administration of the compulsory pooling orders for the Scott No. 24 and the Marcotte No. 2 wells. Accordingly, Total and a number of other interest owners made separate applications to the Division Director to stay the effect of Orders No.s R-10877 and R-10878 until the differences between the pooling orders and the Court's ruling on the spacing order were reconciled.[2]

On the same day the District Court issued its bench ruling in the 640-acre spacing case, Burlington sent its transmittal advising of the Division's issuance of Order R-10878 and enclosing a copy of Burlington's itemized estimated well costs schedule and AFE. (See Exhibit D, attached). In its September 15 transmittal, however, Burlington advised that in order to participate in the well "under the terms of the compulsory pooling order," Total should pre-pay its share of the $2,316,973.00 estimated completed well costs, execute the enclosed AFE and also execute Burlington's April 1, 1997 operating agreement. Total and a number of other interest owners had earlier found Burlington's customized operating agreement objectionable for a number of reasons, and consequently refused to execute the same.[3] Because Burlington's September 15th transmittal attempted to impose conditions on the ability of non-consenting interest owners to elect to participate in the well, Total pointed out to the Division Director in its first Motion For Stay that these new conditions exceeded the terms of the compulsory pooling order and negated the ability of the owner of the previously uncommitted interest to consent to the drilling of the well and avoid

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[2]Total Minatome Corporation's Motion For Stay of Orders R-10877 and R-10878, October 3, 1997; Lee Wayne Moore and JoAnn Montgomery Moore, Trustees, Motion For Stay, October 6, 1997; Timothy B. Johnson, Trustee, et al., Motion for Stay, October 6, 1997.

[3]Among other things, Burlington's operating agreement contained a 400% non-consent penalty, well data access restrictions and unreasonable gas balancing provisions.

the risk penalty by tendering its share of estimated well costs. The election period under Order R-10878 was scheduled to terminate automatically on October 19, 1997, and Total accordingly requested an expedited ruling on its Motion For Stay. Burlington subsequently responded to Total's Motion For Stay. On October 15, 1997, the Division Director issued a letter ruling declining to grant the Total request. Subsequently, on October 7, 1997, Total filed its Application for Hearing De Novo in these consolidated cases and on October 16, 1997, tendered its share of estimated well costs in order to avoid triggering the assessment of risk penalty charges under the compulsory pooling order for the Marcotte No. 2. (Exhibit B) As indicated by our October 16th transmittal, because of the pendency of the *de novo* proceeding before the Commission, it was noted that payment was made under protest and without prejudice to any of Total's rights.

At the same time it tendered its share of wells costs, Total requested that it be provided with certain well data reflected on Total's standard well information requirements form. (Exhibit E, attached.) The form Total provided with its tender is the same form it uses for each and every well in which it participates. To now, no operator has refused to provide such information.

Burlington rejected Total's proper and timely tender of its share of estimated well costs claiming that Total placed conditions on its payment. In this regard, the October 16, 1997 transmittal for Total's payment more accurately and correctly speaks for itself. Burlington's rejection is a mischaracterization and a contrivance intended to justify its recoupment of the 200 percent risk penalty assessment from Total's proportionate share of production. At the same time, Burlington, on its own, attempts to condition the furnishing of well data on the execution of vague and undefined confidentiality agreements.

BURLINGTON'S REJECTION CONTRAVENES THE TERMS OF ORDER R-10878 AND ABROGATES TOTAL'S RIGHT UNDER THE ORDER

The terms of Order R-10878 are generic in form and follow the pattern the New Mexico Oil Conservation Division established decades ago for compulsory pooling orders. Industry has come to rely on the consistent phrasing and construction of the Division's pooling orders in the course of practice. In this particular case, the respective rights and obligations of the operator and the pooled interest owner are set forth in decretal paragraphs 3 and 4:

> (3) After the effective date of this order, the operator shall furnish the Division and each known interest owner in the subject unit an itemized schedule of estimated well costs.
>
> (4) Within 30 days from the date the schedule of estimated well costs is furnished to him, any non-consenting interest owner **shall have the right** to pay his share of estimated well costs to the operator in lieu of paying his share of reasonable well costs out of production, and any such owner who pays his share of estimated well costs as provided above shall remain liable for operating costs but shall not be liable for risk charges.

(Page 10, Order R-10878; emphasis added.)

