

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

**IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
DIVISION FOR THE PURPOSE OF
CONSIDERING:**

**CASE NO. 11844
ORDER NO. _____
(de novo)**

**APPLICATION OF CHESAPEAKE OPERATING,
INC. FOR AN UNORTHODOX WELL LOCATION,
LEA COUNTY, NEW MEXICO**

**RESPONSE OF MARATHON OIL COMPANY TO
THE MOTION TO QUASH SUBPOENA OF
CHESAPEAKE OPERATING, INC.**

On November 14, 1997, the Oil Conservation Commission issued a subpoena at the request of Marathon Oil Company ("Marathon"), directing Chesapeake Operating, Inc., to produce certain data relating to Chesapeake's application in this case. On November 24, 1997, Chesapeake filed and served its Motion to Quash that subpoena.

Chesapeake contends that the subpoena should be quashed because: 1) Marathon may purchase the seismic data which Marathon seeks through the subpoena; 2) the data sought by Marathon is confidential business information; and 3) the amount of data sought by Marathon is overly broad for purposes of this *de novo* hearing. Chesapeake's Motion must be denied because: 1) Chesapeake has not offered to sell the information to Marathon; 2)

because Marathon is entitled to the information through the Commission's discovery process regardless of whether it may purchase it elsewhere, and regardless of whether the information is confidential; and, 3) because the data is relevant to the issues in this case.

I. MARATHON HAS A RIGHT TO THE DATA

Chesapeake begins its Motion by arguing that because it has offered to sell the data to Marathon, Marathon may not discover that data through the Commission's discovery process. This argument is a mischaracterization of the negotiations between the parties, and a misreading of a prior Commission Order.

Attached to Chesapeake's Motion is a letter from Chesapeake to Marathon. In that letter, Chesapeake does not offer to sell the data to Marathon. In fact, the letter states ***"Chesapeake is NOT amenable to selling its data covering the subject six square miles requested by Marathon as part of a resolution to Marathon's appeal."*** (emphasis added). Instead, Chesapeake conditions release of the data upon Marathon's waiver any rights at issue in the current proceeding, and any rights to protest any further unorthodox well locations in the area.

Marathon has a constitutional right to review the information sought by the subpoena. It has a right to timely review this information once it is produced prior to a Commission hearing on the proposed unorthodox well location. After it has had a reasonable time to review this data, it has a right to cross-examine the witnesses of Chesapeake who seek a

Commission Order approving the location. If denied access to this data and the opportunity to cross-examine the witnesses who support the unorthodox location, its constitutional rights to due process will be violated and the Commission's order will be invalid as to Marathon.

Marathon owns an interest in the acreage immediately offsetting the proposed unorthodox well location. Under NMSA 1978, Section 70-2-17A, Marathon is guaranteed the opportunity produce its just and equitable share of the hydrocarbons underlying its tract. If Chesapeake is allowed to drill its well at the proposed unorthodox location, Chesapeake may drain hydrocarbons away from Marathon's tract that cannot reasonably be offset with counter drainage, thereby defeating Marathon's correlative rights.

Correlative rights are unique property rights. *Cowling v. Board of Oil, Gas and Mining*, 830 P.2d 220, 225 (Utah 1991). When the Division affects a party's correlative rights, it must ensure that such action complies with its duties to protect that party's constitutionally-protected rights. *Uhden v. New Mexico Oil Conservation Comm'n.*, 112 N.M. 528, 530, 817 P.2d 721,723 (1991); *Santa Fe Exploration Co. v. Oil Conservation Comm'n.*, 114 N.M. 103, 113, 835 P.2d 819, 829 (1992).

Federal courts have decided that the New Mexico Oil Conservation Commission proceedings are entitled to recognition as valid proceedings by the federal courts. *Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1415-17 (10th Cir. 1990). However, that approval is premised upon the presumption that the Commission's proceedings meet due

process standards which include the ability of adversely affected parties to present evidence and cross-examine witnesses. The right to confront and cross-examine witnesses applies to administrative proceedings where an interest protected by the Due Process clause is at stake. *See Doe v. United States Civil Service Comm'n.*, 483 F. Supp. 539, 579 (S.D.N.Y. 1980) (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). Without the opportunity to review the underlying seismic information upon which Chesapeake has based its decision to locate the proposed well at the proposed unorthodox location, Marathon's due process right of cross-examination will be denied. As it stands, Marathon faces the deprivation of constitutionally protected property rights in an administrative hearing because it is denied the right to review the data used to make the geological interpretation of this reservoir which will be drained by the proposed well. If this data is not made available to Marathon, its due process rights will be violated and the order of the Commission will be invalid as to its interests.

