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October 29, 1984

Mr. Richard L. Stamets
Acting Chairman
Oil Conservation Commission
P. O. Box 2088
Santa Fe, New Mexico 87501

"Hand Delivered"

RECEIVED
OCT 31 1984
OIL CONSERVATION DIVISION

Re: NMOCC Case 8352: Application of Cities Service Oil & Gas Corporation for Temporary 640-acre Spacing Rules in West Bravo Dome Area, Harding County, New Mexico

Dear Mr. Stamets:

On behalf of Cities Service Oil & Gas Corporation, please find enclosed our Memorandum in opposition to Amerigas' Motion to Dismiss the Cities Service Application in Case 8352.

Very truly yours,

W. Thomas Kellahin

WTK:ca
Enc.

cc: Owen Lopez, Esq.
Hinkle Law Firm
218 Montezuma Avenue
Santa Fe, NM 87501

William F. Carr
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P. O. Box 300
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STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION COMMISSION

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

CASE: 8352
ORDER R-

APPLICATION OF CITIES SERVICE OIL
AND GAS CORPORATION FOR TEMPORARY
SPECIAL SPACIAL RULES IN THE WEST
BRAVO DOME CARBON DIOXIDE GAS AREA,
HARDING COUNTY, NEW MEXICO.

RECEIVED
OCT 31 1984
OIL CONSERVATION DIVISION

CITIES SERVICE OIL & GAS CORPORATION'S MEMORANDUM IN OPPOSITION TO AMERIGAS' MOTION TO DISMISS CASE 8352

On September 26, 1984, the Oil Conservation Commission held a hearing on Cities Service Oil & Gas Corporation's application for 640-acre spacing in the West Bravo Dome. This Memorandum further supports the arguments made on behalf of Cities Service Oil & Gas Corporation against the Amerigas' Motion to Dismiss this Case.

FACTS:

On May 15, 1984, Case No. 8190 was heard before the Oil Conservation Commission (Commission) in which Amoco Production Company ("Amoco") sought to establish temporary 640-acre spacing rules in the Bravo Dome Unit Area. Cities Service appeared at that hearing and made a motion to

consolidate that case with the following case, No. 8191, which was subsequently withdrawn without prejudice at the close of the hearing on Case No. 8190.

Cities Service sought consolidation of testimony in the two cases regarding the appropriate spacing to be applied to the Bravo Dome Unit and the West Bravo Dome Area. Cities Service's position was that consolidation of testimony would show that these two areas were part of the same geologic formation and, therefore, that the West Bravo Dome area should also be subject to 640-acre spacing rules.

Several interested parties, including Amerigas, objected to the consolidation. Amerigas, which operates wells on 160-acre spacing in an area of overlap of the West Bravo Dome area and the Bravo Dome Unit, objected to Cities Service's use of Amoco's data to "bootstrap" its own case for 640 spacing in West Bravo Dome. Under the order sought by Amoco and eventually issued by the Commission, Amerigas would be able to continue operating and conducting new drilling on 160-acre spacing for certain of its acreage.

Amoco objected to consolidation on the basis that the cases were at different stages, since Amoco had a unit approved and Cities Service did not. Amoco suggested that the cases remain on "separate dockets, separate hearings, separate decisions and orders". The Commission denied the Motion for Consolidation, and Cities Service participated in the hearing to the extent of cross-examining witnesses.

Following the hearing, the Commission issued Order No. R-7556 in which it denied Amoco's application of 640-acre spacing in the Western and Southwestern portion of the unit. The Commission established the "Bravo Dome 160-acre Area" which includes part of the land in Cities Service's proposed West Bravo Dome Area in the present Case No. 8352. The land included in both areas is the "area of overlap."

The Commission ordered, inter alia:

"(3) That the portion of Order No. R-6645 relating to spacing is hereby superseded but that portion of said Order relating to the reinjection of gas for test purposes shall remain in full force and effect."

"(7) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary."

Cities Service filed the present Case 8352 on September 6, 1984, Amerigas has moved to dismiss the area of overlap from the case on the grounds of collateral estoppel, claiming that since Cities Service did not timely appeal Order No. 7556, that order became final, and Cities is collaterally estopped from denying the establishment of 160-acre spacing in the area of overlap.

Alternatively, Amerigas asserts that the proper procedure to establish 640-acre spacing is by a Motion to Amend Order No. R-7556 and, since Cities has not made such

a motion, the area of overlap should not be considered in this proceeding.

