BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

OPERATOR'S POST-HEARING BRIEF

Pursuant to the Presiding Officer Order Establishing Post-Hearing Briefing Schedule, entered March 3, 2024, Patrick Development Corporation ("Operator") submits its Post-Hearing Brief (this "Brief"), as set forth below.

INTRODUCTION

The determination of this matter is, at its heart, a rather simple series of questions the Commission must pose to itself. Did Operator know its license was suspended? Was the notice which Staff purportedly gave to Operator regarding the license suspension sufficient? Does Staff's own conduct in light of the compliance efforts Operator did make justify a heightened penalty? The answer to each question is no and the evidence set forth in this proceeding and detailed below confirms each of those answers.

The reality is, during all time periods at issue, Operator has demonstrated that it was actively working to comply with Commission regulation and cure all issues that it actually knew about. Unfortunately, mail problems arose with the United States Postal Service ("USPS") which were completely outside Operator's control. Nonetheless, Operator utilized its open line of communication with Staff to inform Staff of the mail problems and requested that Staff correspond with Operator via email. Operator also used this open line of communication to expressly inform Staff that Operator believed it had completed all compliance actions needed. Sadly, Staff refused to inform Operator of the true status of Operator's compliance, despite actually knowing

Operator's belief that it was compliant, until these issues snowballed into a much more serious license suspension matter. Then, despite being fully aware of the severity of the mail issues and its own history of conduct, Staff threw the November 7, 2022 license suspension notice letter ("Suspension Letter") in the mail and never bothered to follow up, email, or undertake any action to ensure that Operator ever actually learned that its license was suspended. Such action was not sufficient notice, as set forth by Kansas law, and accordingly, the license suspension lacked sufficient notice and due process and it was void. Since Operator's license was never validly suspended in constitutionally permissible means, Operator cannot subsequently be found to have operated on a suspended license.

To see the full unconstitutionality of this matter, the Commission must put themselves in the shoes of Kerry Patrick, a very sick man who was simply trying his best to run his company. Or perhaps the Commission could place itself in the shoes of Cindy Patrick, a woman who was trying her best to take care of her sick husband. Imagine the surprise of both of those individuals when all of a sudden, a compliance issue they had believed was resolved and behind them resurfaced in the form of a massive $25,000.00 heightened penalty. The reality is this heightened penalty fine is not appropriate legally as the license suspension was not sufficiently noticed, and it is not appropriate equitably given the efforts Operator did make to be in compliance and Staff's lack of candor and bad-faith conduct throughout the entire matter. For those reasons, the Shut-In Order at issue should be rescinded or at a minimum, the heightened $25,000.00 penalty should be reduced.

ARGUMENTS AND AUTHORITIES

The key issue in this matter is due process and notice, particularly to whether sufficient notice and due process occurred in regards to the Suspension Letter. Under Kansas and Federal law, it is apparent that the notice of Operator's license suspension was insufficient.

The first step of evaluating notice is the determination that sufficient notice was required for the license suspension. Kansas law is quite clear that the State (i.e. the Commission) cannot take (i.e. suspend) Operator's property rights in its oil & gas operator's license without sufficient due process. "Once the State has conferred a property interest, the property interest cannot be taken without constitutional procedural due process."[1] Accordingly, before Operator's license can be constitutionally suspended, Operator must first be afforded sufficient due process, which includes sufficient notice. In short, the Commission must first sufficiently notify Operator that its license is suspended before stripping Operator of its ability to conduct oil and gas operations.

While evaluating notice in a different context, the Kansas Supreme Court has already provided guidance on the nature of notice in matters where mere inaction could give rise to a penalty:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. *Notice is required* before property interests are disturbed, before assessments are made, *before penalties are assessed*. *Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act*."[2]

While in a different context, the implementation and necessity of notice in the aforementioned *Genson* case as the same as notice of Operator's license suspension – a penalty might be suffered by the mere failure to act, therefore notice is required. It is undisputable, Operator was

[1] *Stockman v. Unified Gov't of Wyandotte Cnty./Kansas City, Kansas*, 27 Kan. App. 2d 453, 461, 6 P.3d 900, 908 (2000).
[2] *State v. Genson*, 316 Kan. 130, 142, 513 P.3d 1192, 1200 (2022), cert. denied, 143 S. Ct. 1092, 215 L. Ed. 2d 401 (2023) (emphasis added).

constitutionally entitled to sufficient notice that its oil & gas operator's license was to be suspended.

