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

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

CASE NO. 20220

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MARATHON OIL PERMIAN LLC'S RESPONSE TO TAP ROCK OPERATING LLC'S CLOSING BRIEF

Marathon Oil Permian LLC ("Marathon"), though the evidence presented at the February 7, 2019 hearing on Marathon's compulsory pooling applications, and as established in its Post-Closing Brief ("Marathon Brief"), has and continues to negotiate with in good faith with Tap Rock Operating, LLC ("Tap Rock"). Tap Rock's Closing Brief does not refute Marathon's showing. Contrary to Tap Rock's assertions, Tap Rock has not, and indeed cannot, demonstrate that Marathon "failed to comply with the Division's notice requirements for compulsory pooling" or that Marathon failed to "negotiate in good faith with Tap Rock prior to filing its Applications in this case." Response at 1. Nor has Tap Rock demonstrated that dismissal is (or could be) warranted here, especially given the many leases subject to expiration, the number of lessors that will be impacted, and the very small interest that Tap Rock has in this proposed unit, just over 3%. In addition, and importantly, Tap Rock's position in this case is contradicted by Tap Rock's own conduct in other cases, and is not supported by the law or the orders Tap Rock cites. Tap Rock's requested dismissal should be rejected and Marathon's applications granted.

I. MARATHON COMPLIED WITH THE OIL AND GAS ACT AND ITS IMPLEMENTING REGULATIONS

Tap Rock's Brief begins by asserting that Marathon "disregard[ed] the express statutory requirements and rules of the Oil Conservation Commission ("Commission"). Tap Rock Brief at 1. The Oil and Gas Act, however, simply does not impose a "good faith" negotiation requirement on applicants. The Oil and Gas Act does not require any specific information be included in a well proposal letter, in an application for compulsory pooling, or set forth any standards governing negotiations. Thus Tap Rock's argument that Marathon somehow disregarded a statutory requirement lacks any merit. The only statute Tap Rock cites, NMSA 1978, § 70-2-7, authorizes the Division to promulgate rules pursuant to the Oil and Gas Act. *See* NMSA 1978, § 70-2-7 ("The oil conservation division of the energy, minerals and natural resources department shall prescribe by rule its rules of order or procedure in hearings or other proceedings before it under the Oil and Gas Act [this article]."). That statute is irrelevant, except that it authorizes the Division's rules that Tap rock also cites. Rules that Marathon undisputedly complied with.

With respect to the regulations implementing the Oil and Gas Act, Tap Rock cites two rules, Rules 19.15.4.9 and 19.15.4.12 NMAC. Rule 19.15.4.9 is inapplicable here as it governs the notice required to provide prior to a hearing, which Tap Rock is not disputing.[1] Rule 19.15.4.12(A)(1) sets forth the notice requirements for compulsory pooling applications. It requires:

> The applicant shall give notice to each owner of an interest in the mineral estate of any portion of the lands the applicant proposes to be pooled or unitized whose interest is evidenced by a written conveyance document either of record or known

[1] Even if this rule were relevant, Marathon complied with it. Marathon provided information to the Division for the Division to post on its website that included, among other items "a legal description of the spacing unit or geographical area the applicant seeks to pool or unitize," Rule 19.15.4.9A(8) NMAC, and Marathon mailed notice of the hearing to Tap Rock, which Tap Rock does not dispute receiving.

> to the applicant at the time the applicant filed the application and whose interest has not been voluntarily committed to the area proposed to be pooled or unitized (other than a royalty interest subject to a pooling or unitization clause). An applicant seeking compulsory pooling of a standard horizontal spacing unit need not give notice to affected persons in adjoining spacing units or tracts unless the division so directs.

Marathon complied with this rule. Marathon gave notice to mineral interest owners "*known to [Marathon] at the time the [Marathon] filed the application and whose interest has not been voluntarily committed* to the area proposed to be pooled or unitized." Again, this Rule applies to notice for the pooling hearing, and there is no dispute that Marathon complied with it. The Rule does not require any good faith negotiations prior to filing the application and entirely fails to support Tap Rock's argument.

II. MARATHON'S NEGOTIATIONS WITH TAP ROCK COMPLIED WITH THE COMMISSION'S REGULATIONS GOVERNING NOTICE AND DIVISION ORDERS

Tap Rock did not raise compliance with the Commission or Division's compulsory pooling notice requirements in either its Motion for Continuance or at the hearing on February 7, 2019. Tap Rock also did not request briefing on this issue; instead, counsel for Tap Rock requested briefing on the requirements for good faith negotiations. Because Tap Rock raised this issue for the first time in its Brief, the Division should not reach it. In any event, Marathon's Brief, as well as the testimony and evidence at the February 7, 2019 hearing demonstrates Marathon's compliance with Commission and Division orders governing notice. Tap Rock cites two orders in support of its argument, neither of which actually support Tap Rock. As discussed above, Marathon complied with Rules 19.15.4.9 and 19.15.4.12 NMAC. Apart from citing these two rules in its Brief, Tap Rock advances no legal argument as to how Marathon did not comply with them. Thus, Tap Rock's argument with respect to these two rules lacks merit.