Cities Service contends that the area of overlap is properly before the Commission in this case because:

(1) The Commission's power to amend and modify Order No. R-7556 based on its continuing jurisdiction of the case and in consideration of fairness to the parties precludes the application of collateral estoppel.

(2) Cities Service has new evidence that was not available in the May 16, 1984 hearing and therefore meets the test for a "new trial" under State v. Luttrell, 28 N.M. 393 (1923).

(3) Cities Service has preserved the right to have its case heard by the action taken to withdraw the application in Case No. 8191 without prejudice.

ARGUMENT

1. The Commission's power to amend and modify Order No. R-7556 based on its continuing jurisdiction of the case, and in consideration of fairness to the parties, precludes the application of collateral estoppel.

In its brief in support of the Motion to Dismiss, Amerigas has stated the rule for collateral estoppel and has applied it to the facts of this case in boilerplate fashion. Amerigas' argument for applying collateral estoppel is premised on the view that the only proper action to be taken by Cities Service was to appeal from or

move to amend Order No. R-7556. This view is erroneous, thus collateral estoppel cannot be used offensively in this case to bar Cities Service from its opportunity to have a full and fair hearing.

It is well settled that an agency is free to amend and modify its own orders, even "change its mind," while it retains jurisdiction of a matter. "As a general matter, an agency is free to alter its past rulings and practies even in an adjudicatory setting, see, e. g., American Trucking Association v. Atchinson, Topeka and Santa Fe Railroad, 387 U.S. 397, 416, (1967)," Hatch v. Federal Energy Regulatory Commission, 654 F.2d 825, 834 (D.C. Cir. 1981). "An agency, when faced with new facts, or in light of reconsideration of the relevant facts, may alter past interpretations or overturn past administrative rulings and practice (citing American Trucking)", U.S. v. An Article of Drug Neo-Terramycin, 540 F. Supp. 363, 371 (N.D. Texas, 1982) aff'd., 725 F.2d 976 (5th Cir. 1984). "The Department had authority to correct or change its order ... because it retained jurisdiction over the subject matter before it. An administrative agency has the authority to reconsider and change its orders during the time it retains control over any question submitted to it," Western Kraft Paper Group v. Department for Natural Resources and Environmental Protection, 632 S.W. 2d 454, 455 (Ky. App. 1982).

In the present case, the Commission clearly retained jurisdiction over the matter for the purpose of entering other orders: "It is further ordered ... (7) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary." Order No. R-7556, P.8. This language clearly indicates that the possibility of change or modification is contemplated.

It is noteworthy that the Commission, through Order No. R-7556, superceded a portion of Order No. R-6645, see Order No. R-7556, p. 7, subsection (3). Amerigas has argued that if the Commission promulgates an order establishing 640-acre spacing in the area of overlap, such an order would be in direct conflict with Order No. R-7556. Any subsequent order in conflict with a previous order obviously would supercede the previous order, and it is apparent that the Commission employs this device in its changes or modifications of prior orders.

Amerigas seems to suggest that, by the very fact that no formal appeal from or Motion to Amend Order No. R-7556 was made, the doctrine of collateral estoppel should apply virtually automatically in the present case because administrative remedies were not exhausted. In Kuykendall v. Corporation Commission, et al. 634 P.2d 711 (Okla. 1981) the appeal before the Oklahoma Supreme Court arose from a factual situation identical to the present case.

The Corporation Commission has issued an order establishing drilling and spacing units of a certain size. Appellant filed an application to delete certain sections of land from the provisions of such order, and the form used to seek a change in the order was no impediment to consideration of the merits of the application.

Indeed, in the administrative context, policy considerations of efficient use of agency expertise and the peculiar flexibility in the administrative setting to afford a full and fair hearing to the parties dictate against the rigid application of the principles of collateral estoppel or res judicata. This issue was addressed in 2 Cooper, State Administrative Law, Ch XV:

> "In simplest terms, the question is whether an administrative agency should be permitted to change or amend its prior order, where to do so would affect the rights or privileges of one who was a party to the proceedings in which the prior order was entered.
>
> .....
>
> Where the conduct of a business is subject to the continued supervision of a regulatory agency the predominant public interest usually favors the policy permitting the agency to make new orders affecting the future conduct of that business, even though different conduct has been permitted (or prohibited) in the past."