The next step, and likely the most important aspect of this analysis, is to determine what constitutes sufficient notice. Binding Kansas and Federal law are well established on the standard of what constitutes sufficient notice and due process and what happens when sufficient notice is not provided:

> "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."[3]

> "[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*…"[4]

> "Without such notice, due process was denied and any resulting judgment rendered is void."[5]

Binding law on notice and due process is clear, there is no blanket, one-size-fits-all approach that can be undertaken to establish sufficient notice. Instead, sufficient notice and due process must consider all of the circumstances in determining whether such notice was reasonably calculated to inform Operator of the license suspension. Further, binding law is clear that the standard of sufficient notice is that the means employed must be such as one desirous of actually

[3] *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).
[4] *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).
[5] *All. Mortg. Co. v. Pastine*, 281 Kan. 1266, 1275, 136 P.3d 457, 464 (2006).

informing Operator. The reasonableness and constitutional validity of the notice given to Operator is measured on whether the selected method was *reasonably certain* to inform Operator of the license suspension.

The analysis must then turn to the specific means of notice Staff utilized in purportedly informing Operator that its license was suspended and the evaluation of whether the means of such notice was the same as one who was *desirous of actually informing* Operator and whether such notice was *reasonably certain*, *under all the circumstances*, to inform Operator.

The Suspension Letter was purportedly only sent out via first class mail, as "Staff mails license suspension letters via first class mail. Staff does not email such letter or call operators regarding such letters."[6] After Staff purportedly put the Suspension Letter in the mail, the record is undisputed that Staff members never undertook any action to follow up to ensure that the Suspension Letter was actually received, Staff never sent a follow up letter, never called Kerry Patrick, and never sent an email. Staff did nothing more than allow KOLAR to automatically change Operator's name to red text.[7]

It has also never been established that the Suspension Letter was ever actually sent. Staff implies that it was, but when Staff's witnesses were asked on that subject, neither could affirmatively state that they knew the letter has actually been sent. Mr. Duling stated that he assumed the legal department sent the letter.[8] It was established that Paula Murray was the specific Staff member who sends out suspension letters.[9] Paula Murray did not issue any evidence or testimony in this matter, she did not testify, and no evidence has ever been presented that Ms. Murray ever actually put the Suspension Letter in the mail, with proper postage, addressed to

[6] Rebuttal Testimony of Tristain Kimbrell, at 7:21-22.
[7] *See*, Transcript, at 122:11-21; see also, Transcript at 52:14-23.
[8] *See*, Transcript, at 45:12-46:4.
[9] *See*, Transcript, at 118:10-13.

Operator. Instead, when the member of Legal Staff, Tristian Kimbrell, was asked whether or not he knew with certainty whether the Suspension Letter was sent in the mail, with proper postage, addressed to Operator, Mr. Kimbrell was evasive and simply stated "I don't think we can know anything without absolute certainty, Mr. Ely."[10] Staff has failed to produce any evidence that it actually put the Suspension Letter in the mail.

It is also established that Kerry Patrick, Operator's principal agent at the time, repeatedly contacted Staff and informed Staff about the issues Operator was having with physical mail service and that he requested correspondence via email to ensure that he was informed.[11] In fact, Staff was encountering mail issues on its own when it attempted to send physical mail to Operator, independent from the information Operator was informing Staff of, which corroborates the legitimacy of the mail issues Operator was complaining of.[12] Staff then made an internal decision to email *AND* mail physical copies of letters to Operator, to ensure that Operator received them.[13]

While Tristan Kimbrell attempted to claim that Staff's decision to do that was only limited to one single letter[14] around the time of the email reflected in Nancy Borst's August 31, 2022 email, Staff's own course of conduce belies that claim. Mr. Kimbrell attached to his pre-filed testimony several exhibits showing Staff's correspondence with Operator. In each and every one of the exhibits Mr. Kimbrell references, Staff both emailed and physically mailed a copy of the letter to Operator.[15] In fact, there is no letter or other document, other than the Suspension Letter, where Staff did not also email a letter or document to Operator in addition to physically mailing the same:

[10] Transcript, at 123:17-21.
[11] *See*, Pre-Filed Testimony of Kerry Patrick, at 7:22-9:12; see also, Operator's Exhibit 3-B, 3-C, 3-D, and 3-E.
[12] *See*, Operator's Exhibits 3-G, 3-H, and 3-I.
[13] *See*, Operator's Exhibit 3-I.
[14] *See*, Transcript, at 120:12-15.
[15] *See*, Transcript, at 120:16-121:13.

