

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the matter of the failure of Benjamin M.) Docket No.: 17-CONS-3100-CPEN
Giles (“Operator”) to comply with K.A.R. 82-)
3-111 at the Clearwater #2 and Clearwater #5) CONSERVATION DIVISION
wells in Butler County, Kansas.)
_____) License No.: 5446

MOTION TO STRIKE OPERATOR’S JUNE 27, 2017 REPLY

The Staff of the State Corporation Commission of the State of Kansas (“Staff,” and “Commission,” respectively) moves the Commission to strike Operator’s June 27, 2017, reply filed in this docket. In support of its motion, Staff states as follows:

I. Background

1. On June 2, 2017, Operator filed a motion appealing Staff’s implementation of the terms of the Commission-approved settlement agreement in this matter, despite Operator having explicitly waived its right to do so pursuant to the terms of the agreement.¹

2. On June 8, 2017, the Commission stayed implementation of the terms of the agreement for 30 days and provided Staff the opportunity to respond to Operator’s allegations.²

3. On June 12, 2017, Staff filed a response to Operator’s motion, stating that the Commission-approved settlement agreement should remain in full force and effect.

4. On June 27, 2017, Operator filed a reply expressing its continued opposition to Staff’s implementation of the terms of the Commission-approved settlement agreement.

¹ See Order Approving Settlement Agreement, Settlement Agreement, paragraph 4.

² See Order on Compliance with Settlement Agreement, paragraph 8.

II. Argument

5. No Commission regulation allows for an entity to file a reply to a response, and no Commission order has authorized Operator to file a reply to Staff's response. K.A.R. 82-1-218(d) governs responsive pleadings; Operator's reply, however, is not contemplated by that subsection. Further, the Commission specifically authorized Staff to file a response in the Commission's June 8, 2017, Order, but did not likewise allow for a reply from Operator. Accordingly, Operator's reply should be stricken because it is not authorized by Commission statutes or regulations, and has not otherwise been authorized by the Commission.

6. Notwithstanding the impermissibility of Operator's proffered reply, Operator's reply was untimely. To the extent Operator can file any document at all, the timeframe to do so is governed by K.A.R. 82-1-217 and K.A.R. 82-1-218. Under K.A.R. 82-1-218, the filing of certain responsive documents is allowed within ten days of service of the document being responded to. Under K.A.R. 82-1-217(a), the day of the event from which the designated period of time begins to run shall not be included, but weekends and the last day of the period computed are included. If a period runs on a weekend, the deadline is the end of the next business day. Under K.A.R. 82-1-217(c), if service is by mail, then three days are added to the prescribed time period.

7. Staff's response was filed and served June 12, 2017. Thus, if Operator were allowed to file a reply, it would have been due June 26, 2017. This fact was acknowledged by Operator in emails between Operator, Staff, and the Prehearing Officer, in which Operator's counsel also mischaracterized Staff's position regarding Operator's legal ability to submit a reply.³ Under K.A.R. 82-1-205, Commission office hours are from 8:00 a.m. to 5:00 p.m.

³ See *Attachment A*, in which Operator's counsel states, "I've determined that my deadline to file a reply to Staff's response to my motion is June 26, 2017. Staff agrees that is the correct date. Please let us know if you disagree," versus *Attachment B*, a separate email chain exclusively between parties, in which Staff's counsel states, "I believe your analysis regarding calculation of dates under K.A.R. 82-1-217 and 218 is correct. However, I encourage you to contact the prehearing officer for any sort of confirmation of your right or timeframe to file a reply."

Operator did not submit its filing until after the close of business on June 26, 2017, which means it was not actually filed until June 27, 2017. Accordingly, Operator's reply should be stricken because it was not timely.

8. In addition to the foregoing, Operator's reply is immaterial as it adds nothing of factual value for the Commission to consider. Instead, it accuses Staff of a "distasteful"⁴ and "unwarranted and repugnant assassination of Operator's character,"⁵ claiming Staff's response is "latent with contradictions,"⁶ which Operator argues constitutes a "wretched effort to justify its bad faith."⁷ K.A.R. 82-1-119(j) allows the Commission to reject documents containing defamatory, scurrilous, or unethical language. Respectfully, Operator's filing only rehashes covered ground while publicly hurling invective at Staff.

9. While Staff could theoretically motion to file a sur-reply, there are obviously contested material issues of fact in this matter that are not going to be resolved through replies and sur-replies ad infinitum. By email, the prehearing officer has already scheduled a June 30, 2017, prehearing conference, although no formal order is on file in the docket. Accordingly, Operator's reply should be stricken as immaterial and/or under K.A.R. 82-1-119(j).

