BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the matter of the request to transfer wells from Quito, Inc. to Emerson Operating, LLC.	)))))	Docket No: 25-CONS-3236-CMSC CONSERVATION DIVISION License No: 33594 & 36165

BRIEF OF QUITO, INC.

COMES NOW Quito, Inc. (hereafter "Quito"), and submits its initial brief pursuant to the Presiding Officer Minutes Noting Post-Hearing Briefing Schedule previously filed herein.

I. Statutes, Regulations Governing Transfer of Operator Responsibility

There is only limited statutory language treating transfer of operator responsibility. Under K.S.A. 55-155(f), the following language appears:

> "If an operator transfers responsibility for the operation of a well… to another person, such operator shall file a notice of transfer of operator with the commission in accordance with rules and regulations of the commission."

That same subsection also imposes requirements to comply with the Surface Owner Notice Act, but compliance with those provisions are not a material issue involved in this administrative proceeding.

There are two (2) regulations which the Commission has adopted which have a bearing on transfer of operator responsibility. The first is K.A.R. 82-3-136. That regulation lists four (4) things which must be done in order to transfer operator responsibility under subsections (a) through (d). Under subsection (a), the past operator must report the transfer to the conservation division within 30 days after the change upon a form prescribed by the commission. Second, under subsection (b), the past operator shall furnish a list of all active and inactive wellbores on the lease with the notice of transfer. Third, transfers may not be made to any unlicensed person under subsection (c). Fourth, the new operator shall change the tank battery identification sign within 90 days of any transfer under subsection (d).

The second regulation pertinent to transfer is K.A.R. 82-3-410. That regulation provides that the transferring operator shall notify the conservation division in writing, on a form prescribed by the commission and in accordance with K.A.R. 82-3-136, of the intent to transfer the authority to operate an injection well from one operator to another. That regulation requires the transfer to be made "on the form prescribed by and in accordance with" K.A.R. 82-3-136, and sets out a list of eight (8) information items which the transfer of injection well authority must contain. Notable in that list is item (a)(5) which requires the transferring operator to identify the proposed effective date of transfer. Because the notice of transfer is to be provided to the Commission in accordance with K.A.R. 82-3-136, and that regulation requires notice to the Commission within 30 days **after** the change, literal compliance with K.A.R. 82-3-410(a)(5) is rendered problematic, and Quito submits that in practice, the "forms" prescribed by the Commission do not facilitate advance notice to the Commission of the effective date of transfer of injection authority. Under subsection (b) of K.A.R. 82-3-410, the transferring operator may be required to conduct a mechanical integrity test as a condition of the transfer.

The Commission has previously determined that it is appropriate for Commission Staff to review and approve or oppose transfers of operator responsibility. While Quito does not necessarily concur that Commission Staff has such authority, it seems largely a waste of time, paper and ink to re-litigate that question. Suffice it to say that counsel for Quito is unaware of any case law authority in the state of Kansas addressing that particular question.

Thus, Quito will assume for purposes of this brief, the proposition that Commission Staff has authority to review and approve or oppose transfers of operator responsibility. Assuming such authority exists, surely it must be exercised within the confines of the existing statute and regulations dealing with that topic. Staff's authority (and the authority of the Commission in turn) does not extend beyond the confines of the express provision of the applicable statutes and regulations. In particular, consideration of equitable issues, factors that are not expressed in either the statutes or regulations, and Staff's assessment of the ability of the new operator to comply, are all subjects which are properly beyond the scope of the Commission's legal authority, and must be disregarded.

II. Scope of Agency Authority.

Although the authority of the Commission to regulate various aspects of the oil and gas industry is broad, it is not limitless. Administrative agencies are creatures of statute and their power is dependant upon authorizing statutes; therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency. Am. Trust Adm'rs v. Sebilius, 273 Kan. 694, 44 P.3d 1253 (2002). As noted in Fischer v. Dep't of Revenue, 317 Kan. 119, 121-22, 526 P.3d 665, 667 (2023):

> "As an agency of the executive branch, KDOR derives authority to initiate an agency proceeding—what we call subject matter jurisdiction—from statutes."

