

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

In the matter of the failure of Patrick)	Docket No. 23-CONS-3169-CPEN
Development Corporation (Operator) to)	
comply with K.A.R. 82-3-120 and K.A.R.)	CONSERVATION DIVISION
82-3-133 by operating under a suspended)	
license.)	License No. 6279

**OPERATOR’S REPLY TO STAFF’S RESPONSE
TO OPERATOR’S POST-HEARING BRIEF**

Patrick Development Corporation (“Operator”) submits this Reply (this “Reply”) to Staff’s Response to Operator’s Post-Hearing Brief, as set forth below.

1. Staff engaged in gamesmanship to try to deny Operator an opportunity to respond to Staff’s arguments.

Operator is saddened that it feels the need to file this Reply in the first place, but Staff’s bad-faith gamesmanship compels Operator to do so. The Presiding Officer Order Establishing Post-Hearing Briefing Schedule indicated the parties were unable to reach an agreement on a briefing schedule.¹ Said Order continued to state that each party may optionally submit an initial post-hearing brief and then any party may optionally submit a responsive post-hearing brief, provided the other party submitted an initial post-hearing brief.² The Order does not prohibit a party from filing a reply brief in response to a party’s response brief.³

Further, the Commission expressly contemplated and approved of Operator filing a reply to a response brief from Staff:

“CHAIRMAN FRENCH: ... You know, I’m envisioning probably a brief from – from Patrick, a response from staff, and a reply from Patrick, if you wish to do it. Something’s not elongated because I think the issue is – is pretty limited in this case. I mean, it’s – it’s – it should be pretty limited briefing.”⁴

¹ See, Presiding Officer Order Establishing Post-Hearing Briefing Schedule (Mar. 20, 2024).

² *Id.*

³ *Id.*

⁴ Transcript, at 153:25-154:5.

Operator attempted to comply with the Commission's express directive, by proposing a post-hearing briefing schedule identical to the one expressly envisioned by Chair French.⁵ While the Presiding Officer found Operator's suggestion reasonable,⁶ Staff decided to be obstructionist and in a blatant act of defiance of the Commission itself, Staff outright refused to comply with the post-hearing briefing schedule expressly envisioned by Chair French.⁷

In light of Staff's non-compliance and obstructionist behavior, the Presiding Offer then ordered simultaneous briefing pursuant to the Presiding Officer Order Establishing Post-Hearing Briefing Schedule.⁸ Under the mistaken belief that Staff would engage in good-faith conduct, Operator did not contest or propose an alternative schedule, but had Operator known what Staff would do, Operator would have raised concerns.

Operator filed its Brief on April 10, 2024. Staff did not file anything on that date. Instead, Staff waited until April 17, 2024, to file a response to Operator's initial Brief. As Staff's emails in Exhibit A indicate, this was clearly a calculated attempt at gamesmanship by Staff to deny Operator the ability to respond to the arguments Staff sought to raise in post-hearing briefing. Despite the crux of this issue being Operator's burden to demonstrate insufficient notice, and the Commission expressly contemplating that by initially ordering a post-hearing briefing schedule where Operator had an opportunity to respond to Staff's post-hearing arguments, Staff didn't want to abide by what the Commission intended and thus engaged in gamesmanship to try to deny

⁵ See, Email from Jackson Ely to Jon Myers and Kelcey Marsh (Mar. 18, 2024, at 2:48 PM) (part of a larger email chain attached hereto as Exhibit A).

⁶ See, Email from Jon Myers to Jackson Ely and Kelcey Marsh (Mar. 18, 2024, at 3:37 PM) (part of a larger email chain attached hereto as Exhibit A).

⁷ See, Email from Kelcey Marsh to Jon Myers and Jackson Ely (Mar. 18, 2024, at 4:26 PM) (part of a larger email chain attached hereto as Exhibit A); see also, Email from Kelcey Marsh to Jackson Ely and Jon Myers (Mar. 18, 2024, at 4:49 PM) (part of a larger email chain attached hereto as Exhibit A).

⁸ See, Presiding Officer Order Establishing Post-Hearing Briefing Schedule (Mar. 20, 2024).

Operator an opportunity to respond to Staff's arguments. Staff likely did not expect Operator to overcome Staff's gamesmanship by merely filing this Reply.

All of the core arguments Staff raised in its Response could have and should have been raised in an initial post-hearing brief. Chair French was explicit in stating that the issue for the post-hearing briefs was limited and the obvious subject was the notice issue. Knowing in advance the subject of the post-hearing briefs, Staff should have raised these issues in an initial post-hearing brief, but instead Staff purposefully refused to file an initial brief and instead raised these arguments solely in its Response entirely for the purpose of getting the final word and denying Operator an opportunity to respond to Staff's arguments. That conduct is obvious bad-faith and it compels Operator to file this Reply in an attempt to mitigate Staff's gamesmanship.

