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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CASE NO. 20221

TAP ROCK OPERATING, LLC'S CLOSING BRIEF

Tap Rock Operating, LLC ("Tap Rock") submits the following Closing Brief in support of its request for dismissal of the above-referenced consolidated cases heard by the Oil Conservation Division ("Division") on February 7, 2019.

BACKGROUND

In Case Nos. 20220 and 20221 (the "Cases"), Marathon Oil Permian LLC ("Marathon") filed forced pooling applications concerning acreage and depths in which Tap Rock has a working interest. These matters were heard by the Division on February 7, 2019, Docket No. 06-19. Tap Rock is an uncommitted working interest owner in the proposed units, entered an appearance in both cases through counsel.[1]

As a matter of law, Marathon failed to comply with the Division's notice requirements for compulsory pooling and did not negotiate in good faith with Tap Rock prior to filing its Applications in this case. This clear disregard for the express statutory requirements and rules of the Oil Conservation Commission ("Commission") requires immediate dismissal of the Cases.

[1] Tap Rock also timely filed a motion for continuance on the ground that Marathon failed to negotiate in good faith prior to force pooling Tap Rock's interest. Tap Rock's motion was denied by the Division on February 4, 2019 and the Cases were heard three days later.

Tap Rock asks the Division to dismiss Case Nos. 20220 and 20221 to afford Marathon another opportunity to comply with notice requirements and to meet its duty to negotiate in good faith with Tap Rock.

ARGUMENT

A. Marathon Failed to Comply with the Oil Conservation Commission's Notice Requirements for Compulsory Pooling Applications

The Oil Conservation Commission has established specific notice requirements for compulsory pooling proceedings such as these. *See* 19.15.4.9, 19.15.4.12 NMAC; NMSA 1978, § 70-2-7 (1987). The Oil Conservation Division has clarified its notice requirements as follows:

> (a) 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. The proposal should specify the footages from section lines of the intended location, and, in the case of a directional well, of the intended point of penetration and bottom hole location. The Division understands these requirements to be comparable to the proposal requirements included in forms operating agreements generally used in the industry.
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> (b) Although exact footage locations for the proposed well should be specified in the well proposal, the exact footage locations need not necessarily be specified in the application filed with the Division or in formal notices of hearing. . . .
>
> (c) A proposed form of joint operating agreement should not be required in every case but should be furnished with reasonable promptness if requested. . . .

Division Order No. R-13165; *see also* Division Order No. R-14053-B.

Division Order No. R-13165 is particularly instructive. In that case, the intervening parties filed motions to dismiss the applications because: (a) the well proposals did not contain specific footage locations; (b) the applicant did not furnish a proposed form joint operating agreement with its well proposal; and (c) the proposals in the separate cases, collectively, constituted a multi-well drilling program, and applicant's correspondence indicated uncertainty

as to whether it would actually drill all of the proposed wells. For these reasons, the Division re-set the cases for hearing for more than thirty days so at to allow the applicant to furnish the intervener with a more specific proposal and with requested documents.

Here, Marathon failed to comply with the Commission's compulsory pooling notice requirements. The facts here are similar to the proceedings subject to Order No. R-13165. Marathon originally sent Tap Rock well proposal letters indicating that they were seeking to drill **eight (8)** wells in both the Wolfcamp and Bone Spring formations. Tap Rock's Cross-Exam Exhibit No. 2 (Feb. 7, 2019 Hearing). Then, on December 20, 2018, Marathon filed its applications for the drilling of **six (6)** wells (Case No. 20220: the Will Kane 15 WXY Fee 3H, the Will Kane 15 WB Fee 4H, the Will Kane 15 WA Fee 6H, the Will Kane 15 WXY Fee 10H, the Will Kane 15 WB Fee 11H; Case No. 20221: the Will Kane 15 TB Fee 7H). Later, *the week of the hearing of the Cases*, Marathon advised Tap Rock that it intended to drill only **four (4)** wells. Tap Rock's Cross-Exam Exhibit No. 1 (Feb. 7, 2019 Hearing). Finally, at hearing, Tap Rock learned that Marathon in fact intended to drill six wells and was seeking an order from the Division to that effect. Marathon's Exhibit No. 3 (Feb. 7, 2019 Hearing).