Citing Rodewald v. Kansas Dep't of Revenue, 296 Kan. 1022, 1038, 297 P.3d 281 (2013); Stutsman v. Kansas Dept. of Revenue, No. 119, 528, 437 P.3d 102, 2019 WL 1303063, at 3 (Kan. App. 2019) (unpublished opinion). In a case involving natural gas sales and transportation contracts submitted to the Commission by a natural gas public utility, Kan. Pipeline P'ship v. State Corp. Comm'n, 22 Kan. App. 2d 410, 416-17, 916 P.2d 76, 81-82 (1996) it was stated:

> "No one contests that the KCC's authority is limited to that conferred by statute."

citing Cities Service Gas Co. v. State Corporation Commission, 197 Kan. 338, 342, 416 P.2d 736 (1966); Kansas-Nebraska Natural Gas Co. v. Kansas Corporation Commission, 4 Kan. App.2d 674, 675, 610 P.2d 121, rev. denied 228 Kan. 806 (1980).

The Commission's power to adopt rules and regulation is a delegation of legislative authority. As was discussed in Gumbhir v. Kansas State Board of Pharmacy, 228 Kan. 579, 618 P.2d 837 (1980), certain rules and regulations of the Board of Pharmacy were challenged on the basis that the legislature had improperly delegated its legislative power to a non-governmental association. In Syl. Paras. 1and 3, the Court stated:

> "Under Article 2, Section 1 of the Constitution of the State of Kansas the legislative power of this state shall be vested in a house of representatives and senate." Syl. Para. 1.
>
> "The legislature may enact general provisions for regulation and grant to state agencies certain discretion in filling in the details, provided it fixes reasonable and definite standards to govern the exercise of such authority." Syl. Para. 3.

See Boswell, Inc. dba Broad Acres v. Harkins, 230 Kan. 738, 740-41, 640 P.2d 1208 (1982); State ex rel. Stephan v. Finney, 251 Kan. 559, 836 P.2d 1169 (1992).

Expanding upon the principle that state agencies are creatures of statute and in order for their regulation to be valid, the regulation must conform to the delegation of legislative authority granted by statute, it was stated in Marcotte Realty & Auction, Inc. v. Schumacher, 225 Kan. 193, 589 P.2d 570 (1979) that:

> "The power to adopt rules and regulations is administrative in nature and in order to be valid must be within statutory authority. If the regulation goes beyond that which the legislature has authorized or it violates the statute, it is void."

Citing Goertzen v. State Department of Social & Rehabilitation Services, 218 Kan. 313, Syl. Para. 1, 543 P.2d 996 (1975); Hartman v. State Corporation Commission, 215 Kan.

758, 529 P.2d 134 (1974); Amoco Production Co. v. Arnold, Director of Taxation, 213 Kan. 636, 518 P.2d 453 (1974). Also in support of the proposition that administrative regulations must follow the law to be valid, and they cannot contravene a controlling statute, see Bruce v. Kelly, 316 Kan. 218, 514 P.3d 1007 (2022).

Rules and regulations adopted by an administrative board to carry out the policy declared by the legislature in the statutes have the force and effect of laws; such regulations are issued for the benefit of both the agency, and the public and an agency must be held to the terms of its regulations. Tew v. Topeka Police & Fire Civ. Serv. Commn', 237 Kan. 96, 100, 697 P.2d 1279 (1985). An agency may not violate its own rules, and where it fails to follow the rules that it has promulgated, its orders are unlawful. Kansas Commission on Civil Rights v. City of Topeka Street Department, 212 Kan. 398, Syl. P1, 511 P.2d 253, cert. denied 414 U.S. 1066, 94 S. Ct. 573, 38 L. Ed. 2d 470 (1973); McMillan v. McKune, 35 Kan. App. 2d 654, 660, 135 P.3d 1258, 1262-63 (2006).