Id. at 506 and 523.

This approach to the use of collateral estoppel in agency proceedings is articulated in the case law: "[I]n the administrative law context, the principles of

collateral estoppel and res judicata are applied flexibly....The offensive use of collateral estoppel raises a question of fair procedures," Artukovic v. INS, 693 F. 2d 894, 898 (9th Cir. 1982). See also, Griffin v. Big Spring Independent School District 706 F.2d 645, 654 (5th Cir. 1983); cert. denied, 104 S.Ct. 525 (1944) Anthan v. Professional Air Traffic Controllers Organization, 672 F.2d 706, 709-10 (8th Cir. 1982).

In the present case, Amerigas' rigid insistence on adherence to a process of administrative appeal is not necessary to serve the purpose of the appeal structure. In Farmers Investment Co. v. Arizona State Land Department, 666 P.2d 469, 478 (Ariz. App. 1982), the court said, "the basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Whether the question of spacing of the area of overlap is put before the Commission by way of appeal, motion to amend, application to delete certain lands from the order (Kuykendall) or in the context of a subsequent case, the effect is the same. The Commission has the continuing jurisdiction to consider the matter, the expertise to effectively analyse new information (which Cities Service has in the present case) and the duty to provide a full fair hearing to all parties in the matter

when it appears that a modification or change of a prior order will further the effective regulation of the business.

In light of the Commission's duty to act, Amerigas' reguest that that the Commission refrain from acting because Order No. R-7556 has been in effect only three months makes no sense whatsoever. The only practical effect of such a delay would be that Cities Services interests would be subserved to Amerigas' desire to wait until some arbitrary, undefined period of time has passed after which a change or elimination of Order No. R-7556 could be effected.

Furthermore, the responsibility to provide a full and fair hearing in this case is particularly important in view of the consensus of the parties in the prior hearing that Cities Service's case be heard separately from Amoco's application for 640 acre spacing. Considerations of new evidence aside, Amerigas' position seems to be that, for purposes of the prior hearing, Cities Service's case had to be heard separately, and that now, for the purpose of conducting Cities' case separately, it must be considered to have already been heard in the prior case. Amerigas can't have it both ways. Such a position is fundamentally unfair and is contrary to the purpose of conducting agency hearings so as to fully and fairly consider all relevant facts and issues.

2. Cities Service has new evidence that was not available in the May 16, 1984, hearing and therefore meets the test for a "new trial" under State v. Luttrell, 28 N.M. 393 (1923).

In the event the Commission finds that collateral estoppel would otherwise bar Cities Service from presenting its case, Cities asserts that it presented new information not available in the prior hearing. Under State v. Luttrell, the requirements necessary to obtain a new trial upon the ground of newly discovered evidence are that the evidence (1) must be such as will probably change the result if a new trial is granted; (2) must have been discovered since the trial; (3) must be such as could not have been discovered before the trial by the exercise of due diligence; (4) must be material to the issue; and (5) must not be merely impeaching or contradictory to the former evidence." Id. at 397.

In the context of administrative hearings of oil and gas cases, the "new trial" test is based on the requirement of changed conditions. In Union Texas Petroleum, et al. v. Corporation Commission of Oklahoma, 651 P.2d 652 (Okla. 1982), the court, in referring to a statutorily created prohibition against a collateral attack on a Commission order absent substantial evidence of changed conditions, said:

> "[T]he change of conditions or change in knowledge of conditions necessary to support an order of modification speaks to knowledge or conditions which did not obtain at the time the prior order was considered, and not to evidence of conditions or knowledge of conditions which could have been brought forward at the time of the hearing on the prior order but were not considered at that time".

Id. at 659.

The court went on to define three types of change of condition, one type being pertinent to the present case: "Second is a change in the information gained from development or depletion experience which demonstrates that the original conclusions reached were incorrect as applied to the studied reservoirs." Id. at 659.

Subsequent to the May 16, 1984 hearing, Cities Service conducted flow rate studies on selected wells in the West Bravo Dome area for a duration of 60 days. At the May 16, 1984 hearing Amoco presented the results of flow rate studies conducted for over a year in the central portion of the Bravo Dome Unit under 640-acre spacing. From the year-long studies based on 640-acre spacing was possible to calculate the flow rates from wells spaced on 160-acre spacing. Under 640-acre spacing conditions, the total yield of CO2 from four wells is not greater than the yield from one well draining 640 acres.

