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

APPLICATION OF MARATHON OIL PERMIAN LLC FOR COMPUSLORY POOLING, LEA COUNTY, NEW MEXICO.

CASE NO. 20220

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MARATHON OIL PERMIAN LLC'S POST-HEARING BRIEF

These cases involve applications Marathon Oil Permian LLC ("Marathon") filed seeking to pool uncommitted mineral interest owners pursuant to the Oil and Gas Act. Specifically, in Case 20220, Marathon seeks to pool uncommitted mineral interests within a Wolfcamp horizontal spacing unit underlying the E/2 of Section 15, Township 24 South, Range 34 East, NMPM, Lea County, New Mexico. In Case 20221, Marathon seeks to pool uncommitted mineral interests within a Bone Spring spacing unit underlying the E/2 of Section 15, Township 24 South, Range 34 East, NMPM, Lea County, New Mexico.

Marathon has 15% of the working interests in the proposed units. Chevron, who does not seek to be designated operator, has approximately 66%. Together, then, Marathon and Chevron have approximately 81% of the working interest in the proposed units. *See* Marathon Hearing Exhibit 4. Tap Rock Resources, LLC, ("Tap Rock") the only party objecting to this pooling application, has just over 3%. *Id.* As demonstrated at the February 7, 2019 hearing, multiple leases at issue are set to expire in April, June, or July. *See* Marathon Hearing Exhibit 5. If the Oil Conservation Division ("Division") grants Marathon's applications, Marathon intends to undertake activities to save those leases from expiration. If those leases expire, however,

approximately 25 lessors will be impacted. In addition, Marathon and Chevron's correlative rights will be negatively impacted. The upcoming lease expirations demonstrate that time is of the essence with respect to Marathon's applications.

Tap Rock, the only party objecting to this pooling application, attempts to delay Marathon's applications by asserting, incorrectly, that Marathon failed to negotiate with Tap Rock in good faith. To the contrary, Marathon sent Tap Rock a proposal letter on October 17, 2018 asking Tap Rock to elect into the wells (or not) within 30-days and alternatively offering to acquire Tap Rock's interests within a set period of time. Tap Rock ***never responded*** to Marathon's proposals. Tap Rock has not proposed its own wells, and has not expressed any interest in this proceeding other than delay. Based on Tap Rock's conduct to this point, Marathon believes that Tap Rock will not enter into a voluntary agreement, and further negotiation will be futile. Marathon's more recent communications with Tap Rock, when faced with Tap Rock's months-long silence, are reasonable and evidence good faith. Marathon's communications with Tap Rock beginning in late-January 2019, when Tap Rock finally engaged in this process, confirm Marathon undertook good faith negotiations with Tap Rock. Tap Rock's assertions to the contrary cannot be squared with the facts and or Division practice.

Under Division practice and precedent, the lease expiration issues and outweigh Tap Rock's objection regarding the sufficiency of negotiations in this matter, to the extent Tap Rock's objection has any merit, which it does not.. Consequently, the Division should reject Tap Rock's objections to Marathon's applications and should grant Marathon's applications.

I. MARATHON'S COMMUNICATIONS WITH TAP ROCK WERE REASONABLE AND IN GOOD FAITH

The Oil and Gas Act and the rules implementing it do not contain a good faith negotiations requirement. The Oil and Gas Act, in Section 70-2-17(C), provides that when interest owners

"have not agreed to pool their interests, and where one such separate owner, or owners, who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply, *the division, to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, shall poo*l all or any part of such lands or interests or both in the spacing or proration unit as a unit. *See* NMSA 1978, § 70-2-17(C) (emphasis added). That statute allows for pooling "after notice and hearing." *Id.* Section 70-2-18 requires an operator seeking to dedicate lands to a spacing unit with divided mineral ownership "to obtain voluntary agreements pooling said lands or interests *or an order of the division pooling said lands*." (Emphasis added). Rule 19.15.14.12, which governs the notice requirements for compulsory pooling applications, does not contain a requirement for "good faith negotiations." The Rule requires an applicant to "give notice to each owner of an interest in the mineral estate of any portion of the lands the applicant propose to pool… and whose interest has not been voluntarily committed to the area proposed to be pooled." Rule 19.15.14.12(A)(1)(a). The "good faith" requirement Tap Rock asserts in these cases has developed as a matter of Commission and Division practice. Marathon's communications with Tap Rock meet the statutory and regulatory requirements, as well as Division practice, which is discussed in more detail below.

The undisputed facts show that Marathon undertook good faith efforts to obtain Tap Rock's voluntary joinder in the wells beginning with Marathon's proposal letter sent on October 17, 2018, continuing through the February 7, 2019 hearing, and even through the time of the filing of this brief. Tap Rock, conversely, decided to wait until January 23, 2019, two weeks before the compulsory pooling hearing, to raise its purported concerns with Marathon. Those concerns are "purported" because at no time before the hearing did Tap Rock ever identify a single concern it had with Marathon's proposal or Marathon's Joint Operating Agreement ("JOA"). Tap Rock's

decision to wait until the last minute in an apparent effort only to delay is improper, in bad faith, and should not be countenanced by the Division.