In short, because the arguments raised Staff's "Response" should have been brought as Staff's initial post-hearing brief, and Staff did not file its post-hearing brief, Operator is forced to construe Staff's "Response" as, in actuality, Staff's initial post-hearing brief, which was filed one week out of time. For that reason, Staff's "Response" should be stricken as untimely. To the extent that Staff's "Response" is not stricken, this Reply should be construed as Operator's response to Staff's untimely initial post-hearing brief.

Because no order of the Commission prohibits Operator from filing this Reply, and this Reply is consistent with the express directive of the Commission itself as set forth at the conclusion of the evidentiary hearing,⁹ this Reply is proper. Operator was expressly contemplated to have an opportunity to respond to Staff's post-hearing arguments, and despite Staff's gamesmanship, this Reply accomplished that goal.

⁹ See, Transcript, at 153:25-154:5.

2. Notice via Ordering Clause F in the Docket 23-3030 Penalty Order is insufficient.

Turning to the merits of Staff's Response, nothing raised in Staff's Response changes the deficiency of the notice provided in this matter. Staff points to a single sentence buried in the Penalty Order in Docket 23-3030 stating: "If Operator is not in compliance with this Order and the Order is final, then Operator's license shall be suspended without further notice and shall remain suspended until Operator complies."¹⁰

The authorities Operator provided in its Brief also apply to the purported notice given in Ordering Clause F of the Docket 23-3030 Penalty Order:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."¹¹

"[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected..."¹²

Despite the language of Ordering Clause F in the Docket 23-3030 Penalty Order, that notice is still held to the same "reasonably calculated, under all the circumstances" standard. Notwithstanding the language of Ordering Clause F, the KCC via Staff was still mandated to deliver notice by employing means "such as one desirous of actually informing the absentee".

Staff has now retroactively changed its argument for what comprises of sufficient notice multiple times. Now Staff relies upon the language in Ordering Clause F of the Docket 23-3030 Penalty Order as providing sufficient notice. The same analysis applied to Staff's prior notice

¹⁰ Docket 23-CONS-3030-CPEN, Penalty Order, Ordering Clause F (Aug. 9, 2022).

¹¹ *Board of County Comr's of Reno County v. Akins*, 271 Kan. 192, 196 (2001) (quoting, *Mullane v. Central Hanover Bank Tr. Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)) (emphasis added).

¹² *Board of County Comr's of Reno County v. Akins*, 271 Kan. 192, 196 (2001) (quoting, *Mullane v. Central Hanover Bank Tr. Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950)) (emphasis added).

theories in Operator's Brief apply to notice via Ordering Clause F of the Docket 23-3030 Penalty Order. It should be noted that the purported notice in Ordering Clause F came on August 9, 2022. Operator's license was purportedly suspended on November 7, 2022, approximately three months later. During that interim period, Operator expressly informed Staff that it believed that it had done all that was needed to come into compliance. Operator conveyed this information over the phone and in writing via an email to Tristan Kimbrell on September 30, 2022.¹³

Given that Staff had actual knowledge as of September 30, 2022, that Operator honestly believed that it had come into compliance, notice issued on August 9, 2022, is not reasonably certain to inform Operator of an issue which would arise because of non-compliance on November 7, 2022, when Staff actually knew that Operator believed it was compliant approximately a month and a half *AFTER* the Ordering Clause F came on August 9, 2022. This is compounded by the language in Ordering Clause F, stating that the suspension would not be effective if Operator was compliant.¹⁴ Prior to November 7, 2022 Operator thought that it was compliant, Operator expressly informed Staff on September 30, 2022 that it believed it was compliant. An ordering clause from August 9, 2022 which would have been moot if what Operator had informed Staff of on September 30, 2022 was correct cannot constitute sufficient notice for an action three months later on November 7, 2022. Because Kansas law is clear that notice must take into account all of the circumstances surrounding the notice, Staff's alternative notice argument regarding Ordering Clause F in the 23-3030 Penalty Order also fails.

¹³ See, Operator's Exhibit 5.

¹⁴ See, Docket 23-CONS-3030-CPEN, Penalty Order, Ordering Clause F (Aug. 9, 2022).

