**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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# TAP ROCK OPERATING, LLC'S RESPONSE TO MARATHON OIL PERMIAN LLC'S POST-HEARING BRIEF

The positions presented in the Post-Hearing Brief ("Brief") of Marathon Oil Permian LLC ("Marathon") are unsupported by Commission precedent and New Mexico law, and reflect an overall disregard for the procedural requirements of the Oil Conservation Division ("Division"). In short, Marathon seeks to impermissibly shift the burden of good faith negotiations to Tap Rock Operating, LLC ("Tap Rock") in a failed attempt to excuse its pre-hearing conduct in this case. For the reasons described below as well as in Tap Rock's Closing Brief, Tap Rock asks the Division to dismiss the above-referenced applications based on the undisputed evidence at hearing on February 7, 2019 and the rules of the Division.

## I. It is Marathon's Burden—not Tap Rock's—to Demonstrate Its Good Faith Negotiations with Uncommitted Interests Prior to Filing Its Application for Compulsory Pooling.

Marathon commits a good portion of its lengthy brief complaining about Tap Rock's alleged pre-hearing conduct. Marathon's complaints are misplaced. The rules, together with Commission and Division precedent, impose on Marathon, as *applicant*, the burden to demonstrate good faith negotiations with uncommitted interests prior to filing an application for compulsory pooling. *See, e.g.*, 19.15.4.12(A)(1)(b)(vi) NMAC; Commission Order No. R-10731-B, Findings Paragraph (23)(g); Division Order No. R-14053-B, ¶ 38 ("The minimum requirements for good

faith negotiation were established in Division Orders No. R-13155 and No. R-13165.") (quoting Division Order No. R-13165, ¶ 5); *see also* Case No. R-15607. The Commission and the Division have repeatedly recognized the significance of the good faith negotiation requirement in the context of compulsory pooling proceedings, and these indisputable and important requirements cannot be shirked by Marathon by shifting the burden to engage in affirmative, good faith negotiations on the parties against whom Marathon seeks compulsory pooling.

This is consistent, by analogy, with the New Mexico case law. In several other analogous contexts, the burden to engage in affirmative good faith negotiation is placed on the party seeking relief through a regulatory process, i.e., in our case, the applicant—not the party against whom relief is sought, i.e., in our case, the party to be force pooled. *See, e.g., Celsius Energy Co. v. Mid Am. Petroleum, Inc.*, 894 F.2d 1238, 1240, 1990 WL 6446 (10th Cir. 1990) (recognizing lessee's good faith requirement in context of oil and gas lease pooling clause); *Hubenak v. San Jacinto Gas Transmission Co.*, 37 S.W.3d 133, 134 (Tex. App. 2001) (placing burden on condemnor to engage in good faith negotiations to acquire property for pipeline easement before filing suit); *Wyatt-Rauch Farms, Inc. v. Pub. Serv. Co. of Indiana, Inc.*, 160 Ind. App. 228, 235, 311 N.E.2d 441, 445 (1974) (same); *Circle Dot Ranch, Inc. v. Sidwell Oil & Gas, Inc.*, 891 S.W.2d 342, 347, 132 Oil & Gas Rep. 417, 1995 WL 27781 (Tex. App. 1995), writ denied (Aug. 1, 1995) (placing burden on operator to use good faith, taking into account other interests in the pooled acreage); *Amoco Prod. Co. v. Underwood*, 558 S.W.2d 509 (Tex. Civ. App. 1977), *writ refused NRE* (Mar. 8, 1978) (cancelling gas unit designation on basis of jury finding that operator's designation had not been made in good faith); *Elliott v. Davis*, 553 S.W.2d 223, 226 (Tex. Civ. App. 1977), *writ refused NRE* (Nov. 16, 1977) (recognizing burden is on lessee to exercise good faith in making the determination to pool).

## II. Marathon's Brief Reflects a Continued Disregard for Its Duty to Meet the Division's Clearly-Stated Requirement of Good Faith Negotiation.