Chesapeake also argues that by a letter dated October 10, 1997, the Chairman of this Commission has stated the Commission's policy that it will not order the production of data which may be available for purchase elsewhere.

Marathon's response to this vacuous argument is twofold. First, the data is not available for purchase. Chesapeake has stated in no uncertain terms that it will not sell to Marathon the data it needs to prepare for the December 11 hearing. Furthermore, it will only

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sell limited data to Marathon if Marathon first waives its right to oppose the subject unorthodox location, and other unorthodox locations proposed by Chesapeake. *See* Exhibit A to Chesapeake's Motion to Quash.

Second, to the extent that Chesapeake has accurately stated the policy of the Commission, that policy is inconsistent with New Mexico law and the data must be produced. As stated above, Marathon has an absolute constitutional right to review the data. The standard for discovery in New Mexico civil proceedings is whether the information "is relevant to the subject matter involved in the pending action." NMRA 1997, 1-026. While this Commission has not adopted the Rules of Civil Procedure, no standard in any administrative or other civil proceeding provides any contrary guidance. If the data is relevant, it must be produced. That is the standard in New Mexico and neither Chesapeake nor the Commission may ignore it.

II. THE CONFIDENTIAL NATURE OF THE DATA DOES NOT SUPERSEDE MARATHON'S RIGHT TO REVIEW IT

Chesapeake's second argument is that the data which Marathon seeks is confidential. The confidential nature of the information is irrelevant to the issue of whether the Commission can and must Order the production of that data.

Marathon does not dispute the fact that Chesapeake may have contractual limitations on its right to release the data. It is the practice in the industry to enter into such

arrangements in developing prospects for drilling. However, by bringing its application to this governmental authority, and by asking the State to grant approval for a proposed well location that encroaches on acreage owned by another operator, Chesapeake has subjected itself to the processes of this Commission. Private contractual obligations cannot supersede this Commission's statutory charge to protect Marathon's correlative rights and assure that the due process rights of parties to Commission proceedings are protected. The issue of contractual, proprietary information is a red herring in this proceeding. Marathon is willing to execute any appropriate confidentiality agreement, by which it will agree not to disclose the data outside of this proceeding.

As stated above, if the information is relevant, it must be produced. Chesapeake can point to no Commission or judicial precedent that stands for the proposition that confidential, non-privileged data may be withheld from production in a civil proceeding. That precedent simply does not exist. The information is relevant. Chesapeake must produce it.

III. THE DATA IS NOT OVERLY BROAD

Chesapeake's final argument is that "the amount of data requested by Marathon is overly broad for the purposes of the *de novo* hearing." This may not be used by the Commission as a reason to deny production of the data until such time as the Commission has conducted an *in camera* review of the information and verified its relevance.

Chesapeake has not offered to sell the data to Marathon, but it has offered to produce

the data to Marathon if Marathon agrees not to oppose any unorthodox location proposed by Chesapeake “at any point along the north line of the SE/4 of Section 19-T16S-R36E.” That range covers far more than the quarter-mile which Chesapeake claims is sufficient for Marathon’s purposes. To the extent that the data in excess of the quarter-mile limitation that Chesapeake seeks contains information that may show the reservoir’s contours in excess of the quarter-mile limitation that Chesapeake seeks, that information is clearly relevant to the issue of how Marathon’s correlative rights may be affected by the proposed location. The data is relevant. It must be produced.

Furthermore, the Commission and Marathon have nothing other than Chesapeake’s bald statement that the data is overly broad. Neither the Commission nor Marathon have any way of verifying that statement other than reviewing the data. If the Commission wishes to verify that statement, Marathon requests that the Commission conduct an *in camera* review of the information, and rule on its relevance.

IV. CONCLUSION

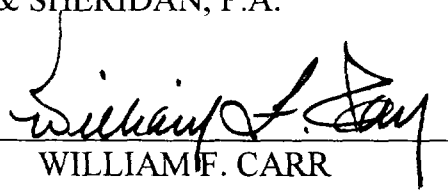
The proposed well location is based on seismic data. The only way that the Commission may discharge its duty of protecting Marathon’s correlative rights is to give it the opportunity to review and question the data upon which Chesapeake is now basing its proposed location. Chesapeake asks the Commission to take actions which will impair the correlative rights of Marathon. Before the Commission may do that, it must give Marathon

the opportunity to review and question the data it seeks by subpoena. Chesapeake's Motion to Quash must be denied.

Respectfully submitted,

CAMPBELL, CARR, BERGE
& SHERIDAN, P.A.

By:

A handwritten signature in black ink, appearing to read "William F. Carr", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of Marathon Oil Company to the Motion to Quash Subpoena of Chesapeake Operating, Inc., was hand-delivered this 1st day of December, 1997 to the following counsel of record:

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