Prior to filing its pooling applications, Marathon sent well proposal letters, including a proposed JOA and a proposed Authorization for Expenditures ("AFE") to the working interest owners ("Proposal Letter"). *See* Proposal Letter, Hearing Exhibit 15. The Proposal Letters were mailed on October 17, 2018, and it is undisputed that Tap Rock received the Proposal Letter on ***October 22, 2018***. Marathon proposed two offers in its Proposal Letter: 1) elect to participate in the wells, or 2) an offer to acquire the working interest owner's interest by assignment under specific terms. The Proposal Letter asked that an election be made within 30 days of receipt of the proposal, and informed the working interest owner that Marathon's offer to acquire their interest by assignment expired on November 19, 2018. It is undisputed that Tap Rock did not elect to participate in the well within 30 days of receipt of the Proposal Letter. It is also undisputed that Tap Rock did not respond to Marathon's offer to acquire Tap Rock's interest by November 19, 2018. It is undisputed that Marathon's contact information, including phone number and email address, is included in the Proposal Letter. At no time did Tap Rock propose any changes to the JOA, request any further information about the well proposal, or ask questions about the AFE or suggest a counter-offer to Marathon with respect to Marathon acquiring Tap Rock's interests. Faced with this silence, it was reasonable for Marathon to decide to file a force pooling application.

Marathon filed its compulsory pooling applications on December 20, 2018, approximately 60 days after proposing the wells. Marathon's counsel mailed the pooling applications and notice of the hearing to Tap Rock on January 4, 2019, and Tap Rock received the pooling applications on ***January 7, 2019***. *See* Marathon Hearing Exhibit 14. Tap Rock did not contact Marathon after receiving the pooling application until January 23, 2019. On February 4, 2019 Marathon emailed

an electronic version of the JOA to Tap Rock, which Tap Rock had already received with the well proposal letters sent on October 17, 2018. The following is a summary of the contacts between Marathon and Tap Rock beginning on January 23, when Marathon first learned that Tap Rock intended to request a continuance (Marathon's communications with Tap Rock are in bold):

- **January 23, 2019, the same day Marathon learned via Tap Rock's counsel that Tap Rock intended to request a continuance, Marathon's landman Ryan Gyllenband called Tap Rock's landman, Erica Hixson, and asked what Marathon could do to alleviate Tap Rock's concerns. Ms. Hixson stated she was not sure what the issues were and she would get back to Marathon.**

- January 29, 2019 (10:17 am): This is the first time Tap Rock affirmatively contacted Marathon about the well proposals. Ms. Hixson left Mr. Gyllenband a voicemail. Mr. Gyllenband recalls her stating that Tap Rock had questions, they did not want to slow down Marathon, and she would send the questions in an email.

- **January 29, 2019 (10:26 am): Mr. Gyllenband returns her call, but does not reach her.**

- January 29, 2019 (12:10 pm): Ms. Hixson sent a list of questions to Mr. Gyllenband.

- **January 29, 2019 (1:04 pm): Mr. Gyllenband responds to Ms. Hixson's email.**

- January 30, 2019 (1:23PM): Ms. Hixson emailed Mr. Gyllenband stating that Tap Rock was asking for a continuance because they didn't have clarity on our suggestion of removing them from the hearing, they didn't have a signed JOA, and said they would be open to discussing a trade, but did not provide any information about a trade.

- **January 30, 2019 (2:03PM): Mr. Gyllenband calls Ms. Hixson after he realizes she did not receive his email sent on January 29 responding to her questions.**

- **January 30, 2019 (2:39 PM): Mr. Gyllenband resends January 29 email to Ms. Hixson and Tap Rock's counsel.**

- **January 30, 2019 (3:37PM): Mr. Gyllenband calls Ms. Hixson to confirm receipt of the email, and Ms. Hixson states that her counsel was suggesting a continuance.**

- January 30, 2019 (4:09PM): Tap Rock confirms via email receipt of Mr. Gyllenband's January 29, 2019 email and states they are not comfortable with being dropped from the hearing so that the parties could continue to negotiate – instead, Tap Rock insisted on being subject to the force pooling.

- **February 4, 2019 (1:44PM): Mr. Gyllenband emailed Tap Rock the JOA (that they already had in hard copy) and asked for any comments they may have.**

- February 4, 2019 (3:17PM): Tap Rock confirmed receipt and said they would look at the JOA.

- February 7, 2019: Tap Rock raises questions about the JOA for the first time at the Examiner Hearing.

- **February 8, 2019: Mr. Gyllenband emails Ms. Hixson asking for more details on the trade.** *See* Feb. 8, 2019 email from Ryan Gyllenband to Erica Hixon, attached hereto as Exhibit A.

- **February 11, 2019: Mr. Gyllenband emails Ms. Hixon to follow up on the JOA sent February 4, 2019 and to ask for suggestions on changes to the JOA.** *See* Feb. 11, 2019 email from Ryan Gyllenband to Erica Hixon, attached hereto as Exhibit B.

- February 12, 2019: Ms. Hixon emails Mr. Gyllenband, stating "Before we get too far on a JOA, I'd like to reiterate that we don't want to be a party to this unit." *See* Feb. 12, 2019 email from Erica Hixon to Ryan Gyllenband, attached hereto as Exhibit B.