III. Emerson Operating, LLC is Qualified to Accept the Transfer.

Emerson Operating, LLC (hereafter "Emerson") is a Kansas limited liability company. Emerson is not registered with the Federal Securities and Exchange Commission. Its sole member is Joe Harper. Quito is a Kansas corporation. Its sole officer, director and shareholder is Mark McCann. Kansas Production Company, Inc. (hereafter "KPC") is a Kansas corporation. Its sole officer, director and shareholder is

Mark McCann. KPC is the owner all of the working interest in the oil and gas leases at issue in this docket.

KPC and Emerson entered into Operating Agreements covering the Sears, Dearmond and McFarland-Delong leases. Quito transferred to Emerson the wells on the Sears, Dearmond and McFarland-Delong leases identified in the T-1 forms each of which were effective as of October 23, 2024, and the T-1s were submitted to the Commission's central office in Wichita, Kansas.

As demonstrated below, Emerson is qualified to hold and maintain an Oil Operator's license under K.S.A. 55-155(c)(4)(A) - (D). Emerson has paid the annual license fee and has complied with the financial responsibility provisions under K.S.A. 55-155(d).

K.S.A. 55-155 sets forth the criteria which a person must show to entitle that person to be issued an oil Operator's license.

"Person" is a term defined by the Act under K.S.A. 55-150(f). A "person" means:

> "any natural person, partnership, governmental or political subdivision, firm, association, corporation or other legal entity."

Emerson filed its application for an oil Operator's license and on October 7, 2024, its license was issued. On that date, Emerson was not registered with the Federal Securities and Exchange Commission. The sole member of Emerson as of the date of filing its application was Joe Harper. In order to demonstrate to the Commission that

Emerson was eligible to receive a license, it was required to show that each of the following:

(A) the applicant (Emerson);

(B) any officer, director, partner or member of the applicant (Joe Harper);

(C) any stockholder owning in the aggregate more than 5% of the stock of the applicant (although limited liability companies do not typically issue stock and frequently express their means of ownership through establishment of membership interests, in this case, Joe Harper is the sole member of Emerson and held 100% of the membership interest); and

(D) any spouse, parent, brother, sister, child, parent-in-law, brother-in-law, or sister-in-law of the foregoing (Joe Harper),

were in compliance with the requirements of Chapter 55 of the Kansas Statutes Annotated, all rules and regulations adopted thereunder, and all Commission orders and enforcement agreements. Prior to filing its application for a license, neither Emerson, nor any person related to Harper within the degrees set out above, had previously been licensed by the Commission; therefore, there appears to be no factual dispute that Emerson and its sole member Joe Harper were fully compliant with all of the applicable statutes, rules, regulations, orders and agreements, and thus, entitled to be issued a license. In reviewing K.S.A. 55-155, it is noted that there are no qualifications in terms of knowledge, education, training or experience that apply to the issuance of an oil Operator's license. In a nutshell, so long as the entity applying, its officers, directors, partners, members or stockholders owning more than 5%, or any person related by blood or marriage within the degree of relationship set forth in subsection (c)(4)(D) to the foregoing has not previously been found to be out of compliance with the statutes, rules, regulations, orders and agreements, the applicant is eligible to have a license issued.

Whether Emerson is "associated substantially" with Quito under the language set forth in K.S.A. 55-155(d)(3)(B) may have a bearing on Emerson's financial responsibility duties once it has held an Oil Operator's license for a period of 36 months, but the language of K.S.A. 55-155(d)(3)(B) has absolutely no bearing on Emerson's right to receive the transfer of the wells located on the leases identified in the various T-1s previously filed herein.