> Q. … Other than the suspension letter that was sent on November 7th, are you aware of any other document that was sent to operator since the entry of the penalty order in Docket 3030 on August 9th, 2022 which was not also sent via e-mail to operator?
> A. Not that I can think of, no.[16]

Mr. Kimbrell's denial of Staff's internal decision to email and mail letters to Operator is also belied by his own explanation of Staff's conduct:

> "Staff was emailing and mailing those specific documents because they were related to Mr. Patrick's attempt to request a hearing, and the time was growing short for that, and so they wanted to make sure that he got the – that e-mail denying his request for hearing plenty of time for him to submit a – a request for hearing in a timely manner. That's why it was being e-mailed to him"[17]

Mr. Kimbrell's position is that Staff sent emails and physical mail to operator because they "wanted to make sure that [Operator] got [it]"[18] and "time was growing short"[19]. Was there not the same necessity to make sure Operator got the Suspension Letter? Was the November 7, 2022 to November 17, 2022 time period for Operator to come into compliance not also short? The same reasons which Mr. Kimbrell claims necessitated Staff sending emails in relation to the request for hearing are also present in regards to the issue of the Suspension Letter. To claim that Staff deemed emails necessary in order to actually inform Operator in August, September, and October of 2022[20] but not in November 2022 is outright disingenuous.

In most situations, simply putting the Suspension Letter in the mail would be sufficient notice, but as cited above, *Board of County Comr's of Reno County v. Akins* held that notice must be reasonably calculated, *under all the circumstances*, to inform Operator.[21] The reason why this means of notice in this specific situation is different and why the means of notice is insufficient is

[16] Transcript, at 122:25-123:5
[17] Transcript, at 121:17-24
[18] Transcript, at 121:20-21.
[19] Transcript, at 121:20.
[20] *See*, Exhibits TK-1, TK-2, TK-3, TK-4, and TK-5.
[21] *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)).

because there is an undisputed and well established record of Operator actually informing Staff of the mail problems and Staff knowingly making the decision to send ***ALL*** correspondence, other than the Suspension Letter, to Operator via physical mail ***AND*** email.

It is particularly noteworthy to recognize that it was Paula Murray who purportedly sent the Suspension Letter and Paula Murray had significant actual knowledge of the mail issues. Ms. Murray received multiple emails from Kerry Patrick regarding the mail problems.[22] Kerry Patrick expressly informed Ms. Murray about a letter from Staff being received in damaged condition in a plastic bag and when Mr. Patrick asked if Ms. Murray wanted him to send a picture of the letter, Ms. Murray stated that "[i]t is not necessary."[23] Ms. Murray also had actual knowledge of the mail issues arising from Staff's end, as she was informed of mail being bounced back.[24] In fact, it was Ms. Murray herself, who initially suggested that Staff should both email and physically mail letters to Operator, an idea that was supported and confirmed by Nancy Borst.[25] Ms. Murray's course of conduct largely followed that decision, as she sent all other letters out both physically and electronically, except the Suspension Letter.[26] Given Ms. Murray's actual knowledge and her demonstrated course of conduct, her failure to email the Suspension Letter is a significant deviation from both her previously stated recognition of the mail issues and her actions undertaken to ensure that Operator was actually notified of what she sent out.

It should be noted that Operator did not have any statutory, regulatory, or other obligation to update its mailing address or to take any effort to get a post office box or do anything else at the time this incident was occurring. K.A.R. 82-3-120 states that an operator must provide "the

[22] *See*, Operator's Exhibit 3-B and 3-C.
[23] Operator's Exhibit 3-C.
[24] *See*, Operator's Exhibit 3-F, 3-G, and 3-H
[25] *See*, Operator's Exhibit 3-I
[26] *See*, Operator's Exhibit 3-J, 3-K, 3-L, 3-M, and 3-N; see also Exhibit TK-2, TK-3, TK-4, and TK-5.

applicant's correct mailing address" upon an application for license renewal.[27] Operator did provide its correct mailing address, that address remained correct during all time periods at issue, and it is undisputed that the address provided was the correct address for the Patrick household. There is no legal requirement for Operator to furnish another address when the address Operator did provide was correct and the issues with that address were unintended and outside of Operator's control. Operator cannot force the USPS to deliver mail correctly. Also, all these mail concerns arose during the time period between Operator's license renewal applications, if there was an obligation to provide an address with no mail issues from the USPS, then such obligation would not have arisen until Operator's next license renewal application. Operator did what it thought was the best course of action at the time to address these concerns, by communicating directly with Staff and requesting Staff correspond with Operator via email.