- **February 13, 2019: Mr. Gyllenband emails Ms. Hixon to answer questions posed by Tap Rock and to request more details on a proposed trade.** *See* Feb. 13, 2019 email from Ryan Gyllenband to Erica Hixon, attached hereto as Exhibit B.

As this summary shows, between January 23, 2019, when Tap Rock first decided to engage in this process until the hearing, Marathon reached out to Tap Rock seven times. Tap Rock was evasive and non-responsive to Marathon's requests for information about how Marathon could address Tap Rock's concerns. The only quasi-offer Tap Rock extended was to suggest the possibility of a trade, but without any detailed information about such a trade. These undisputed facts establish that Marathon conducted good faith negotiations with Tap Rock, contrary to Tap Rock's contentions. Tap Rock's objection to Marathon's application should be rejected.

II. TAP ROCK'S POSITION IN THIS CASE IS DIRECTLY CONTRADICTED BY TAP ROCK'S TESTIMONY AND EXHIBITS IN OTHER CASES

Tap Rock's assertion that Marathon's applications should be dismissed for the failure to do more is without merit and contradicts Tap Rock's own testimony and exhibits offered in other

cases—cases in which Tap Rock has testified that sending a proposal letter and JOA, with no further follow up at all with a working interest owner, constitutes good faith. For example, in Case No. 16230, Ms. Hixson testified that she, on Tap Rock's behalf, sent a well proposal letter to a working interest owner, including an operating agreement, and that, in her opinion, Tap Rock satisfied the good-faith negotiation requirement. *See* Transcript of June 20, 2018 Hearing, Application of Tap Rock Resources, LLC for Compulsory Pooling, Eddy County, New Mexico, Case No. 16230, page 8, lines 20-25, page 9 lines 1-7, and lines 17-20. Ms. Hixson testimony does not include any indication that Ms. Hixson or anyone else from Tap Rock followed up with the working interest owner after sending the proposal letter. Ms. Hixson transmitted the proposal letter via email and hard copy, and in each stated, essentially, that if the working interest owner wanted to discuss Tap Rock's proposal or other options, "please contact me." The hearing exhibits provided by Tap Rock in that case do not include any communications with the working interest owner other than the proposal letter. In other words, apart transmitting the proposal letter to the working interest owner, the record is devoid of any further communications with the working interest owner. Yet, Tap Rock testified to the Division that Tap Rock made good efforts to obtain voluntary participation in the well. On November 5, 2018, the Division granted Tap Rock's application. *See* Order No. R-20208.

Ms. Hixson testified similarly in Case Nos. 16433 and 16432, in response to questions from Tap Rock's counsel, Dana Arnold. *See* October 4, 2018 Hearing Transcript, Case No, 16432, pages 6-7 (Ms. Hixson testifies that 1) she provided the well proposal letter to the parties sought to be pooled; 2) a JOA was included with the proposal, 3) Tap Rock requested that the Division pool uncommitted working interest owners, and 4) in her opinion, Tap Rock made a good faith effort to obtain voluntary participation); *see also* October 4, 2018 Hearing Transcript, Case No, 16433,

pages 7-8 (similar testimony in response to similar questions posed by Ms. Arnold). As in Case No. 16230, the hearing exhibits contain no evidence of any communications with working interest owners other than the proposal letter. The testimony and evidence provided in support of the pooling applications in these three cases state that providing a proposal letter, along with a JOA and AFE, constitutes good faith negotiations by Tap Rock.

Tap Rock's own record in the three cases discussed above as examples is inconsistent with its opposition to Marathon's applications. More importantly here, the record shows that Marathon communicated with Tap Rock multiple times in an attempt to discern and address Tap Rock's concerns and that the parties have not been able to reach agreement.

III. MARATHON'S COMMUNICATIONS WITH TAP ROCK SATISFY THE DIVISION'S PRACTICE OF REQUIRING GOOD FAITH NEGOTIATIONS.

As discussed above, the "good faith" requirement Tap Rock asserts in these cases has developed as a matter of Commission and Division practice. Importantly, neither the Oil and Gas Act nor the rules implementing it contain a "good faith" negotiations requirement.[1] Marathon undisputedly complied with the Oil and Gas Act and its implementing regulations. The Division, in a number of orders, has clarified what the Division considers to be required prior to filing a compulsory pooling application—requirements Marathon undisputedly met here. For example, in

[1] Significantly, the Division rule that allows presentation by affidavit requires that an affidavit contain information regarding "written evidence of attempts the applicant made to gain voluntary agreement including but not limited to copies of relevant correspondence." Rule 19.15.14.12(A)(1)(b)(vi). The Rule, recently promulgated, does not expressly require "good faith negotiations." Cases presented by affidavit routinely rely on similar actions as evidence of good faith negotiations. *See e.g.* Order No. R-20202, *Application of COG Operating, LLC to Re-Open Case No. 15090 to Pool the Interests of Additional Mineral Owners Under the Terms of Compulsory Pooling Order No. R-13808-A, Eddy County, New Mexico*, Case No. 15090 (Re-Opened); Order R-20221, *Application of Cimarex Energy Co. for Compulsory Pooling, Lea County, New Mexico*, Case No. 16379; Order R-20222, *Application of Cimarex Energy Co. for Compulsory Pooling, Lea County, New Mexico*, Case No. 16437; Order R-20273, *Application of Devon Energy Production Company, L.P. For Compulsory Pooling, Eddy County, New Mexico,* Case No. 16346; Order R-20274, *Application of Devon Energy Production Company, L.P. For Compulsory Pooling, Eddy County, New Mexico,* Case No. 16349.