Marathon's brief demonstrates its continued disregard for its burden. Despite clear regulatory authority to the contrary, Marathon's Post-Hearing Brief implies that, because the good faith requirement is not expressly set forth in rule, Commission and Division precedent imposing a good faith negotiation requirement on applicants is somehow not binding on Marathon. *Compare* Brief § I at 2-3, *with* Brief § III at 8-9. Essentially, Marathon asks the Division to ignore precedent in which the applicant was ***ordered*** to refile its applications not earlier than thirty days after furnishing all owners in the proposed unit a formal well proposal letter that identified the well location, *see* Brief at 9 (citing Order No. R-13155), and in which the Commission has stated that a force pooling application can be denied and the applicant instructed to negotiate prior to refiling,[1] *see* Brief at 11 (citing Order No. R-10731-B, Findings ¶ 23(g)).

Although Marathon later admits that "Division Orders have dismissed applications for failure to undertake appropriate efforts with respect to communications with voluntary joinder," Brief at 13, Marathon otherwise inappropriately attempts to shift the burden of good faith negotiations to Tap Rock and asks that the applications be granted over Tap Rock's objections because *Tap Rock* failed to negotiate with Marathon in good faith. To the contrary, the exhibits show that Tap Rock asked for a continuance to continue to negotiate in good faith, and affirmatively requested Marathon make an alternative proposal to Tap Rock, preferably an acre-for-acre trade. *See* Tap Rock's Cross-Exam Exhibit Nos. 1, 4 (Feb. 7, 2019 Hearing).

[1] This is exactly the continuance sought by Tap Rock *prior* to hearing in this case to afford all parties the opportunity to engage in good faith negotiations. *See* Tap Rock Operating, LLC's Motion for Continuance (filed Jan. 31, 2019).

Further, Marathon argues that it is "irrelevant" that it ignored the procedural requirements to negotiate with Tap Rock in good faith prior to filing its applications "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." Brief at 13. This statement is either the result of imprecise drafting or a blatant mischaracterization of the facts. Any "direction" from the Division is unbeknownst to Tap Rock, which was not afforded adequate time to evaluate any accurate well proposal before proceeding to hearing on Marathon's applications.

Finally, it appears that, by its Post-Hearing Brief, Marathon has unilaterally called off any further negotiation: "Based on *Tap Rock's* conduct to this point . . . further negotiations will be futile." Brief at 2 (emphasis added). Nothing about the exhibits to Marathon's brief suggests impasse, but Marathon apparently now seeks to strategically label negotiations with Tap Rock "futile" without adequate basis. This improper attempt to again shift the burden to Tap Rock is further evidenced by the claim that "Tap Rock's communications with Marathon do not demonstrate 'good faith' and do not amount to 'negotiations' . . . ." Brief at 10. All evidence is to the contrary, *see* Tap Rock Operating LLC's Closing Brief at 5-6, and Marathon cannot overcome this failure by attempting to shift the burden to Tap Rock after the hearing.

Marathon's apparent belief, unsupported by the evidence, that Tap Rock will not conduct itself in good faith is a clear reflection of Marathon's attitude throughout these proceedings towards the requirement of good faith negotiations placed on compulsory pooling applicants. At bottom, Marathon has not taken seriously its obligation to negotiate in good faith, where the governing precedent squarely places the burden on the applicant—Marathon.

## III. Marathon's Post-Hearing Course of Conduct Constitutes a Tacit Admission That Its Pre-Hearing Efforts Were Inadequate, But Should Otherwise Be Disregarded by The Division for Purposes of Tap Rock's Motion to Dismiss.

It is undisputed by Marathon that Tap Rock was furnished with inaccurate information in Marathon's well proposal letters. *See* Tap Rock's Post-Hearing Brief. This fact is dispositive here under Division precedent and is *prima facie* evidence of a lack of good faith. At no point prior to hearing did Tap Rock obtain the necessary information from Marathon to make an informed decision as to joinder in the proposed pooling.