K.S.A. 55-155(d) sets out six alternative methods by which an applicant can demonstrate financial responsibility to the Commission. Subsections (d)(1) and (2) allow the applicant to post a performance bond or letter of credit based on the number and depth of wells the applicant is accepting responsibility for. Subsections (d)(4) allows the operator to post a non-refundable fee equal to 6% of the bond or letter of credit that would be required under subsections (d)(2). Subsection (d)(5) allows the applicant to grant the state a first lien on tangible personal property associated with the production facility. Subsection (d)(6) allows the applicant to provide other financial assurance approved by the Commission.

Subsection (d)(3) allows the operator to pay a non-refundable fee of $100.00 per year to assure financial responsibility if certain other conditions are met. The first condition is that the operator has an acceptable record of compliance during the preceding 36 months under subsection (d)(3)(A). The second condition is that the operator has no outstanding undisputed orders or unpaid fines, penalties or costs, and "has no officer or director that has been or is associated substantially with another operator that has any such outstanding orders or unpaid fines, penalties or costs". The correct construction of K.S.A. 55-155(d)(3)(B) is that it means what it says - if a licensee has an acceptable record of compliance, has no outstanding fines, penalties or costs, and is not associated substantially with another non-compliant operator, its financial responsibility fee is $100.00 per year.

Additionally, due to the minimal criteria necessary for an applicant to show in order to be issued an oil operator's license, an applicant has an expectation that the license will be issued upon showing that the criteria have been met. This principal - that a citizen has a reasonable expectation that a governmental benefit will be issued upon satisfaction of the criteria - triggers the due process requirements of the 14th Amendment. This principal is illustrated in Kan. Racing Mgmt., Inc. v. Kan. Racing Comm'n, 244 Kan. 343, 770 P.2d 423 (1989) and Rydd v. State Board of Health, 202 Kan. 721, 451 P.2d 239 (1969).

IV. Factual Basis of Staff's Opposition to Transfer.

In the present case, it appears that Staff opposes the transfer of the wells and leases for the following reasons:

A. Staff witnesses expressed concern that Mark McCann (hereafter "McCann") would be giving direction to Joe Harper and be involved in the decision making process concerning operation of the leases and wells. For a variety of reasons, these concerns do not establish a factual or legal basis to oppose the transfer.

First, McCann, as the sole officer, director, and shareholder of KPC has a legitimate property interest in the leases and wells. Ownership of the working interest in the leases and wells by KPC does not appear to be an issue contested by any of the parties. The assertion that Emerson should operate the leases and wells free of any input, comment, suggestion or recommendation of McCann is in derogation of the legitimate rights which exist arising out of ownership of the leases by KPC.

Following transfer, as the party exercising physical control of the wells and leases, Emerson is charged with the responsibility of operating the wells and leases in compliance with the applicable statutes, regulations, rules, orders and agreements of the Commission. As representatives of the agency charged with enforcement of those statutes and regulations, Commission Staff's focus is properly directed toward insuring that the licensed operator comply. Nothing in the testimony presented to the Commission by Staff suggests that McCann has or will, in any way, encourage or promote Emerson to violate the statutes and regulations during the course of operation of the leases and wells.

Evidence that a third-party may provide input, recommendations or instructions on operation of oil and gas leases and wells to the licensed operator does not violate any of the statutes under K.S.A. 55-150 et seq., or the regulations adopted thereunder. The right or ability to provide such input is not a factor expressly enumerated, or by any reasonable construction implied in the existing statute and regulations governing transfer of operatorship. The existence of such condition is not relevant to the process of determining whether the transfer should be approved or opposed.

B. Concerns regarding Emerson's ability to comply.

Citing the "long history" of Quito's compliance issues, Staff cites a general concern that Emerson will be unable to comply with applicable statutes and regulations. Closely related to this concern are concerns that the operating agreement between KPC and Emerson will not be long-lasting. Again, for a multitude of reasons, evidence of this nature does not establish a basis to oppose the transfer. First, this concern is based largely (if not entirely) upon speculation and conjecture. Staff engages in making a prediction that Emerson will fail to operate the leases and wells in a manner that is complaint with the statutes and regulations. Effectively, Staff is predicting an adverse outcome before Emerson is even given a chance to demonstrate its ability to operate the leases and wells in a complaint manner.