Order R-13155 (Aug, 11, 2009),[2] the Division stated that, while not required by statute or rule, the Division has, by long-standing practice, required that applicants for compulsory pooling furnish interest owners with a well proposal prior to filing an application "to afford the owners a reasonable opportunity to reach a voluntary agreement." Order R-13155, Findings ¶ 5. The Division noted that the practice of requiring a well proposal letter be sent prior to filing an application is not a *per se* requirement, when, for example, "the consequent delay will jeopardize an application's leasehold interest." *Id.* ¶ 6. The Division authorized COG to refile its applications "30 days after COG has furnished to all owns in the proposed unit a formal well proposal, including a proposed form of joint operating agreement and an authorization for expenditures (AFE)...." Decretal ¶ 1. Contrary to Tap Rock's argument, the Division did not require COG to undertake any further efforts with respect to Chesapeake before refiling its pooling application, other than furnishing the well proposal and AFE. Consequently, Division practices does not support Tap Rock's argument that Marathon failed to comply with Division practice prior to filing the pooling application.

The Division followed Order R-13155 with Order No. R-13165 (Sept. 3, 2009),[3] designed to clarify the requirements the Division will apply in compulsory pooling applications. *See* Findings ¶ (5) ("Because past Division practice has not been entirely consistent, and because some language in Order No. R-13155 was not intended to apply to all cases, the Division takes this opportunity to clarify the requirements it will ordinarily require in compulsory pooling cases...."). The Division stated: "At least thirty days before filing a compulsory pooling application, in the absence of extenuating circumstances, an applicant should send to locatable parties it intends to as

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[2] *Application of COG Operating LLC for Designation of a Non-Standard Oil Spacing and Proration Unit and Compulsory Pooling, Eddy County, New Mexico*, Case Nos. 14365 and 14366.

[3] *Application of Cimarex Energy Co. for a Non-Standard Spacing Unit and Compulsory Pooling, Chavez County, New Mexico*, Case Nos. 14368, 14369, 14370, 14372.

the Division to pool a well proposal identifying the proposed depth and location and target formation, together with a proposed [AFE] for the well." Findings ¶ 5(a). A proposed form of JOA is not required in every case "but should be furnished with reasonable promptness if requested." *Id.* ¶ 5(c). "[C]ompliance with the more subjective requirement the Division has customarily recognized for good faith negotiations is better examined...at the compulsory hearing, based upon a full evidentiary record." *Id.* ¶ 5(d).

Marathon more than complied with Order R-13165. Marathon sent its Proposal Letter more than 60 days before filing the compulsory pooling applications – and Tap Rock did not respond until months later. Marathon even included its JOA, which Order R-13165 does not require. Marathon met the "more subjective" good faith negotiation requirement as demonstrated at the hearing, by Marathon's multiple communications with Tap Rock. Tap Rock, however, failed to uphold its end of the negotiations—rather than timely alert Marathon to its concerns with the JOA or Marathon's Proposal Letter, Tap Rock sat back silently until right before the scheduled hearing. Even when Tap Rock began to communicate with Marathon, Tap Rock's commutations with Marathon do not demonstrate "good faith" and do not amount to "negotiations" because Tap Rock never indicated its concerns with the JOA or Marathon's proposed development, and never presented any good faith solutions to address Tap Rock's concerns. It is patently unfair to sit silently until the last minute and then claim that negotiations have not occurred.

Marathon's course of conduct with Tap Rock is consistent with Division orders granting applications even when there has been an assertion that good faith negotiations did not occur. Order R-12581 (July 6, 2006)[4] is illustrative. In that case, the Division concluded that Hudson Oil Company ("Hudson") satisfied the good faith negotiation obligation by sending an AFE and JOA

[4] *Application of Hudson Oil Company of Texas, William A. Hudson, and Edward R. Hudson for Compulsory Pooling, Eddy County, New Mexico*, Case No. 13598.

to working interest owners, even though Hudson did not respond to a request from an interest owner in a way that was satisfactory to that owner. *See* Findings ¶ 7(e) ("Hudson provided an AFE and a JOA to prospective partners in this well."); *id.* ¶ 8(a) (The Ards sent Hudson a letter requesting additional information, but they "never receive[d] a satisfactory response from Hudson."). In that case, as here, the working interest owner contended that Hudson, the applicant, did not negotiate in good faith and did not treat them in an equitable manner. *Id.* ¶ 8(a). But, in that case, unlike here, the testimony demonstrated that the working interest owner "normally request additional information prior to agreeing to participate in wells in which cost to the [interest owner] will be substantial." *Id.*

The Division rejected this argument, stating: "Hudson did supply an AFE and JOA to the Ards [the protesting working interest owner] and to all other parties owning an interest in these Units implying parties were likely treated equitably in regards to basic information: *Id.* ¶ 9. Even though Hudson apparently only responded once to the working interest owner's request for information, and even though the working interest owner contended the response was unsatisfactory, the Division granted the application and designated Hudson the operator of the Units. Findings ¶ 14, Decretal ¶¶ 1, 2. The same outcome is warranted here.

