

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

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Dwight D. Keen

In the Matter of the Application of Cholla)	Docket No: 18-CONS-3350-CUIC
Production, LLC to authorize injection of)	
saltwater into the Marmaton C Formation)	CONSERVATION DIVISION
at the Metzger #1-16 well, located in)	
Section 16, Township 19 South, Range 33)	License No: 31819
West, Scott County, Kansas.)	

**ORDER ON APPLICANT’S MOTION TO DISMISS AND PROTESTANT’S
MOTION FOR STAY OF PROCEEDINGS**

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

Background:

1. On March 12, 2018, Cholla Production, LLC (Cholla) filed an Application seeking injection authority into the Marmaton C Formation at the Metzger #1-16 well, located in Section 16, Township 19 South, Range 33 West, Scott County, Kansas.¹

2. On March 27, 2018, Lario Oil & Gas Company (Lario) filed a letter of protest alleging that the Metzger #1-16 was part of a prior unitization docket, *Application of Lario Oil & Gas Company for an Order Authorizing the Unitization and Unit Operations of the Feiertag Unit in Scott County, Kansas*, Docket No. 17-CONS-3516-CUNI (Dec. 14, 2017) [*hereinafter* Docket 17-3516], that remains in dispute in the District Court of Scott County, Kansas.² Lario further alleged that granting injection authority would harm its correlative rights and cause waste.³

¹ Application (Mar. 12, 2018).

² Protest by Lario Oil & Gas Company (Mar. 27, 2018).

³ *Id.*

3. On April 24, 2018, Cholla filed a Motion to Dismiss Protest and Approval of Application. Cholla alleged Lario's arguments are meritless as "the Metzger 1-16 well is outside the boundary of Lario's proposed Feirtag unit" and "there is no communication between the Metzger 1-16 and Lario's proposed Feirtag unit."⁴ Cholla also moved for dismissal for failure to establish a direct and substantial interest pursuant to K.A.R. 82-3-135b.⁵

4. On April 27, 2018, Lario filed a Response to Motion to Dismiss and Motion for Stay of Proceedings. Lario acknowledged "the Metzger #1-16 well is outside the boundary of Lario's proposed Feirtag unit in Docket 17-3516."⁶ Lario alleged that the Metzger #1-16, the subject of the current application, and the Metzger #2-16, which is a well that is proposed to be part of the unit in Docket 17-3516, are related.⁷ Lario explained, "[i]f Lario is successful in the Scott County Case, and its Feiertag unit is approved, Lario would be taking over operations of the Metzger #2-16 well"⁸ "Cholla is seeking to inject saltwater into the Marmaton C formation, [a]nd, the entire basis for Cholla's protest in Docket 17-3516 was Cholla's contention that the Marmaton C reservoirs in the Metzger #1-16 and Metzger #2-16 wells are connected."⁹ Lario requested the Commission deny Cholla's Motion to Dismiss and enter an order staying all proceedings in the docket pending final judicial determination of Docket 17-3516.¹⁰

5. On May 4, 2018, Commission Staff (Staff) filed a Response to Operator's Motion to Dismiss Protests, stating "Staff has not completed its review of the application . . ." and therefore

⁴ Motion to Dismiss Protest and for Approval of Application at 2-3 (Apr. 24, 2018).

⁵ *Id.* at 3. Cholla cites *Application of Cross Bar Energy, LLC, for a Permit to Authorize the Injection of Saltwater into the Vigle VW-6 Well Located in the SW/4 of Section 14, Township 23 South, Range 10 East, Greenwood County, and an Amendment to Injection Permit E-27315 to Change the Authorized Injection Rate and Pressure*, Docket No. 17-CONS-3689-CUIC (Apr. 5, 2018) [*hereinafter* Cross Bar], wherein the Commission held that a protestant in a proceeding must establish standing under Kansas's two part test to maintain a protest in the matter.

⁶ Response to Motion to Dismiss and Motion for Stay of Proceedings at 3 (Apr. 27, 2018).

⁷ *Id.* at 3-5.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.* at 6.

Staff commits to no position except that the Application should not be granted by the Commission at this time.¹¹

6. On May 7, 2018, Cholla filed a Reply and Response Opposing Lario Motion to Stay. Cholla reasserted its primary concerns that Lario does not have standing and the prospective harm is mere speculation regarding future occurrences, including the outcome of Docket 17-3516 on judicial review.¹²

Motion to Dismiss:

7. The Commission finds and concludes that Cholla's Motion to Dismiss should be denied. In support of dismissal, Cholla raised *Cross Bar's* holding that K.A.R. 82-3-135b protestants must demonstrate standing to meet the requirements for filing a protest. However, such reliance is misplaced. The key distinction is the timing.

8. In *Cross Bar*, the Commission held in abeyance an initial motion to dismiss pending further inquiry.¹³ The Commission later explained, "[a]t the pre-evidentiary stage of a proceeding, a party need only demonstrate a prima facie case for standing . . . the Commission must determine if the facts alleged in the protest, and inferences to be made therefrom, demonstrate standing."¹⁴ The Commission based this interpretation on the applicable case law regarding motions to dismiss.¹⁵ Additionally, "[d]ismissal . . . before utilization of discovery is seldom warranted."¹⁶

9. The Commission finds that Lario has established a prima facie case for protestant status, and without further evidence on the record *in this matter*, dismissal is not warranted at this

¹¹ Staff's Response to Operator's Motion to Dismiss Protests at 2-3 (May 4, 2018).

¹² Reply and Response Opposing Lario Motion to Stay at 3 (May 7, 2018).