Neither the statutes or regulations identify the probability that the new operator will or will not comply with the applicable statutes and regulations as a factor to be considered in determining whether a transfer of operatorship should be approved or opposed. Nothing in the statutes or regulations give rise to a reasonable inference that the probability of future compliant performance is a condition upon which transfers should be opposed.

The probability of future compliant operation involves the subjective exercise of Staff's perception of the new operator based largely on Staff's assessment of the prior operator. There are no defined criteria or standards to guide Staff's predictions.

C. Emerson's financial dependence on KPC.

Under the terms of the Operating Agreements, KPC, as the owner of the entire working interest, agrees to pay all costs of operating the leases and wells being transferred to Emerson. Staff raises concerns that Emerson lacks the financial ability to independently operate the leases and wells. Again, for a variety of reasons, these issues do not present a basis to oppose the transfers.

Under the applicable statutes and regulations, so long as the new operator has provided sufficient evidence of financial responsibility pursuant to K.S.A. 55-155(d), the new operator's financial ability to comply with the statutes, rules and regulations is not a factor expressly, or by reasonable implication, identified as bearing upon transfer of operatorship from the old operator to a new operator.

Additionally, Joe Harper testified that Emerson has the independent financial ability to comply with the statutory and regulatory requirements associated with operating the wells and leases being transferred. In the event Emerson becomes obligated to advance funds to perform operations necessary to achieve compliance, it has legal remedies which it can exercise in the event the cost of such operations is not promptly reimbursed by KPC, including mechanic's and materialman's lien rights under K.S.A. 55-201, et seq.. Under the terms of the Operating Agreements, Emerson can demand advance pre-payment of anticipated monthly operating expenses from Quito. The statute, K.S.A. 55-155(d), expressly specifies an operator's financial responsibility duties. Imposing criteria above and beyond the requirements of the statute invites the Commission to act in a manner which is beyond the authority which the legislature has conferred upon it. No provision of the Act governing oil or gas operations, nor any regulation thereunder, give Staff a license to require the production of financial information from a proposed new operator.

D. The proposed transfer allows Quito to escape its regulatory obligations.

Staff asserts that allowing transfer of the wells on the Sears, Dearmond and McFarland-Delong leases to Emerson effectively allows Quito to transfer its "good leases" to Emerson while simultaneously retaining operator responsibility for its remaining leases upon which regulatory compliance issues exist. Similar to the preceding Staff concerns opposing transfer, even if the Commission accepts this contention as true, the asserted effect of the transfer is not a factor under the existing statutes and regulations, and is contrary to the recent amendment of K.S.A. 55-179.

By Final Order dated February 9, 2023, in Docket No. 22-CONS-3115-CMSC, In the matter of the application of Quito, Inc. (Operator) for an Operator's license renewal, the Commission denied Quito's license renewal application, the effect of which was to suspend Quito's license for a period of one year. Subsequently, Quito has applied for a new Operator's license, but the application for a new Operator's license is opposed by Commission Staff in Docket No. 25-CONS-3245-CMSC, In the matter of the application of Quito, Inc. (Applicant) for an Operator's license. Quito is not attempting to shirk its regulatory responsibilities.