Commission Order R-10731-B,[5] cited by Tap Rock in its Motion for Continuance, does not compel a contrary conclusion. In that Order, the Commission was deciding between two competing well proposals, which is not an issue here since Tap Rock has not filed competing proposals. The Commission, in Order R-10731-B, acknowledged that "good faith negotiations" is ***a factor*** when evaluating competing proposals. Findings ¶ 23(g). The Commission also stated that a force pooling application can be denied and the applicant instructed to negotiate prior to refiling.

[5] *Application of KCS Medallion Resources*, Case No. 11667, and *Application of Yates Petroleum Corporation*, Case No. 11677.

Findings ¶ 23(g). Tap Rock reads this Order too narrowly because the Commission in Order R-10731-B identified good faith negotiations as "a factor," and as discussed in more detail below, the Division has acknowledged that countervailing issues, such as lease expiration issues, can overcome allegedly insufficient negotiations.

Second, and importantly, the facts of that case demonstrate that Marathon's communications with Tap Rock, both before and **after the filing of the pooling application**, is relevant to the issue of good faith and satisfies the Division and Commission's requirements. The Division and the Commission relied on negotiations that took place prior to the hearing as well as negotiations that took place prior to filing the compulsory pooling applications when assessing the adequacy of discussions between the two parties. *See* Findings ¶ 6 ("Yates and Medallion have conducted negotiations *prior to the hearing* but have been unable to reach a voluntary agreement as to which company will drill and operate the well within the spacing unit." (emphasis added); Findings ¶ 23(g) ("Both Yates and Medallion conducted adequate discussions prior to filing competing force pooling applications."). Significantly, the communications that took place in that case were much more abbreviated and less compliant with Division practice than here, because the competing applicants filed compulsory pooling applications either before formally proposing the wells or only shortly thereafter. With respect to the N/2 of the proposed unit, Medallion sent a letter to Yates on August 30, 1996, offering Yates a farmout, which Yates declined on September 17, 1996. Less than ten days later, Medallion filed its compulsory pooling application for the N/2. Five days after filing the pooling application, Medallion proposed the well, and the hearing, originally scheduled for just week away, was continued for approximately only 20, to November 7, 1996, to allow Yates the "opportunity to review the proposal." Yates then informed Medallion that it preferred a different well location.

Yates then proposed its own well for the N/2 and the parties met on the date that the hearing was scheduled for, November 7, to discuss development of the units and could not reach an agreement. Several days later, Medallion proposed to drill a well in the E/2 and then just one day later filed a compulsory pooling application for the proposed E/2. Yates then formally proposed wells in the W/2 and E/2, by letters dated November 14 and November 22 respectively, and then, less than two weeks later, filed its compulsory pooling applications. The Division granted Medallion's applications and denied Yate's applications.

The Commission concluded that this course of conduct satisfied the good faith requirement. Findings ¶ 23(g). Significantly, the Commission and the Division relied on communications between the parties after the compulsory pooling applications were filed but before the hearing. As discussed above, Marathon, in good faith, reached out to Tap Rock as soon as Marathon was aware of Tap Rock's concerns. The fact that those communications with Tap Rock occurred after the filing of the compulsory pooling application is irrelevant, especially in light of Marathon's compliance with the Division's later direction to provide the Proposal Letter to Tap Rock with adequate time for Tap Rock to evaluate it before seeking to pool Tap Rock.

In fact, very few Division Orders have dismissed applications for failure to undertake appropriate efforts with respect to communications with voluntary joinder, and those orders are easily distinguishable. For example, in Order No, R-10545 (Feb. 22, 1996),[6] the Division concluded that the applicant in that case had not undertaken "reasonable efforts" because it filed its pooling application only eight days after sending a letter to the working interest owners requesting voluntary agreement. Order ¶ 9, Findings ¶ 11; *see also* Order No. R-10977, ¶¶ 3, 4

[6] *Application of Meridian Oil, Inc. for Compulsory Pooling and An Unorthodox Gas Well Location, San Juan County, New Mexico*, Case No, 11434.

(April 17, 1998)[7] (dismissing an application because the applicant filed a compulsory pooling application two weeks before formally proposing the well to the interest owners). In Order R-9093-B (Sept. 1990),[8] the Division concluded that the applicant did not conduct good faith negotiations because it "*neither initially nor subsequent to completing the subject well*...attempted to secure a voluntary agreement with Chevron." Findings ¶ 17 (emphasis added).