With respect to notice, Tap Rock's Brief focuses solely on Order No. R-13165.[2] That Order clarified the requirements the Division will generally apply in compulsory pooling applications, with which Marathon complied.[3] Contrary to Tap Rock's brief, Marathon's conduct is distinguishable from that at issue in Order No. R-13165.

- Marathon sent Proposal Letters more than 30 days prior to filing its compulsory pooling application, in fact nearly 60 days.
- Marathon's Proposal Letters identified the proposed depth and location and target information.
- Marathon's Proposal Letters included "proposed" AFEs, identified by well name and number.
- The Well Proposal identified the surface hole and bottomhole locations.
- Although not required by Order No. R-13165, Marathon included a proposed JOA.
- Marathon's Proposal Letter included an offer to acquire Tap Rock's interest and an offer for Tap Rock to elect (or not) to join in all or some of the wells.

Receiving no objections or voluntary joinder in the wells, Marathon filed its pooling applications. Marathon's Proposal Letters complied with the notice requirements of Order No. R-13165.

Tap Rock attempts to create a deficiency in Marathon's Proposal Letters by pointing to the fact that Marathon's Proposal Letter identified eight (8) wells, whereas Marathon is only seeking an order from the Division to pool six (6) wells. Tap Rock's assertion that it could not know the footages of the wells fails because Marathon did not change any of the footages

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[2] Tap Rock also cites Oder No. R-14053-B. Significantly, in that case, unlike here, the party opposing pooling responded to the applicant's written proposal via written correspondence, which included specific alternative terms. *See* Order No. R-14053-B, ¶23(b), 34(a)-(c). Tap Rock never responded to Marathon's Proposal Letter—its failure to do so, and to wait until the February 7 hearing to raise any specific concerns with Marathon's proposal demonstrates ***Tap Rock's lack of good faith***.

[3] Tap Rock's contention that Marathon violated Division precedent as a "matter of law" is inconsistent with the Division's acknowledgment that "good faith negotiations" is a "subjective requirement better examined…at the compulsory hearing, based upon a full evidentiary record." Order No. R-13165 ¶ 5(d).

between the Proposal Letter and the pooling application. With the exception of the two wells Marathon did not propose in its pooling application, the remaining six wells are exactly the same in the Proposal Letter and the pooling application. In addition, with the exception of the two wells Marathon did not propose in its pooling application, the AFEs provided with the Proposal Letter correspond to the six wells in the pooling application. The AFEs are identified by well name, which did not change between the Proposal Letter and the pooling application. In other words, and contrary to Tap Rock's Brief, Marathon did provide notice of the actual wells Marathon seeks to pool, including the corresponding AFEs. Consequently, there is no deficiency in Marathon's Proposal Letter, which distinguishes Marathon's Proposal Letter from those at issue in Order No. R-13165.

Beyond that, Order No. R-13165 acknowledges the practical reality that changes may occur between when a proposal letter is sent and the time of the hearing, stating that if a general location is provided in an application, and if it becomes necessary to change the location prior to hearing, "reasons for such variation can be explained at the hearing and approved by the Division in its order, *without the necessity of further proceedings*." Order, ¶ 5(b). As discussed above, Marathon did not change its proposed locations, and consequently, Order No. 13165 is irrelevant. More importantly, in the very order Tap Rock cites, the Division has rejected the formalistic approach Tap Rock advances.

Similarly, in Order No. 14053-B, which Tap Rock cites in its Brief at 2, the Division approved a force pooling application when the applicant changed the target formation from the Third Bone Spring Sand to the Wolfcamp formation. *See* Findings ¶ 19-20. The applicant in that case provided AFEs with its proposals for the Bone Spring formation, then provided updated, more costly AFEs for the wells in the Wolfcamp formation. *See* Findings ¶ 24. Despite changing

the formation and the costs proposed in the AFEs (neither of which has happened in this case), the Division rejected the argument that the applicant did not negotiate in good faith and designated the applicant as the operator of the wells.