WHEREFORE, for the reasons described above, Staff respectfully requests Operator's June 27, 2017, reply be stricken from the record, and for any other relief the Commission believes just and appropriate.

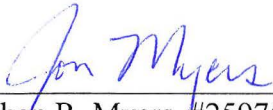
⁴ See Reply, page 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at page 4.

Respectfully submitted,



Jonathan R. Myers, #25975
Litigation Counsel, Kansas Corporation Commission
266 N. Main, Suite 220, Wichita, Kansas 67202
Phone: 316-337-6200; Fax: 316-337-6211

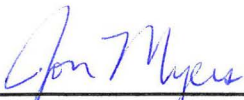
CERTIFICATE OF SERVICE

I certify that on 6/29/17, I caused a complete and accurate copy of this Motion to be served via United States mail, with the postage prepaid and properly addressed to the following:

Jonathan A. Schlatter
Morris, Laing, et al.
300 N. Mead, Suite 200
Wichita, Kansas 67202
Attorney for Benjamin M. Giles

And delivered by email to:

Michael Duenes
KCC Topeka



Jonathan R. Myers
Litigation Counsel
Kansas Corporation Commission

Jon Myers

From: Michael Duenes
Sent: Friday, June 16, 2017 9:12 AM
To: Jonathan Schlatter
Cc: Jon Myers
Subject: RE: 17-CONS-3100-CPEN -- Benjamin M. Giles

I agree that Monday, June 26th is the correct date.

Michael J. Duenes, *Assistant General Counsel*
Office of General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road | Topeka, KS | 66604-4027
Phone (785) 271-3181 | <http://kcc.ks.gov/>
Fax (785) 271-3314 (Advisory)

This message is from the Office of General Counsel of the Kansas Corporation Commission and is intended only for the addressee. This transmission, email, and any files transmitted with it, may be (1) subject to the Attorney-Client Privilege, (2) an attorney work product, or (3) strictly confidential under federal or state law. Unauthorized forwarding, printing, copying, distributing, or using such information is strictly prohibited and may be unlawful. If you have received this transmission in error, notify the sender (only) and delete the message. This message may also be subject to disclosure under the Kansas Open Records Act, K.S.A. 45-215 *et seq.*

From: Jonathan Schlatter [<mailto:jschlatter@morrislaing.com>]
Sent: Friday, June 16, 2017 8:49 AM
To: Michael Duenes
Cc: Jon Myers
Subject: FW: 17-CONS-3100-CPEN -- Benjamin M. Giles

Mr. Duenes,

I've determined that my deadline to file a reply to Staff's response to my motion is June 26, 2017. Staff agrees that is the correct date. Please let us know if you disagree.

Thank you,

Jon Schlatter
Morris Laing Evans Brock & Kennedy, Cht.
316-262-2671
jschlatter@morrislaing.com

Jon Myers

From: Jon Myers
Sent: Thursday, June 15, 2017 9:01 AM
To: Jonathan Schlatter (jschlatter@morrislaing.com)
Subject: RE: 17-CONS-3100-CPEN -- Benjamin M. Giles

Mr. Schlatter,

I believe your analysis regarding calculation of dates under K.A.R. 82-1-217 and 218 is correct. However, I would encourage you to contact the prehearing officer for any sort of confirmation of your right or timeframe to file a reply, and I would appreciate being informed of the results of any such communication.

Sincerely,

Jon Myers

Litigation Counsel

Conservation Division

Kansas Corporation Commission

266 N. Main, Suite 220 | Wichita, KS | 67202-1513

Phone (316) 337-6200 | Fax (316) 337-6211 | <http://kcc.ks.gov/>

From: Jonathan Schlatter [<mailto:jschlatter@morrislaing.com>]
Sent: Wednesday, June 14, 2017 4:43 PM
To: Jon Myers
Cc: Carnella Anderson
Subject: RE: 17-CONS-3100-CPEN -- Benjamin M. Giles

Jon,

I believe my deadline date to file a reply is June 25, 2017, which is a Sunday, so June 26, 2017.

In civil practice, there is no deadline to file a reply to a response to a motion (other than a motion for summary judgment) provided it is filed before the hearing. When practicing before the Commission we typically follow 82-1-218(d), which prescribes 10 days to file an "other proper pleading", and add 3 days for service by mailing under -217 (c). So, 13 days from June 12 is June 25. Does that sounds correct to you?

Jon Schlatter
Morris Laing Evans Brock & Kennedy, Cht.
316-262-2671
jschlatter@morrislaing.com