Furthermore, Staff's contention is contrary to the express provisions of K.S.A. 55-179(b)(3) and (4). In determining the person that is legally responsible for the proper care and control of an abandoned well, subsection (b)(3) of that statute provides:

> "Accepting an assignment of a lease, obtaining a new lease or signing an agreement or any other written document between private parties shall not in and of itself create responsibility for a well located upon the land covered thereby unless such instrument adequately identifies the well and expressly transfers responsibility for such well;"

And subsection (b)(4) provides:

> "[T]he operator that most recently filed a completed report of transfer with the commission in which such operator accepted responsibility for the well or, if no completed report of transfer has been filed, the operator that most recently filed a well inventory with the commission in which such operator accepted responsibility for the well. Any modification made by commission staff of any such documents shall not alter legal responsibility unless the operator was informed of such modification and approved of the modification in writing;"

Clearly, the import of subsection (b)(3) is that an assignment, new lease, or other written document (including an operating agreement) between private parties does not transfer operator responsibility for all wells located on the lease. The responsibility for the proper care and control of the well arises when a well is specifically identified and expressly transferred. Reading the two subsections together, it is clear that all of the wells on the land covered by an assignment, new lease, or other written document need not be transferred to a new operator. To the extent the provisions of K.A.R. 82-3-136(b), requiring the past operator to furnish a list of all active and inactive wellbores on the lease, are contrary to K.S.A. 55-179, the regulation must be interpreted in the manner which is consistent with the prevailing statute. Certainly, there is nothing under K.A.R. 82-3-136 which requires a past operator to transfer all of the wells on all of its leases, or all of its leases, to a new operator. Staff's opposition to transfer of some, but not all, of the leases from Quito to Emerson, is contrary to the statutory authority which the legislature has established, specifically allowing such transfers. Imposition of additional criteria, such as Staff's ability to enforce regulatory compliance against past operators, is beyond the scope of and inconsistent with the existing statutory and regulatory framework presently in place.

E. Distinction between Quito/KPC and Emerson.

Finally, Staff opposes the transfer based upon the assertion that there is no distinguishable difference between Quito/KPC and Emerson. Staff testimony cites the similarity of this transfer to the prior transfer to Thor Operating, LLC addressed in

Docket No. 24-CONS-3001-CSHO.

As noted above, Emerson Operating, LLC is a Kansas limited liability company. Joe Harper is its sole member and officer. Kansas Production Company, Inc. is a Kansas corporation. McCann is its sole officer, director and shareholder. The past operator, Quito, Inc., is a Kansas corporation. Its sole officer, director and shareholder is McCann. Corporations and Limited Liability Companies are creatures of statute. Here in Kansas, the general corporation code is set out at K.S.A. 17-6001 et seq.. K.S.A. 17-6001(a) provides that:

> "Any person, partnership, association or corporation, singly or jointly with others, and without regard to such person's or entity's residence, domicile or state of incorporation, may incorporate or organize a corporation under this code by filing with the secretary of state articles of incorporation which shall be executed and filed in accordance with K.S.A. 2015 Supp. 17-7908 thought 17-7910, and amendments thereto."

Limited Liability Companies are governed by K.S.A. 17-7662 et seq., the Kansas Revised Limited Liability Company Act. That Act defines a "person" under K.S.A. 17-7663(l). Under K.S.A. 17-7663(b):

> "a limited liability company formed under the laws of the state of Kansas revised limited liability company act shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's articles of organization."

By statutory definition, Emerson, Quito and KPC are separate legal entities; Harper and McCann are separate natural persons. In Kansas, the judiciary has authority to ignore the existence of a legal entity and look to its principal or principals, and this authority is exercised by the Courts by piercing the corporate veil.

The predominate test of piercing the veil applied by Kansas Courts is articulated in Amoco Chemicals Corp. v. Bach, 567 P.2d 1337 (1977). There, the Kansas Supreme Court set forth the following eight factors:

> (1) undercapitalization of a one-[person] corporation, (2) failure to observe corporate formalities, (3) non-payment of dividends, (4) syphoning of corporate funds by the dominate shareholder, (5) non-functioning of other officers or directors, (6) absent corporate records, (7) the use of the corporation as a facade for operations of the dominate stockholder or stockholders, and (8) the use of the corporate entity in promoting injustice or fraud.