The procedure for a non-consenting interest owner to exercise the rights accruing to it under the administrative order are clear, simple and straightforward. That Total followed the procedure fully and in a timely manner are not at issue in this case. To the contrary, Burlington has chosen to mischaracterize Total's payment as justification for its attempt to recoup the risk penalty from Total's share of production, thus depriving Total of the rights it was accorded by the Division under its Order. This Burlington may not do. Absent its mischaracterization, Burlington can point to no authority under the Oil and Gas Act or to any the provision of the Order which authorize its rejection of Total's tender and the imposition of the risk penalty. Similarly,

Burlington is unable to cite to any similar practice on the part of the industry where a timely and proper tender of a pooled party's share of well costs is made.

If allowed to be given effect, Burlington's unauthorized rejection of the tender will negate the express terms of Order R-10878 and will abrogate Total's right to avoid the risk penalty assessment in direct disregard for the Division's order. As a further consequence to the industry overall, the predictability and reliability of the Division's pooling orders will be rendered uncertain and open to question.

It is a sporting use of the Division's orders and procedures by which Burlington seeks to obtain a competitive advantage and leverage its bargaining position over a non-consenting party in the course of this administrative proceeding. Such conduct is an openly improper abuse of the administrative process which cannot be countenanced. The Commission must not allow this precedent to be established.

BURLINGTON WILL NOT BE PREJUDICED BY THE STAY

The drilling of the Marcotte No. 2 well under Order No. R-10878 is complete and the commencement of the Scott No. 24 under Order No. R-10877 is imminent. Total's working interest ownership in the Marcotte No. 2 is 4.65 percent. Total owns 3.5 percent of the acreage dedicated to the Scott No. 24. In the overall context of the prosecution of drilling activities of both wells, Total's proportionate shares are relatively small. Conversely, Burlington owns or controls significantly larger interests. Accordingly, the economic consequences to Burlington of staying the pooling orders for Total's interests are likewise insignificant and will not prejudice the operator in any way.

Earlier, Burlington itself acknowledged as much when it proposed that Total's election be held in abeyance and that Burlington would be willing to "carry" the interests of Total and other non-consenting working interest owners pending the resolution of the 640 acre spacing issue in the courts. (See excerpts from Burlington's October 10, 1997 Response to Total Minatome Corporation, et al.'s Motions To Stay, Exhibit F, attached.)

Given that Burlington's initial plans were to drill these two wells on 160 acre spacing units and the fact that Burlington commenced the Marcotte No. 2 before both (1) the effective date of the 640 acre spacing order and (2) the filing of its compulsory pooling applications, it is apparent that the full-time commitment of 100 percent of the working interests has never been a matter of paramount importance to Burlington's drilling program. Accordingly, Burlington's earlier proposal that the elections and payments be held in abeyance suggest an appropriate basis for the Commission to provide similar interim relief here.

CONCLUSION

For the above reasons, the Commission should immediately order the interim stay of Orders R-10877 and R-10878 pending the Commission's full disposition of the de novo proceeding. Further, in view of the immediate uncertainty created by Burlington's disavowal of Total's tender of its share of well costs for the Marcotte No. 2 and the likelihood that this scenario will be repeated for the Scott No. 24 well, the Commission is requested to issue an expedited ruling on this Second Motion For Stay.

Counsel for Timothy B. Johnson, Trustee, et al., and Lee Wayne Moore and JoAnn Montgomery Moore, Trustees, concurs with Total's request for stay. Counsel for Burlington has not responded to our communications seeking concurrence to the request. (Exhibit F).

MILLER, STRATVERT & TORGERSON, P.A.

By_____

J. Scott Hall
P.O. Box 1986
Santa Fe, New Mexico 87501
(505) 989-9614
Attorneys for Total Minatome Corporation

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing was mailed to counsel of record on the 31 day of October, 1997, as follows:

W. Thomas Kellahin, Esq.
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504-2265
Attorneys for Burlington Resources Oil & Gas Company

Rand L. Carroll, Esq.
New Mexico Oil Conservation Division
2040 S. Pacheco St.
Santa Fe, NM 87505-5472

Lynn Hebert, Esq.
New Mexico Oil Conservation Division
2040 S. Pacheco St.
Santa Fe, NM 87505-5472

J. E. Gallegos, Esq.
Gallegos Law Firm, P.C.
460 St. Michaels Drive #300
Santa Fe, New Mexico 87505-7602

J. Scott Hall