3. Operator believed it was compliant with the Docket 23-3030 Penalty Order prior to its license being suspended.

Next, Staff asserts a nonsensical argument that Operator requesting a hearing in Docket 23-3030 indicated that Operator somehow knew that it was noncompliant. Staff claims that “[i]f Mr. Patrick truly believed that Operator was in compliance with the Commission’s Order [in Docket 23-3030], then there would have been no reason to submit such a request [for hearing].”¹⁵ Simply stated, that position makes no sense and Staff has it completely backwards. An operator requesting a hearing for a penalty order inherently indicates that the operator does not believe the underlying penalty order is proper. If Operator requested a hearing in Docket 23-3030, that would have been because Operator believed the penalty order in 23-3030 was not justified. Staff somehow appears to indicate that if an operator was actually in compliance, then the operator would *not* request a hearing for that matter and would simply accept a penalty. That is nonsensical – why would an operator who thought it was actually compliant not request a hearing to a penalty order it believed was unjustified? The opposite of Staff’s contention is reality, Operator requesting a hearing in 23-3030 is further indication that Operator believed that it was compliant and that Operator believed the penalty order in that docket was erroneous.

As to Staff’s claims that Operator did not conduct due diligence to ensure it was compliant, it must again be pointed out that Operator expressly informed Staff on September 30, 2022 that it believed it was compliant.¹⁶ Operator cannot read minds and if Staff believed Operator was non-compliant, then it should have informed Operator of its concerns when Operator expressly informed Staff that Operator believed it was compliant.

¹⁵ Staff’s Response to Operator’s Post-Hearing Brief, at ¶ 5.

¹⁶ See, Operator’s Exhibit 5.

4. A heightened penalty is inappropriate.

Finally, Staff argues that the heightened penalty is appropriate, but such an approach is unfairly punitive. The reality is that Operator didn't know it was non-compliant. Operator didn't get the November 7, 2022, license suspension letter. When Operator finally did find out, on December 29, 2022, Operator leaped into action to fix the issue right away.

When Staff was informed that Operator genuinely believed it was compliant prior to December 29, 2022, and honestly didn't know about the issues and didn't receive the license suspension letter, Staff didn't back off its position and instead doubled down on its draconian attempt to hammer Operator with an exorbitant fine. But why? Why is there the need to so harshly penalize Kerry Patrick, a sick man who has suffered a stroke, cancer, and other serious health issues. Why is there the need to so harshly penalize Cindy Patrick, who has now been unexpectedly thrust into running Operator's business operations and who is simply trying her best to make sure Operator is compliant in an industry in which her exposure was relatively limited up until this point. The Patrick family is currently struggling with the significant health issues of its patriarch and the burden of medical bills and the emotional toll that takes. Why is there the need to lay heightened burdens on an already-suffering family?

The reality is, Operator didn't know it was non-compliant before the December 29, 2022 Shut-In Order was entered. When it found out, it immediately fixed the issue. Why is there the need to so harshly penalize the Patrick family for that? Is the quick action to come into compliance once Operator actually found out worth nothing?

If the reason for the heightened penalty is because of a need to deter non-compliance, then that concept doesn't work when Operator was genuinely unaware that it was non-compliant – as is the case here. If the reason for the heightened penalty because the Commission wishes to set an

example for what it perceives to be a bad-actor, then the Commission must really consider whether Operator is the type that should have an example made out of it, given that Operator is a company which was formerly run by a stroke victim suffering from cancer and a plethora of other ills and which is currently run by that man's spouse who is trying her best in an industry which is relatively new to her. If the reason is purely an economic calculation, does the lack of production for the three weeks after Operator notified Staff that the issue was cured and during which Staff unreasonably drug its feet on getting back out to remove the seals count for nothing?

The reality, as supported by the record, is that Operator fixed the issue the moment it found out about it. Operator would have found out about the issue sooner, and by extension fixed the issue sooner, if Staff had been communicative and forthcoming when Operator expressly informed Staff that Operator believed it was compliant. Given this prompt remedial action, why is Staff on such a warpath to ensure that Operator suffers a heightened penalty?

Given everything stated above, a fine in this matter is not appropriate, a heightened fine even less so. Operator legitimately did not know its license was suspended and Staff's means of notifying Operator was not sufficient due process or notice. For the above reasons, Operator respectfully requests that the Commission rescind the Shut-In Order in this proceeding, or at least reduce the fine, and grant such further relief to Operator as it deems proper.