¹³ Order on Default and Standing at 7, *Cross Bar* (Oct. 19, 2017).

¹⁴ Written Findings and Recommendations at 16, *Cross Bar* (Mar. 29, 2018); see Final Precedential Order at 1, *Cross Bar* (Apr. 5, 2018) (adopting the Written Findings and Recommendations)).

¹⁵ See *Labette County Medical Center*, 2017 WL 3203383 at *6 (discussing *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258 (2012)); *Bd. of Cty. Commissioners of Sumner Cty. v. Bremby*, 286 Kan. 745, 751 (2008).

¹⁶ *Families Against Corp. Takeover v. Mitchell*, 268 Kan. 803, 809 (2009).

stage. While the Commission agrees that the Protest was based on the faulty premise that the Metzger #1-16 was within the unit boundary, Lario specifically alleged that the adjacency of the two properties may cause both correlative rights issues and waste. Both instances are mentioned in K.A.R. 82-3-135b and are well within the Commission's jurisdiction.¹⁷

10. There exists a factual dispute as to whether the Metzger #1-16 and Metzger #2-16 and the underlying formations are related. Therefore, the Commission denies Cholla's Motion to Dismiss and turns to Lario's Motion for Stay of Proceedings.

Motion to Stay:

11. The Commission finds and concludes that Lario's Motion for Stay of Proceedings should be granted. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants."¹⁸ Lario bears the burden of proving that a stay is necessary.¹⁹

12. Both Parties rely solely on evidence presented in Docket 17-3516 to make their respective cases here. The Commission takes official notice of the pleadings in Docket 17-3516 and in the subsequent Scott County District Court case.²⁰ In so doing, the Commission notes that the sufficiency of the evidence is at issue in the case and that Cholla continues to be an active participant.²¹ Therefore, the Commission finds that Lario has met the burden of proving a stay is warranted because the outcome of Docket 17-2516, the Metzger #2-16, and the underlying facts are critical to the resolution of this Docket and the Metzger #1-16.

¹⁷ K.S.A. 74-623; see K.A.R. 82-3-135b.

¹⁸ *Harsch v. Miller*, 288 Kan. 280, 292–93 (2009) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)).

¹⁹ *Id.* at 293.

²⁰ K.S.A. 77-524(f).

²¹ See Brief of Petitioner Lario Oil & Gas Company at 3, *Lario Oil & Gas Co. v. State Corp.* Comm'n, No. 2018-CV-00001 (May 14, 2018); Answer and Response of Cholla Production, LLC, *Lario Oil & Gas Co. v. State Corp.* Comm'n, No. 2018-CV-00001 (Feb. 5, 2018).

13. Additionally, the Commission finds Cholla's opposition to Lario's involvement here and Cholla's insistence that the two matters are unrelated to be somewhat disingenuous. Cholla was allowed to protest and maintain a presence in Docket 17-3516 and certainly has an interest in the outcome for the future production of its lease. The Commission cannot know how the District Court will ultimately rule. Therefore, Cholla's allegation that Lario's interests here are too speculative applies equally to Cholla's own interests and preferred outcome in Docket 17-3516. This observation bolsters Lario's allegations.

14. Finally, the Commission rejects Cholla's argument that Lario is in effect seeking a stay of Docket 17-3516 by requesting a stay in the current matter. The Commission understands Cholla's argument to be that they will be prejudiced by a stay here because they will not be allowed to produce their lease as they see fit pursuant to the Commission's decision in Docket 17-3516. This reinforces the Commission's belief that this Docket and Docket 17-3516 are related by demonstrating that Cholla has an interest in the affirmation of the Commission decision in Docket 17-3516.

15. Lario did not seek a stay in Docket 17-3516 because seeking a stay of an order denying relief would grant Lario nothing. Likewise, the effect of granting a stay here will not have the de facto effect of granting unitization. Lario stands in the same position. Similarly, Cholla's lease, wells, and interests, as they pertain to the two matters, remain the same as before these matters were filed. The subject acreage maintains the status quo and no Party is prejudiced as a result.

16. The Commission therefore finds both Parties and the Commission should be spared the expense of litigating this matter at this time. All involved will benefit by allowing Docket 17-3516 to follow its natural course before the District Court of Scott County. This decision is within

the Commission's discretion to control the disposition of the cases before it with all due respect to "economy of time and effort for itself, for counsel, and for litigants."²² The Commission therefore concludes that this matter should be stayed until such time as Docket 17-3516 is finally resolved.

THEREFORE, THE COMMISSION ORDERS:


- A. Cholla's Motion to Dismiss Protest and for Approval of Application is denied.
- B. Lario's Motion for Stay of Proceedings is granted pending resolution of Docket 17-3516 currently before the District Court of Scott County, Kansas.
- C. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).²³
- D. This Order constitutes non-final agency action.²⁴ Any request for review of this action shall be in accordance with K.S.A. 77-608 and K.S.A. 77-613. Lynn M. Retz, Secretary to the Commission, is the proper party to receive service of a petition for judicial review on behalf of the Commission.²⁵
- E. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 06/12/2018 _____

Mailed Date: 06/13/2018 _____
DLK/sc



Lynn M. Retz
Secretary to the Commission

²² *Harsch*, 288 Kan. at 292-93 (2009).

²³ K.S.A. 55-162; K.S.A. 55-606; K.S.A. 55-707; K.S.A. 77-503(c); K.S.A. 77-531(b).

²⁴ K.S.A. 77-607(b)(2).

²⁵ K.S.A. 77-613(e).

CERTIFICATE OF SERVICE

18-CONS-3350-CUIC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of
06/12/2018
first class mail and electronic service on _____.

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