In Order No. R-12555 (May 11, 2006)[9] the Division found that the applicant, Pride Energy Company ("Pride"), adequately negotiated with Yates with respect to one well proposal, the X-1 well, but not the second, the X-2 well. With respect to the second well, the X-2 well, the Division found that Pride's application should be denied because Pride proposed the well on May 4, 2006, just days before the compulsory pooling hearing. Findings ¶ 15, ¶ 17. That is not the case here—Marathon proposed the wells long before the hearing and the parties engaged in communications up to and beyond the hearing. Conversely, for the first proposal, Pride contacted Yates in December, and waited to send an AFE in February. Findings ¶ 14. After that, the parties "had further discussion" but failed to reach an agreement. Findings ¶ 14(a). The Division concluded that Pride conducted good faith negotiations with Yates regarding the X-1 well. Findings ¶ 16.

The circumstances here demonstrate that Marathon's communications with Tap Rock are akin to those the Division found adequate with respect to the Pride's proposed X-1 well and clearly distinguishable from the facts that the Division relied on with respect to its denial of Pride's application for the the X-2 well. Here, it is undisputed that Marathon sent the proposal letter more than 90 days before the hearing—on October 22, 2018, with the hearing held on February 7, 2019. The proposal letter was sent more than 30 days before the pooling application was filed. During

[7] *Application of Redstone Oil & Gas Company for Compulsory Pooling and Unorthodox Well Location, Eddy County, New Mexico,* Case No. 11927.
[8] *Application of Yates Energy Corporation to Amend Division Order R-9093*, Case No. 9998.
[9] *Application of Pride Energy Company for Compulsory Pooling, Lea County, New Mexico*, Case No.

that time, Tap Rock did not voice a single concern or issue with Marathon's proposal nor did Tap Rock attempt to counter Marathon's offers. As soon as Marathon became aware that Tap Rock had an issue, Marathon contacted Tap Rock, multiple times, to no avail. Marathon's actions clearly distinguish Marathon from Pride's conduct with respect to the X-2 well, demonstrating that Tap Rock's argument fails. Instead, as with the Pride X-1 well, Marathon conducted good faith negotiations with Tap Rock but has not been able to reach a voluntary agreement. That is all the Oil and Gas Act, the rules implementing it, and the Division require.

In fact, when, as here, lease expiration issues are an issue, the Division has been willing to grant applications with even fewer negotiations between the parties. For example, in Order No. R-11870 (Dec. 6, 2002),[10] the Division found that "minimal negotiations have taken place between the applicants." In that case, in July 2002, Arrington sent a sent an AFE to Great Western, but did not give Great Western a JOA, or an actual well location, and undertook no further efforts to obtain Great Western's joinder in the well, according to Great Western's witness. *See* Transcript of Hearing, Page 23, lines 12-23. Apparently, Great Western did not respond to Arrington's proposal, before Arrington filed its pooling application. *See* Hearing Exhibit No. 3 (outlining Arrington's communications with Great Western). In September 2002, Arrington filed its pooling application, and Great Western still provided no response to Arrington's proposal or pooling application. The Examiner stated: "The minimal negotiations between the parties might, in another case, required dismissal of both applications. However, the proximity of the expiration of Arrington's interest held pursuant to a term assignment on March 1, 2003, militates against dismissal in this case."

[10] *Application of David H. Arrington Oil and Gas, Inc. for Compulsory Pooling, Lea County, New Mexico*, Case No. 12942, and *Application of Great Western Drilling for Compulsory Pooling, Lea County, New Mexico*, Case No. 12956.

Findings ¶ 28. The Division granted Arrington's application and designated Arrington as operator. Decretal ¶¶ 1, 2.

Here, Marathon did more than minimal negotiations prior to the hearing. Marathon provided Tap Rock with a proposal letter that included the AFEs and JOA. Marathon's Proposal Letter also offered to acquire Tap Rock's interest. Tap Rock never responded. As soon as Marathon became aware that Tap Rock had concerns, Marathon contacted Tap Rock and continued to contact Tap Rock to discuss a path forward. To date, Tap Rock has not suggested any concrete counter offers.[11] Even if the Division were to conclude that Marathon and Tap Rock's communications were akin to those in Order No. R-11870 (which Marathon's were not), then the lease expiration issues here militate against dismissal, just as they did in Order No. R-11870.

IV. TAP ROCK'S RECENTLY CREATED CONCERNS REGARDING THE JOA AND MARATHON'S PLAN OF DEVELOPMENT DO NOT EXCUSE TAP ROCK'S FAILURE TO NEGOTIATE WITH MARATHON

At the February 7, 2019 hearing, counsel for Tap Rock raised three issues in an apparent attempt to demonstrate Tap Rock's concerns with the JOA or Marathon's development plans. The fact that Tap Rock's counsel raised these issues for the *first time* at the hearing reflects negatively on Tap Rock for one of two reasons: Either Tap Rock had concerns from the beginning and withheld those concerns from Marathon until the hearing, even though Marathon asked Tap Rock repeatedly about its concerns, or Tap Rock created these concerns for the sole purpose of raising them at the hearing in attempt to cast aspersions on Marathon and its proposals.