Respectfully submitted,

MORRIS LAING LAW FIRM

By: /s/ Jackson C. Ely
Jackson C. Ely, #29037
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Email – jely@morrislaing.com
Attorneys for Operator

CERTIFICATE OF SERVICE

I, Jackson C. Ely, hereby certify that on this 22nd day of April, 2024, I caused the original of the foregoing **OPERATOR'S REPLY TO STAFF'S RESPONSE TO OPERATOR'S POST-HEARING BRIEF** to be electronically filed with the Conservation Division of the State Corporation Commission of the State of Kansas, and served to the following by means of electronic service:

Kelcey Marsh, Litigation Counsel
Kansas Corporation Commission
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266 N. Main St, Ste 220
Wichita, KS 67202-1513
k.marsh@kcc.ks.gov

Jonathan R. Myers, Assistant General Counsel
Kansas Corporation Commission
266 N. Main St., Ste. 220
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j.myers@kcc.ks.gov

/s/ Jackson C. Ely
Jackson C. Ely, #29037

EXHIBIT A

Carol Hannon

From: Kelcey Marsh [KCC] <k.marsh@kcc.ks.gov>
Sent: Monday, March 18, 2024 4:49 PM
To: Jackson Ely; Jon Myers [KCC]
Subject: RE: KCC Docket No. 23-CONS-3169-CPEN / Operator Patrick Development - Post Hearing Briefing Schedule

At the hearing, Chair French said that instead of figuring out a briefing schedule then directed the parties to consult with Mr. Myers about establishing a briefing schedule. I took his envisioning as an example of what he was looking for, not a directive. I think it would be inappropriate and unfair advantage if Staff is not allowed to present the final argument for the reasons I expressed in my email below, especially when Staff would have had the Final argument if closing statements were allowed to be made.

Kelcey Marsh
Litigation Counsel



Conservation Division
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From: Jackson Ely <jely@morrislaing.com>
Sent: Monday, March 18, 2024 4:39 PM
To: Kelcey Marsh [KCC] <k.marsh@kcc.ks.gov>; Jon Myers [KCC] <j.myers@kcc.ks.gov>
Subject: RE: KCC Docket No. 23-CONS-3169-CPEN / Operator Patrick Development - Post Hearing Briefing Schedule

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All,

I would counter that the reply after Staff's response was expressly stated by Chair French at the end of the evidentiary hearing as what the Commission was envisioning. I think that the most appropriate course of action would be to follow the guidance expressly stated by the Commission itself, which aligns with what I have stated in my prior email.

Sincerely,

Jackson C. Ely | Attorney
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From: Kelcey Marsh [KCC] <k.marsh@kcc.ks.gov>

Sent: Monday, March 18, 2024 4:26 PM

To: Jon Myers [KCC] <j.myers@kcc.ks.gov>; Jackson Ely <jely@morrislaing.com>

Subject: RE: KCC Docket No. 23-CONS-3169-CPEN / Operator Patrick Development - Post Hearing Briefing Schedule

I am good with having Operator's Post-Hearing Brief two weeks after the transcript is provided and Staff's Response due two weeks after that. It does not seem appropriate for Operator to have a final reply after Staff's Response since we are filing briefs in lieu of closing statements. As Staff has the burden of proof, Staff should also get to have the final response like it would at the end of the hearing.

Sincerely,

Kelcey Marsh
Litigation Counsel



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From: Jon Myers [KCC] <j.myers@kcc.ks.gov>

Sent: Monday, March 18, 2024 3:37 PM

To: Jackson Ely <jely@morrislaing.com>; Kelcey Marsh [KCC] <k.marsh@kcc.ks.gov>

Subject: RE: KCC Docket No. 23-CONS-3169-CPEN / Operator Patrick Development - Post Hearing Briefing Schedule

Parties:

Mr. Ely's suggestion sounds reasonable to me, although there are no doubt also other reasonable ways to proceed. If parties were inclined, I'm sure simultaneous briefing would work fine, too. Mr. Marsh, your thoughts on format/schedule?

Sincerely,

Jon Myers

Assistant General Counsel

Office of General Counsel

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: Jackson Ely <jely@morrislaing.com>

Sent: Monday, March 18, 2024 2:48 PM

To: Jon Myers [KCC] <j.myers@kcc.ks.gov>; Kelcey Marsh [KCC] <k.marsh@kcc.ks.gov>

Subject: KCC Docket No. 23-CONS-3169-CPEN / Operator Patrick Development - Post Hearing Briefing Schedule

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Mr. Myers and Mr. Marsh,

Pursuant to the Commission's order at the end of the evidentiary hearing, Operator is reaching out to establish a post-hearing briefing schedule.

It sounded to me that the Commission was contemplating an Operator post-hearing brief, followed by Staff's Response, then by Operator's Reply. I don't know if a transcript of the hearing will be provided, but my initial thoughts are as follows:

1. Operator's Post-Hearing Brief due two weeks after the transcript is provided.
2. Staff's Response due two weeks after that.
3. Operator's Reply due one week after that.

I am of course open to suggestions or alternatives if the Commission or Staff has another schedule in mind.

Sincerely,

Jackson C. Ely | Attorney

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