In an apparent attempt to remedy the situation, Marathon seeks to present evidence in its Post-Hearing Brief of negotiations with Tap Rock that occurred after the hearing on the applications on February 7, 2019. *See* Brief at 6. Since the time of hearing, Marathon affirms it has "undert[a]k[en] good faith efforts to obtain Tap Rock's voluntary joinder . . . even through the time of the filing of this brief." Brief at 3. This argument amounts to a tacit acknowledgement that Marathon could have done more to obtain Tap Rock's voluntary joinder in pooling through negotiations.

However, Commission precedent suggests that post-hearing evidence of good faith negotiation should not be considered by the Division after the close of evidence at hearing. As Marathon recognizes, Order No. 13165 provided: "[C]ompliance with the more subjective requirement . . . for good faith negotiations is better examined . . . at the compulsory hearing, based on a full evidentiary record." Brief at 10. Here, Marathon was afforded the opportunity to present evidence at hearing regarding its attempts to obtain voluntary joinder. Any argument related to post-hearing matters only supports Tap Rock's position, under Commission and Division precedent, that additional time, either by dismissal or continuance, was required prior to hearing for the parties to determine whether a voluntary agreement could have been reached.

## IV. Marathon's Citation to Tap Rock Testimony Elicited in Unrelated and Unopposed Hearings Where Good Faith Negotiation Was Not a Contested Issue Is Inapposite Here.

Marathon's citation to Tap Rock's testimony and exhibits concern its own good faith negotiation in other cases is unconvincing, where the cases cited are factually and procedurally distinguishable. *See* Brief, § II, at 6-8. Tap Rock's applications in Case Nos. 16320, 16432, and 16433 involved unopposed compulsory pooling applications where no other parties intervened or entered an appearance. Any implication by Marathon that, in those cases, further communications with uncommitted interest owners who were not intervening or protesting an application completely misses Tap Rock's point in the instant matter. Failure to negotiate with unjoined parties was simply not an issue in Case Nos. 16320, 16432, and 16433. In fact, had questions been raised in those instances about further discussions with the parties that Tap Rock sought to pool, Tap Rock would have answered affirmatively that it had communicated with the parties, beyond the mere well proposal, in advance of the pooling filing. Here, however, Marathon's communications with Tap Rock do not satisfy its burden where Tap Rock timely contested these compulsory pooling proceedings expressly because Marathon had not negotiated in good faith.

## V. The Oil and Gas Act Imposes on the Division a Duty to Protect *All* Correlative Rights, Regardless of the Percentage of Interest.

In its brief, Marathon repeatedly make light of Tap Rock's percent interest as "only 3%." The reality is that a 3% stake in these wells is, in fact, a substantial amount of money. In any event, the OCD has the duty to protect all parties correlative rights, regardless of ownership percentage. Section 70-2-11 of the Oil and Gas Act provides: "The division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided." NMSA 1978, § 70-2-11 (1977). Throughout the Act, the New Mexico legislature expressed a clear policy of protecting owners of royalty interests or undivided interests in oil or

gas minerals that are separately owned in the context of adjudicatory hearings before the Division. *See, e.g.*, §§ 70-2-11, -17. Specifically, any order effecting forced pooling "shall be upon such terms and conditions as are just and reasonable and will afford to the owner or owners of each tract or interest in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil or gas, or both." § 70-2-17(C). Nowhere in the Act is this critical statutory charge lowered or otherwise altered depending on percentage of ownership. Rather, the Division has a duty to protect the correlative rights of *all* interest owners. Marathon's argument that Tap Rock's ownership interest is minimal in the subject tracts is unconvincing in light of the clear policy established in the Oil and Gas Act that the Division must protect all correlative rights, not just those with a significant ownership interest.

## VI. Conclusion.

In light of the foregoing, Tap Rock asks the Division to dismiss the applications in Case Nos. 20220 and 20221 in accordance with precedent to afford the parties sufficient opportunity to negotiate in good faith.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following counsel of record by electronic mail on February 19, 2019:

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