For example, Tap Rock's first issue concerns the costs that could be assessed against Tap Rock based on the estimated costs Marathon provided to Tap Rock in its AFEs. To demonstrate Tap Rock's concerns, Tap Rock created a spreadsheet laying out three scenarios, each scenario

[11] Tap Rock's suggestion of a trade, without further information such as acreage to be traded, is not adequate.

representing a different number of wells and a different cost to Tap Rock based on Marathon's estimated AFEs.[12] The first scenario is based on the eight wells listed in Marathon's Proposal Letter. The second scenario is based on the six wells Marathon included in its compulsory pooling application. The third scenario is based on a **January 29, 2019** email from Mr. Gyllenband to Ms. Hixson in which Mr. Gyllenband stated that Marathon would initially be drilling four wells and a February 4, 2019 email from Mr. Gyllenband to Tap Rock stating Tap Rock's interest in the units. *See* Tap Rock Exhibit 2 (Scenario Three is based on "Well Count as communicated in 1/29/19 email)); *id.* ("Tap Rock percentage (as communicated in 2/4/19 email")). Tap Rock's reliance on information it obtained January 29 and February 4, three months after Marathon proposed the wells, in an attempt to demonstrate Tap Rock's concerns with Marathon's proposals fails; Tap Rock's issues that Tap Rock created as of January 29/February 4cannot be a basis for why Tap Rock did not negotiate with Marathon beginning in October 2018, or even December, 2018, when Marathon filed its pooling application. In any event, the AFEs are estimates, subject to change and to objection once the wells are drilled.

Tap Rock's second and third concerns relate to language in the JOA and those concerns also appear to be created for the hearing, because Tap Rock had the JOA since October 2018 and never raised the issues with the JOA language until the hearing, despite Marathon's requests for Tap Rock's feedback on the JOA. Tap Rock's concerns with the JOA language revolve around the lease expiration issues, including the timing proposed in the JOA and impacts of lease expiration. Because Tap Rock had never reached out to Marathon, it is unlikely that Tap Rock was aware of the lease expiration issues, which form the basis of Tap Rock's comments on the JOA. Because Tap Rock likely was not aware of the lease expiration issues, Tap Rock's reluctance to enter into

[12] Counsel for Marathon objected to this exhibit at the hearing because there was no opportunity to cross-examine the person who prepared it to ensure its accuracy.

the JOA as of October 2018 or as of December 2018 cannot be based on those issues. Rather, it appears as if Tap Rock created these concerns after the fact in an attempt to justify their decision not to join the JOA.

V. CONCLUSION

Based on the foregoing, Marathon ask that the Division grant its applications in Case Nos. 20220 and 20221 and reject Tap Rock's own inconsistent position regarding what is required for good faith negotiations.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: _____

Deana M. Bennett
Zoë E. Lees
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record by electronic mail on February 15, 2019:

Seth McMillian
P.O. Box 2307
Santa Fe, NM 87504
smcmillan@montand.com

Dana Arnold
Tap Rock Resources, LLC
620 Park PointDrive, Suite 200
Golden, CO 80401
Darnold@taprk.com

By: _____

Deana M. Bennett
Zoë E. Lees
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

Zoe Lees

From: Gyllenband, Ryan (MRO) <mrgyllenband@marathonoil.com>
Sent: Monday, February 11, 2019 2:57 PM
To: Deana M. Bennett; Bradfute, Jennifer (MRO)
Subject: FW: Will Kane Unit

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From: Gyllenband, Ryan (MRO)
Sent: Friday, February 08, 2019 7:18 PM
To: 'Erica Hixson' <ehixson@taprk.com>
Subject: RE: Will Kane Unit

Erica,

This email just now came through. I was presented with it at the hearing yesterday, but it shows that I received it at 5:42PM on Friday 2/8/19, even though it clearly seems that you sent it on Tuesday 2/5/19 at 10:06AM. Our emails are very strange!

No I have not sent a trade proposal. Since I only handle Lea County and I don't know of any operated Tap Rock units in Lea where we have an interest I'll ask my Eddy county colleagues if they know of any in Eddy county. In the meantime, please let me if you know of any acreage of Marathon's that Tap Rock is interested in and I will propose the trade to the team.

Thanks and have a great weekend!

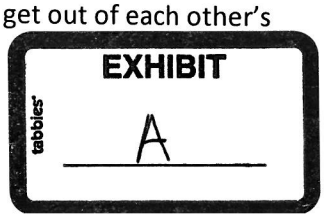
Ryan

From: Erica Hixson <ehixson@taprk.com>
Sent: Tuesday, February 05, 2019 10:06 AM
To: Gyllenband, Ryan (MRO) <mrgyllenband@marathonoil.com>
Subject: [External] RE: Will Kane Unit

Hey Ryan,
Did you ever send a trade proposal?
Erica

From: Erica Hixson
Sent: Wednesday, January 30, 2019 12:23 PM
To: 'Gyllenband, Ryan (MRO)' <mrgyllenband@marathonoil.com>
Subject: RE: Will Kane Unit

Ryan,
I believe our gen counsel will be requesting a continuance on this, knowing that we didn't have clarity on the highlighted item below and don't have a JOA signed. Let me know if you have any ideas/trade proposals to get out of each other's hair on this one. I can chew on it, too...