There are benefits to the approach Operator suggested: (1) instantaneous delivery of information; (2) confirmation that information Staff sent to Operator was actually received; and (3) the potential for Staff to save money on postage. The Commission has established a preference for sending information electronically, as demonstrated by the various orders regarding electronic service which is present in this docket and essentially every other docket that the undersigned counsel has participated in. Communicating via email is a reasonable request, with various benefits to it, and there was no reason to suspect that Staff would not or did not agree with that request. Staff never asked Operator to update its physical mailing address, and Staff never raised any concern or rejected Operator's request to send information via email. Staff's arguments as to what Operator failed to do to ensure that it was getting mail are all arguments made retroactively, and with hindsight in an attempt to justify the insufficient notice. If Staff wanted Operator to

[27] K.A.R. 82-3-120(c)(1).

update its mailing address, get a post office box, or undertake some other action, the time to raise that issue was when Operator proposed communicating via email – not now when Staff is trying to rewrite history. Communication via email was clearly acceptable to Staff in August, September, and October of 2022 – to allow it to rescind that position in November 2022, without conveying that to Operator, should be equitably estopped.

If a reasonable person could honestly say that they were surprised that the Suspension Letter never arrived at the Patrick household, then the analysis of sufficient notice would be very different. Unfortunately, it is not a surprise that the Suspension Letter was never received – and therein lies the key fact of this case. If Staff, particularly Paula Murry, was desirous of actually informing Operator of the Suspension Letter, she would have done exactly what she did with literally every other letter she sent out to Operator, which was email and physically mail the letter. She did not do so. It is also clear that the act of simply mailing the Suspension Letter was not *reasonably certain under all the circumstances* to inform Operator of the license suspension, given the well documented history of mail either not arriving or arriving damaged to the Patrick household. Given all these facts, the act of simply throwing the Suspension Letter in the mail (presuming it actually was ever sent out) and conducting no follow-up, was nothing more than an impermissible mere gesture, as circumstances required more to constitute sufficient notice.

This is important because the Kansas Supreme Court has evaluated notice issues in the past and held "the lack of actual receipt of notice… would result in a gross injustice to a blameless litigant."[28] Operator did not have actual receipt of the Suspension Letter, Operator has established ample evidence of the legitimacy of the circumstances outside of its control which likely caused Operator not to receive the Suspension Letter, and Operator has produced ample evidence that

[28] *Johnson v. Brooks Plumbing, LLC*, 281 Kan. 1212, 1217 (2006).

Staff knew about those circumstances, established procedures to ensure that Operator received information Staff sent, but nonetheless sent the Suspension Letter in a manner which had been established as not ensuring actual delivery and in a way which was inconsistent with Staff's prior conduct. To allow the mere gesture notice Staff utilized to be sufficient would result in a gross injustice to Operator who legitimately was unaware that its license was suspended and had tried to work with Staff to make sure Operator was adequately informed of what Staff wanted to inform Operator of.

Staff's initial attempt at notice, the act of simply throwing the Suspension Letter in the mail is constitutionally insufficient. Accordingly, the next step is to evaluate Staff's alternative notice theory – that listing Operator as having a suspended license on the KCC's website and turning Operator's name red in KOLAR is sufficient notice. First, as to KOLAR, simply listing a name in red is not inherently a notice of a license suspension – in fact not even all operators would even know that is what the red means:

> Q. Okay. And so an operator logging into KOLAR would see that its name is red and would just know that its license is suspended because of that; is that correct?
> A. I believe most operators would realize that something was at least amiss and would call, but I believe most operators are aware that a red name means that a license has been suspended.[29]

To know that a red name in KOLAR means that an operator's license is suspended requires a leap in logic and to assume that all operators inherently know that a red name unambiguously means an operator's license is suspended is unsupported by the record. That form of notice is simply too tenuous to be constitutionally sufficient. Notice requires actually informing a party of issues, and a red name provides none of that. What if an operator's agent was colorblind and unable to distinguish the shade of red in the name? In such a hypothetical, the name color change

[29] Transcript, at 124:4-11.

in KOLAR would reveal nothing. The idea that the change in a name color constitutes sufficient notice inherently requires the assumptions that an operator's agent is not colorblind, and that an operator's agent knows that a red name conclusively means the operator's license is suspended. "[N]otice must be of such nature as reasonably to convey the required information."[30] Putting a name in red conveys no information, much less the required information, and accordingly that is insufficient.