Tap Rock's prejudice argument similarly lacks merit. Tap Rock never raised any questions or concerns with respect to the AFEs, JOA, or Marathon's well proposal. With the exception of the two wells Marathon determined not to propose, the wells included in the pooling application are named the same as the wells that Marathon proposed in its Proposal Letter and the corresponding AFEs. In addition, Marathon's Proposal Letter contains separate elections for each well, and consequently, Tap Rock had the option to elect into all or some (or none) of the wells. Any confusion that Tap Rock has is of Tap Rock's own creation.[4]

In sum, Tap Rock's notice argument should be rejected both because it is raised for the first time in Tap Rock's Brief and because it is unsupported by the law or the facts. Marathon did provide Tap Rock with accurate and definitive "well proposal[s] identifying the proposed depth and location," along with corresponding AFEs for the wells Marathon was actually proposing and then seeking to force pool at hearing on February 7, 2019.

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[4] As Marathon's Brief demonstrates, Tap Rock's concerns regarding the differences between the Proposal Letter and the January 29 email are post-hoc rationalizations for Tap Rock's failure to engage with Marathon. Tap Rock's Brief makes that clear: Tap Rock asserts that it "had no way of knowing which wells Marathon actually intended to drill, or the intended footage locations of those wells." Tap Rock also asserts it "was prejudiced because it had no way of knowing which AFEs were implicated." Tap Rock also states that it "therefore could not make a reasoned and informed decision about whether to voluntarily participate in the proposed pooling." Tap Rock's decision-making process prior to December 20, 2018, when Marathon proposed six wells, rather than eight, could not have been influenced by Marathon's future actions. Between October 22 and December 20, Tap Rock could have, but chose not to, make an informed decision about whether to voluntarily participate. After December 20, 2018, if Tap Rock actually had concerns based on the change from 8 to 6 wells, Tap Rock could have, but never did, raise those concerns with Marathon. In other words, Marathon had no way to know that Tap Rock had concerns or needed additional information because Tap Rock never asked for any additional information. Consequently, any prejudice or lack of information is Tap Rock's creation, and not Marathon's.

Even if the Division were to conclude that Marathon did not comply with the notice requirements, the notice requirements set out in Order No. R-13165 are not a per se requirement. In that Order, the Division acknowledged that if there are extenuating circumstances, then the notice requirements do not apply. Order No. R-13165 ("At least thirty days prior to filing a compulsory pooling application, *in the absence of extenuating circumstances*, an applicant should send to locatable parties it intends to ask the Division to pool a well proposal identifying the proposed depth and location and target formation, together with a proposed Authorization for Expenditures (AFE) for the well…." (emphasis added)). The Division has identified lease expiration issues as such extenuating circumstances, as Marathon established in its Brief.

III. MARATHON COMPLIED WITH THE COMMISSION'S GOOD FAITH NEGOTIATIONS REQUIREMENTS

Marathon has fully complied with, and continues to comply with, its obligation to negotiate in good faith. Tap Rock's position is based on flawed assumption that all negotiations have to be done before filing a compulsory pooling application. Neither the Division nor the Commission's orders can or should be read so narrowly.

First, Tap Rock cites the Commission rules governing affidavits to support its argument. Those rules provide that when an applicant presents a case by affidavit, rather than by in person witnesses, the affidavit must include "written evidence of attempts the applicant made to gain voluntary agreement including but not limited to copies of relevant correspondence." 19.15.4.12(A)(1)(b)(vi) NMAC. The affidavit rule does not apply here because Marathon did not present these cases by affidavit and, more importantly, the rule, by its plain language, does not limit the written evidence to only those negotiations made prior to filing a pooling application and does not contain any good faith requirement. To the extent it is applicable, the record is clear

that Marathon made multiple "attempts" to gain voluntary agreement, ***including multiple communications with Tap Rock as soon as Marathon learned that Tap Rock had concerns.***

Commission Order No. R-10731-B, cited Tap Rock Brief at 4, also does not support Tap Rock's argument.[5] Paragraph 23(g) of Order states that "good faith negotiation prior to *force pooling is a factor*" (emphasis added) and the Commission upheld the Division's conclusion that the parties in that case had "conducted adequate discussions prior to filing completing force pooling negotiations, so this is not a factor in awarding operations." A review of the entire Order, however, demonstrates that the Division and the Commission looked at the entire scope of the negotiations between the parties, not simply those prior to the filing of the application. *See, e.g.*, Findings ¶ 7 ("Yates and Medallion have conducted negotiations prior to hearing…").

Similarly, in Order No. R-14053-B, cited Tap Rock at Brief at 2, the Division looked to both pre-filing and post-filing negations. The Division noted that there was "no evidence that Applicant refused to discuss its proposal with Intervenors during period either preceding or following the filing of this application." Order No. R-14053-B, ¶ 39. Order No. R-10731-B and Order No. R-14053-B thus demonstrates that negotiation post-application filing are relevant.