Veil-piercing is a judicial function. As such, it is a quintessential function of the general or common law power that Courts possess. If Am. Trust Adm'rs v. Sebillius (Supra) and Fischer v. Dep't of Revenue (Supra) are correct statements of the law in this state, the Commission has no authority to pierce the veils of the three artificial entities (Quito, Thor and KPC), and look to their principals for purposes of assessing the distinctions between their principals; the connections between their principals, or the ability of one principal of a separate entity to exercise economic or functional control over a separate person or legal entity.

Kansas case law confirms that state agencies cannot disregard corporate separateness or impose one company's liabilities on an affiliated company or individual absent explicit legislative authority. In Hill v. Kansas Dep't of Labor, 22 Kan. App. 2d 215, 210 P.3d 647 (2009) the agency attempted to hold a corporation's owner personally liable for the corporation's violation of law for failing to carry workers compensation insurance. The Court held that there was no legal or factual basis to "support...disregard of the corporate entity" in that administrative enforcement action, and that the penalty could only be imposed on the corporate employer. The agency had "no basis to disregard [the] corporate entity and pierce the corporate veil" in the absence of statutory authority. In Cray v. Kennedy, 230 Kan. 663, 640 P.2d 1219 (1982), the Supreme Court similarly held that the Department of Revenue could not impose additional qualifications on a liquor license application by imputing misconduct from a related entity. This was an ultra vires act because the agency's power is limited to what is explicitly authorized by statute. In Pemco, Inc. v. KDOR, 258 Kan. 717, 907 P.2d 863 (1995), the Court reiterated: "An administrative body has only such authority as is expressly or by necessary implication conferred by statute."

Kansas' approach is not unique. For example, in United States v. Bestfoods, 524 US 51 (1998), the EPA sought to hold a parent corporation liable for the environmental clean up liability of its subsidiary. The Court affirmed that "CERCLA does not purport to reject this bedrock principal" that a parent corporation is not liable for a subsidiary's acts absent piercing of the corporate veil or other exceptional circumstances. In Bestfoods, the Court noted that even in a regulatory context, a parent company could only be held liable if either the common law veil-piercing test was met or the parent itself directly operated the facility - mere ownership was insufficient. The Court pointedly required Congress to "speak directly" if it intended to abrogate the traditional rule of limited liability. Veil-piercing is "equitable at its core," available to Courts to impose liability on shareholders or affiliates when the corporate form is misused. Veil-piercing is thus recognized as a "rare" and drastic remedy, invoked only to prevent fraud or injustice. Lindsey D. Simon, Chapter 11, Shapeshifters, 68 Admin. L. Rev. 233 (2016). Notably, Courts - not executive agencies - traditionally undertake the fact intensive, case-by-case analysis required to "pierce the veil." Wagenmaker & Oberly, Piercing the Corporate Veil of Nonprofits, Wagenmaker & Oberly Blog (November 19, 2018).

In Texas the Railroad Commission regulates oil and gas operators, but cannot summarily impose an operator's liabilities on that operator's owners or affiliates without Court intervention. In <u>Love v. State</u>, 972 SW2d 114 (Tex. App. - Austin 1998), the State (on the Commission's behalf) sued two corporate officers of an oil operator to hold them personally liable for well-plugging violations. The State's petition advanced veil-piercing theories (alter ego and "sham to perpetrate a fraud"), but notably this was pursued in Court, with a jury trial, rather than by an administrative order. The fact that the Commission needed the Attorney General to bring a separate lawsuit and prove alter ego illustrates that the agency itself lacked power to unilaterally disregard the corporate entity. Texas law treats veil-piercing as a judicial question, requiring a showing of actual fraud or similar misconduct. Texas Courts have since reaffirmed that disregarding the corporate form is an equitable judicial act, not something an agency or even a jury can do absent proper instructions and legal standards. Elizabeth S. Miller, Recent Cases Involving Limited Liability Companies and Partnerships, Baylor Law School (Nov. 2023) at 3.