Further, it should be noted that when an operator's license is suspended and its name changed to red in KOLAR, there is no email, letter, or anything that is sent to the operator to prompt the operator to actually check KOLAR:

> Q. Mr. Kimbrell, you had testified previously that when a TA application is denied, KOLAR automatically generates an e-mail that prompts operators to go check KOLAR. Is there an automatically generated email when a license is suspended?
> A. Not that I'm aware of.[31]

Operator is unaware of any regulatory, statutory, or other requirement that mandates operators check KOLAR at a certain frequency or during set periods of time, and Staff has not indicated any such requirement. As for listing Operator's license as suspended on the KCC's website, the same issue arises, as was no email, letter, or anything which prompts an operator to go check the KCC's website upon a license being suspended.[32] There is also no legal requirement for an operator to check those websites in that context.

The name color change in KOLAR and listing Operator as having a suspended license on the KCC website simply comprises publication notice, as the "notice" was merely published on the websites with no actual notice to Operator. Staff seems to place the burden of checking those

[30] *Board of County Comr's of Reno County v. Akins*, 271 Kan. 192, at Syl. ¶ 3 (2001).
[31] Transcript, at 124:19-25.
[32] *See*, Transcript, at 125:1-8.

websites on Operator, and that is inconsistent with the fundamental principles of notice and due process. That publication form of constructive notice has been viewed skeptically by Kansas courts and permitted only in the narrowest of circumstances:

> "Where the names and addresses of adverse parties are known or are easily ascertainable, notice of pending proceedings by publication service, alone, is not sufficient to satisfy the requirements of due process under the 14th Amendment to the [F]ederal Constitution or [Section 2] of the Bill of Rights of the Kansas Constitution."[33]

Here, constructive notice by publication is wholly inappropriate. Not only did Staff know the name and address (physical mail and email) of Operator, Staff had an ongoing line of communication with Operator's principal agent at the time, Kerry Patrick. Kansas law is clear that publication notice is frowned upon and saved only for the unique occasions where there is simply no other way to inform an absent party and the ability to find a way to notify the absent party is not easily ascertainable. Guidance from the Kansas rules of civil procedure indicate that there must be efforts made to provide service another way first, including the requirement of an affidavit stating the specific efforts made to ascertain the ways one might contact an absent party.[34] Staff made no such efforts, and its back-up argument of notice via KOLAR and the KCC website is a knee-jerk retroactive argument in light of the insufficiency of the Suspension Letter.

The burden of notifying Operator of the license suspension is entirely on the KCC, but Staff's argument desires the Commission to impose a rule that entirely reverses that burden. If taken at face value, Staff's position is that operators have the burden of constantly checking KOLAR and the KCC website just to see if an operator's license is suspended when the operator would have no reason to suspect such a thing. The constitutional requirements of due process and notice are clear, the burden of notifying an operator of actions adverse to their operator's license

[33] *Pierce v. Bd. of Cnty. Comm'rs of Leavenworth Cnty.*, 200 Kan. 74, at Syl. ¶ 6 (1967).
[34] *See*, K.S.A. 60-307.

is on the KCC – it is not an operator's burden to be constantly checking to see if its license is valid when an Operator believes there are no issues. If there are issues, it is the KCC's burden to adequately apprise an operator of such.

As the purported notice by publication on KOLAR and the KCC website is also insufficient, none of the means of notice Staff has asserted are constitutionally sufficient. The faulty delivery of the Suspension Letter, the name color change on KOLAR, and the publication of Operator's license being suspended on the KCC website are all deficient. The proper course of action, and what would have constituted sufficient notice, would be for Staff to do what it had done with literally every other letter it sent to Operator – send it via email as well. Had Staff taken any follow-up action to ensure that Operator actually received the Suspension Letter, a call, an email, or even another letter, there likely would have been sufficient notice. But Staff did nothing other than purportedly throw the Suspension Letter in the mail. A mere gesture is not notice, and the means Staff used to notify Operator were not reasonably certain under all the circumstances to notify Operator of the license suspension nor were the means that which someone desirous of actually informing Operator would have undertaken. All Staff had to do was the same it had done for all its other communications with Operator, but Staff failed to do that. Given that Kerry Patrick had expressly informed Tristan Kimbrell that he believed he had undertaken all that was needed to be compliant,[35] Operator was entitled to better notice than the mere gestures provided.

CONCLUSION

Given everything stated above, a fine in this matter is not appropriate, a heighted 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

[35] *See*, Operator's Exhibit 5.

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, EVANS, BROCK
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CERTIFICATE OF SERVICE

I, Jackson C. Ely, hereby certify that on this 10th day of April, 2024, I caused the original of the foregoing **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:

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