Talk soon,
Erica

From: Erica Hixson
Sent: Tuesday, January 29, 2019 11:10 AM
To: 'Gyllenband, Ryan (MRO)' <mrgyllenband@marathonoil.com>
Subject: Will Kane Unit

Hey Ryan,
Last week you'd called about our intentions on the Will Kane unit upcoming hearing. We got work through our attorney that you guys weren't seeking to force pool Tap Rock? We are a little confused about that - can you confirm what you guys are thinking for the 2/7 hearing?
Other questions:

1) What are the anticipated spud and completion dates for each of the Will Kane wells?
2) What are the upcoming lease expirations? I know you mentioned you might have one as well as CVX?
3) Are you drilling & completing one by one or in batch style?
4) Can you please send DTO or DOTO pages (redacted is fine) showing Tap Rock's interest?
5) Have modifications to the JOA been proposed by other parties? If so, please send the most up to date version for review.
6) Are there other wells that will share in the facilities and pad costs?
7) Whose gathering system will these wells use?

Feel free to give me a call to discuss if that's easier - thanks!
Erica

Erica Hixson
Landman
Office: 720-460-3316
602 Park Point Drive Suite 200
Golden, Colorado 80401
ehixson@taprk.com

Zoe Lees

From: Gyllenband, Ryan (MRO) <mrgyllenband@marathonoil.com>
Sent: Friday, February 15, 2019 1:01 PM
To: Zoe Lees
Subject: FW: Will Kane JOA

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From: Gyllenband, Ryan (MRO)
Sent: Wednesday, February 13, 2019 3:23 PM
To: 'Erica Hixson' <ehixson@taprk.com>
Subject: RE: Will Kane JOA

Erica,

As far as a trade we are definitely open to discussing that option. I've talked with my Eddy Co. coworkers and we can't find anything that jumps out at us where Tap Rock operates and we have a small WI. Please take a look and let me know if you see anything on your end, or alternatively an area Tap Rock is piecing together some acreage and you see Marathon with some leases, that's probably something that would be more evident on your end.

You asked some questions regarding the Will Kane wells the week before last and I had to run down some answers from my team on two of them here they are:

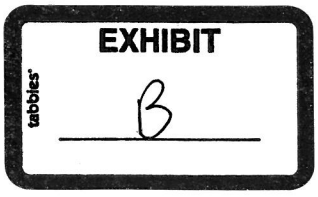
6) Are there other wells that will share in the facilities and pad costs?
   No, we have no plans for other wells to share in the facility costs at this time.
7) Whose gathering system will these wells use?
   This is still being negotiated.

Let me know if you have additional questions.

Thanks,
Ryan

From: Erica Hixson <ehixson@taprk.com>
Sent: Tuesday, February 12, 2019 4:37 PM
To: Gyllenband, Ryan (MRO) <mrgyllenband@marathonoil.com>
Subject: [External] RE: Will Kane JOA

Beware of links/attachments.
Hey Ryan,
Received. I'm hopeful that our Emails are getting along better.



Before we get too far on a JOA, I'd like to reiterate that we don't want to be a party to this unit. We'd much prefer to trade out of this acreage. Have you had a chance to look at other areas where we could make this happen? I am looking for some ideas, too.
Erica

From: Gyllenband, Ryan (MRO) <mrgyllenband@marathonoil.com>
Sent: Monday, February 11, 2019 3:06 PM
To: Erica Hixson <ehixson@taprk.com>
Subject: RE: Will Kane JOA

Erica,

I am following up on the JOA that I sent last week. I understand that Tap Rock has some concerns with the date of the initial well given the joint losses provision. Is there a date that Tap Rock would feel comfortable with, or a way we can amend the joint losses provision/add additional language in Art. XVI that would make Tap Rock feel comfortable? Marathon is open to reviewing any suggestions.

Also please send any other comments to our JOA form that you may have and we will review.

Please confirm that you received this email, hopefully the email issues are now resolved.

Thank you,
Ryan

Ryan Gyllenband
Land Professional
Marathon Oil Company
713.296.2453 (Office)
281.684.7389 (Cell)
mrgyllenband@marathonoil.com

Marathon Oil

From: Gyllenband, Ryan (MRO)
Sent: Monday, February 04, 2019 2:44 PM
To: 'Erica Hixson' <ehixson@taprk.com>
Cc: Clayton Sporich <csporich@taprk.com>; 'darnold@taprk.com' <darnold@taprk.com>
Subject: Will Kane JOA

Erica,

Hope you had a nice weekend.

I wanted to send you the JOA in pdf form in case that was easier for you since the one included with the proposals was a hard copy. Please let me know if there are any provisions you have issue with and we can discuss.

As I previously mentioned, Marathon shows Tap Rock with 3 leases: Estate of George Finley III, Mary Kay Cubine, and Scott R. Brown Revocable Trust covering 1.875, 1.875, and 6.67 net acres respectively, which equals 3.255208% WI in the proposed 320 acre unit.

I've copied Clayton and Dana in case my emails still aren't getting through to you.

Thanks,
Ryan

Ryan Gyllenband
Land Professional
Marathon Oil Company
713.296.2453 (Office)
281.684.7389 (Cell)
mrgyllenband@marathonoil.com