Following the May 16, 1984 hearing, Cities was able to compare its short-term data with the data from Amoco's long-term studies. Cities found that its data

matched Amoco's over the short term. Assuming that Amoco's long-term results are a reliable indicator of the future flow rate in the West Bravo Dome area, Cities asserts that the 160-acre spacing in those portions of West Bravo Dome under Amerigas' operation will effectively drain the pool at a faster rate than that allowed to Cities operators on adjacent land dedicated to 640-acres per well. This situation will force Cities to drill uneconomic wells in order to prevent drainage from its leases by Amerigas' wells on adjacent property.

Cities additionally asserts that Amoco's long-term studies can be used to reliably predict flow rate in the West Bravo Dome area because of the geologic continuity of the common source of supply to the Bravo Dome and West Bravo Dome areas. Since the May 16, 1984, hearing Cities Service has developed information establishing this continuity. Thus, Cities Service's geologic and engineering evidence, coupled with the new interpretation of their short-term flow rate studies after comparision with Amoco's long-term studies, constitutes new evidence which is more than substantial to support an order modifying the spacing in the West Bravo Dome Area to a uniform 640-acre spacing plan.

Furthermore, the change in economic conditions suffered by Cities by being forced to drill uneconomic wells solely to protect its correlative rights is a

sufficient basis for the Commission to issue a modification order. A change in economic conditions has been recognized by the Oklahoma Supreme Court as sufficient to constitute "changed conditions" for purposes of modifying a prior order. See, Kuykendall, at 716-17. In Kuykendall the court said:

> "We therefore hold, that if by increasing the size of a drilling or spacing unit, or if by decreasing it the practicable recovery of minerals may be affected, the Corporation Commission may consider such factors as constituting `waste'".

Id. at 716-17.

In the interest of preventing economic waste, protecting correlative rights, and properly considering new evidence, the Commission should deny Amerigas' Motion to Dismiss the present case No.8352.

3. Cities Service has preserved the right to have its case heard by the action taken to withdraw the application in Case No. 8191 without prejudice.

Following the hearing on Case No. 8190, Cities Service withdrew its application for hearing in Case No. 8191, stating that there was a "substantial need for revision." Cities requested dismissal without perjudice, which was granted. The grant of dimissal without prejudice thus preserves Cities Service's right to bring the application again.

In Arizona Public Service Co. v. Industrial Commission of Arizona, 651 P.2d 886, 133 Ariz. 358 (1982),

reh. denied, (1982), cert. denied, 459 U.S. 837 (1982), a claimant who has requested a hearing on a worker's compensation claim was not allowed to withdraw the request for hearing when dismissal would have prevented the carrier from protesting an error in its notice of claim status. The court said that while a general policy favoring settlements without hearings contemplates dismissals when a settlement is obvious or not contraindicated, dismissal may not be granted when it is clear that to do so would only bind a party to an earlier mistaken determination. The court said, "we believe that the policy of settlements, ... is outweighed by a policy in favor of a resolution on the merits. We strongly disapprove of the disposition of claims by means of a footrace to the Commission.... [W]e believe that a carrier should not be deprived of an opportunity to correct an error and litigate the issues....." Id. at 891.

In the present case, the dismissal was granted because it was obvious to the Commission that Cities needed to revise its case for the purpose of properly litigating the issues. It was clear that there was no indication of settlement among the parties, and that Cities intended to file the application again.

It is patently unfair for Amerigas to object to Cities' filing of the application in this case when Cities had preserved the right to do so in a prior proceeding and

when a hearing on the matter is necessary to fully and fairly litigate the issues between the parties.

CONCLUSION

Cities Service Oil & Gas Corporation's application in Case 8352 is properly before the New Mexico Oil Conservation Commission. The reasons stated by Amerigas to support a Motion to Dismiss are without merit. An order entered by the Commission approving the Cities Service Application in this case is reasonable and proper and should be entered over the objection of Amerigas.

Respectfully Submitted

Kellahin & Kellahin

By _____
W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87501

Attorneys for Cities Service
Oil & Gas Corporation

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION
DEPARTMENT OF ENERGY AND MINERALS

RECEIVED
AUG 8 1984
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF CITIES SERVICE OIL & GAS CORPORATION FOR 640-ACRE SPACING IN THE WEST BRAVO DOME AREA, HARDING COUNTY, NEW MEXICO.