A review of Marathon's communications with Tap Rock prior to filing the applications and before and after the February 7, 2019 hearing demonstrates Marathon's good faith, as Marathon's Brief demonstrates. *See* Marathon Brief at 5-6. Marathon's pre- and post- application filing conduct satisfies the good faith requirement. Marathon has continued to communicate

[5] Tap Rock's Brief attributes quoted language to Order No. 10731-B, which does not appear in the Order. *See* Tap Rock Brief at 4-5 (quoting Order No. R-10731-B as stating that Commission precedent requires "a review of the negotiations between the competing parties prior to the application to force pool in order to determine if there was a "good faith" effort."). That language is found in Division Order No. R-14518, where the Division was summarizing the factors the Division considers when addressing competing applications.

with Tap Rock post-hearing as evidenced by the exhibits attached to Marathon's Post-Hearing Brief.

In addition, Tap Rock's position in these cases cannot be squared with Tap Rock's testimony in other cases, discussed in Marathon's Brief. Tap Rock contends that "Marathon seemed to suggest at hearing that it believes the burden to negotiate in good faith to fall on interest owners rather than applicants." Tap Rock Brief at 4. Tap Rock then states that "[t]his is a mistaken understanding of the requirement of good faith negotiation." Tap Rock Brief at 4. Yet, Tap Rock has testified that only sending a proposal letter, along with a JOA, constitutes good faith. *See* cases discussed in Marathon Brief at 6-8. Following Tap Rock's argument to its logical conclusion, then Tap Rock's own "negotiations" do not meet the Division's and the Commission's standards and dismissal is required.[6] Consequently, under Tap Rock's reasoning, the Tap Rock's cases cited in Marathon's Brief, along with any other cases where Tap Rock similarly testified, must be dismissed.[7]

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[6] Any attempt by Tap Rock at this point to bolster the record regarding its negotiations in those cases by providing additional evidence (if any exists) must be rejected. Tap Rock submitted those cases to the Division for consideration based on the evidence Tap Rock presented during those hearings, which Tap Rock contended is good faith.

[7] Tap Rock asserts that it is unclear how an uncommitted working interest owner can procedurally be excluded from a pooling proceeding if it is a known interest owner in the unit to be pooled. Tap Rock Brief at 5. Marathon explained in emails to Tap Rock's counsel and in its response to Tap Rock's Motion for a Continuance that Marathon would not name Tap Rock as a party to be pooled, allowing Tap Rock and Marathon additional time to negotiate. Contrary to Tap Rock's Brief, page 5 note 2, during the pre-hearing conference, the Division noted that the Oil and Gas Act specifically allows for the Division to pool all or part of the interests in a spacing unit. *See* NMSA 1978, § 70-2-17(C). Also, Tap Rock has itself acknowledged that naming a party in a pooling application does not necessarily mean that party will be pooled, *i.e.*, a party can still elect to join the wells after the hearing has taken place. Marathon's proposed approach of not seeking to pool Tap Rock at the February 7, 2019 hearing was more protective of Tap Rock's rights because Marathon would have had to go back to hearing to pool Tap Rock, if Marathon and Tap Rock were unable to reach a voluntary agreement.

Tap Rock contends that Marathon "has not until very recently responded to Tap Rock's inquiries and offers to discuss trading out of the subject acreage." Tap Rock Brief at 5. Tap Rock only raised a potential trade on January 30, 2019, and then without any specific detail. Marathon cannot be faulted for only "recently responding" to an issue that Tap Rock only recently brought to Marathon's attention. Marathon has continued to e-mail Tap Rock about Tap Rock's trade option, including as of Friday, February 13, 2019. *See* Exhibit B to Marathon's Motion. Yet, Tap Rock has not responded to Marathon's February 13 email and has not provided any additional information about a potential trade. Tap Rock's course of conduct demonstrates Tap Rock's failure to negotiate in good faith.

Tap Rock acknowledges that Order No. R-14053-B, ¶ 38, states: "The minimum requirements for good faith negotiation were established in Division Orders No. R-13155 and No. R-13165." As discussed above, and demonstrated at the hearing and in Marathon's Brief, Marathon complied with the notice requirements in Orders R-13155 and R-13165, *i.e.*, Marathon "complied with the minimum requirements for good faith negotiation," and Marathon would have discussed its proposal with Tap Rock prior to filing its pooling applications, had Tap Rock alerted Marathon to any concerns, and Marathon has continued to discuss its proposal with Tap Rock following the filing of its applications. Marathon has met and exceeded the requirements for good faith negations and Tap Rock's request to dismiss Marathon's applications must be denied.

IV. CONCLUSION

The Division should grant Marathon's applications in Case Nos. 20220 and 20221 because Marathon complied with the Division's notice and good faith negotiations requirements.

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 on February 19, 2019:

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