Although Marathon provided well proposal letters to Tap Rock in advance of hearing, Tap Rock had no way of knowing which wells Marathon actually intended to drill, or the intended footage locations of those wells. Without being provided notice of the actual wells sought to be pooled, Tap Rock was prejudiced because it had no way of knowing which AFEs were implicated. Tap Rock therefore could not make a reasoned and informed decision about whether to voluntarily participate in the proposed pooling. *See* Cross-Exam Exhibit No. 2. In sum, because Marathon did not 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, their applications must be dismissed for violation of the notice provisions. *See* Division Order No. R-13165.

B. Oil Conservation Commission Rules and Precedent Impose an Affirmative Obligation on Marathon to Negotiate in Good Faith Before Filing an Application for Compulsory Pooling

Marathon seemed to suggest at hearing that it believes the burden to negotiate in good faith to fall on interest owners rather than applicants. This is a mistaken understanding of the requirement of good faith negotiation. The rules of the Commission place the burden on an applicant in a compulsory pooling proceeding to affirmatively show "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.

Further, Commission and Division precedent absolutely requires affirmatively places on applicants the burden of demonstrating good faith negotiation prior to filing. In fact, an application must be dismissed until such time as the applicant has negotiated in good faith. The Commission has explicitly decided: "If the force pooling party does not negotiate in good faith, the application is denied and the applicant is instructed to negotiate an agreement prior to refiling the force pooling application." 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 question of whether Marathon has acted in good faith is a question of fact that depends upon the circumstances. While the law may not provide an explicit legal standard for good faith, Commission precedent expressly requires "***a review of the negotiations between the***

competing parties prior to the applications to force pool in order to determine if there was a "good faith" effort." *See* Commission Order No. R-10731-B, ¶ (23)(g). The facts here are clear that Marathon has not made affirmative, good faith attempts to gain the voluntary agreement of Tap Rock.

Marathon merely submitted to Tap Rock flawed and inaccurate well proposal letters discussed above. Tap Rock did not otherwise receive any communication from Marathon *before* Marathon filed its applications. The fact that Marathon did not even attempt to negotiate with Tap Rock *prior* to filing its application to force pool is *prima facie* evidence that Marathon did not act in good faith. Instead, just days prior to hearing, Marathon contacted Tap Rock when Marathon learned Tap Rock would be moving for continuance. Tap Rock then asked Marathon to discuss a land swap. Rather than respond to Tap Rock's request, Marathon instead told Tap Rock that Tap Rock's interests were not going to be force pooled in these proceedings. *See* Cross-Exam Exhibit Nos. 1, 4. Tap Rock communicated to Marathon that it did not understand 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. *Id.* Marathon never provided Tap Rock with a satisfactory explanation.[2] *Id.* All told, Marathon did not even remotely met its 19.15.4.12 NMAC burden.

As hearing testimony demonstrates, Marathon has not until very recently responded to Tap Rock's inquiries and offers to discuss trading out of the subject acreage. *See also* Cross-Exam Exhibit No. 1. And contrary to Marathon testimony, Commission rules and precedent

[2] At the February 4, 2019 telephonic pre-hearing conference on Tap Rock's Motion for Continuance, OCD's Legal Examiner cast considerable doubt on whether Marathon could in fact properly "exclude" Tap Rock from this pooling. Marathon apparently abandoned this approach prior to hearing in these matters.

establish it is in fact Marathon's affirmative obligation, not Tap Rock's, to make multiple attempts to gain voluntary agreement, through good faith negotiations. *See* 19.15.4.12(A)(1)(b)(vi) (requiring "written evidence of ***attempts***"). Marathon has not done so and Tap Rock respectfully requests that the cases be dismissed to afford Marathon with time to meet its duty to negotiate in good faith with uncommitted interest owner Tap Rock before proceeding to force pooling hearing. *See* Commission Order No. R-10731-B, Findings Paragraph (23)(g) ("If the force pooling party does not negotiate in good faith, the application is denied and the applicant is instructed to negotiate an agreement prior to refiling the force pooling application.").

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 15, 2019:

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