CASE: 8352

A P P L I C A T I O N

Comes now Cities Service Oil & Gas Corporation, by and through its attorneys, Kellahin & Kellahin, and applies to the New Mexico Oil Conservation Commission for an order establishing temporary 640 acre-spacing rules for the following described area of the West Bravo Dome in Harding County, New Mexico:

Township 20 North, Range 29 East, NMPM

All of Sections 31, 32 and 33

Township 19 North, Range 29 East, NMPM

All of Sections 1 through 36

Township 18 North, Range 29 East, NMPM

All of Sections 1 through 36

Township 17 North, Range 29 East, NMPM

All of Sections 1 through 12
All of Sections 14 through 22
All of Sections 28, 29, 30, and ~~31~~

~~Township 19 North, Range 30 East,~~ NMPM

~~All of~~ Sections ~~30, 31,~~ and 32

Township 18 North, Range 30 East, NMPM

All of Sections 1 through 36

Township 19 North, Range 30 East, NMPM

All of Sections 19 through 36

Township 18 North, Range 31 East, NMPM

All of Section 1 through 36

Township 19 North, Range 31 East, NMPM

All of Section 19 through 36

Applicant further requests well locations of not less than 1650 feet to the outer boundary of each section and no nearer than 330 feet to any governmental quarter-quarter section line.

Kellahin & Kellahin

By _____

W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87501

(505) 982-4285

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RECEIVED
SEP 1984
OIL CONSERVATION DIVISION

September 6, 1984

Mr. Joe D. Ramey
Oil Conservation Commission
P. O. Box 2088
Santa Fe, New Mexico 87501

"Hand Delivered"

Re: Cities Service Company
West Bravo Dome

Case 8592

Dear Mr. Ramey:

On August 7, 1984, I filed on behalf of Cities Service Company an application for 640-acre spacing in the West Bravo Dome Area. That application had an error in the description of the area. Please find enclosed an amended application.

The application as amended is all within Harding County, New Mexico.

Very truly yours,

W. Thomas Kellahin

WTK:ca
Enc.

cc: E. F. Motter
Cities Service Company
P. O. Box 1919
Midland, Texas 79702

Gerald Barnes, Esq.
Cities Service Company
P. O. Box 300
Tulsa, Oklahoma 74102

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION
DEPARTMENT OF ENERGY AND MINERALS

RECEIVED
SEP 6 1984
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF CITIES SERVICE OIL & GAS CORPORATION FOR 640-ACRE SPACING IN THE WEST BRAVO DOME AREA, HARDING COUNTY, NEW MEXICO.

CASE: 8352

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All of Sections 1 through 36

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All of Sections 1 through 12
All of Sections 14 through 22
All of Sections 28, 29, and 30

Township 18 North, Range 30 East, NMPM

All of Sections 1 through 36

Township 19 North, Range 30 East, NMPM

All of Sections 19 through 36

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Township 19 North, Range 31 East, NMPM

All of Section 19 through 36

Applicant further requests well locations of not less than 1650 feet to the outer boundary of each section and no nearer than 330 feet to any governmental quarter-quarter section line.

Kellahin & Kellahin

By_____

W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87501

(505) 982-4285

STATE OF NEW MEXICO

ENERGY AND MINERALS DEPARTMENT

OIL CONSERVATION DIVISION

GARREY CARRUTHERS
GOVERNOR

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87501
(505) 827-5800

May 22, 1987

Cities Service Oil & Gas Corporation
P.O. Box 300
Tulsa, Oklahoma 74102

Gentlemen:

In accordance with the provisions of Division Order No. R-7737 entered on November 19, 1984, the Oil Conservation Division is reopening Case No. 8352 in order to give all interested parties in the West Bravo Dome Carbon Dioxide Gas Area in Harding County, New Mexico, the opportunity to appear and show cause why West Bravo Dome Carbon Dioxide Gas Area should not be developed on less than 640-acre spacing and proration units.

This case will be heard before an examiner on June 3, 1987, in the Oil Conservation Division Conference Room, State Land Office Building, Santa Fe, New Mexico, at 8:15 a.m. A copy of the docket for this hearing in enclosed.

Sincerely,

Florene Davidson

Florene Davidson
OC Staff Specialist

FD/cr

encl.

cc: Amoco Production Company