A recent Arizona case bluntly illustrates judicial resistance to an agency's attempt to expand its reach beyond the corporation. In State of Arizona v. Tombstone Gold & Silver, Inc., No. CV2021-005917 (Ariz. Super. Ct. Maricopia Cty. Apr. 1, 2024), the Arizona Department of Environmental Quality (ADEQ) sued a small mining company and also sued its individual officers for civil penalties, despite no Arizona statute making corporate officers generally liable. ADEQ urged the Court to adopt the "responsible corporate officer" doctrine or otherwise treat the officers as "operators" personally liable for the company's regulatory violations. The Arizona Trial Court "resoundingly rejected" this gambit. Citing Bestfoods and two centuries of corporate law, the Court held there was no legal or evidentiary basis to hold the individual defendants liable; the State had shown neither that any officer "specifically and deliberately directed" a violation nor that they acted outside the normal scope of their corporate roles. Absent such a showing, the individuals were "not...operators...under the Bestfoods analysis, or any other rational definition" of personal liability. The Court dismissed all claims against the officers and invited them to seek attorneys' fees. As the Court put it, "for now...individuals remain safe from the State's attempts to disregard the corporate form and make them personally liable" for a company's wrongdoing.

Oklahoma law likewise indicates that the Corporation Commission cannot impose liability on non-parties or affiliates without judicial action. The Oklahoma Supreme Court has long distinguished between the Commission's public-regulatory powers and the judiciary's role in adjudicating private rights. Gulf Oil Corp. v. State, 360 P.2d 993 (1961) noted the "general rule" that each corporation is a "distinct legal entity separate and apart from...other corporations or stockholders." In practice, if the Oklahoma Corporation Commission suspects abuse of the corporate form (e.g. a shell operator used to avoid compliance), they must turn to the Courts. These principals were applied in Penmark Resources Co. v. OK Corporation Cmm'n, 2000 OK Civ. App. 29, 996 P.2d 958. In Penmark, neither the Commission nor the Court suggested the Commission had any independent equitable power to rewrite corporate relationships. More broadly, Oklahoma Courts have reiterated that the Commission "is not a Court of general jurisdiction" and cannot adjudicate traditional private-law liabilities such as contract or tort claims between parties (which would include equitable shareholder liability) - those issues are for the District Courts.

Legal scholarship supports the view that veil-piercing is "strictly a judicial act" not easily transplanted into the administrative process. Professor Lindsay Simon, in an Administrative Law Review article, observed that agencies have sometimes tried to employ their "own flavor" of veil-piercing in enforcement contexts, but this raises uncertainty and fairness concerns. Simon, Supra Note 4. Another commentator notes that even if legislatures did grant administrative agencies explicit veil-piercing power, it remains "unclear" how agencies would implement it and what procedural safeguards would apply. Joseph A. Schremmer, Impeding Regulatory Failures in Oil and Gas Licensing: A Discussion of the Public Trust Doctrine and the Public Interest, 45 Envtl. L. 1 (2021), notes the concern is that agencies lack both the equitable jurisdiction and the robust fact-finding procedures of Courts (e.g. jury trials, full discovery) that accompany veil-piercing determinations. As one law professor put it, agencies are meant to implement statutes, "not...to apply judicial decisions" like the alter ego doctrine in the absence of a statutory mandate. Mashaw, Jerry Lewis, Agency-Centered or Court-Centered Administrative Law: A Dialogue With Richard Pierce on Agency Statutory Interpretation. Administrative Law Review, Vol. 59, No. 4, 207, Yale Law School, Public Law Working Paper No. 149.

Commission Staff have cited to Fatzer v. Zale Jewelry Co. of Wichita, Inc., 179 Kan 628, 298 P. 2d 283 for the proposition that an agency may pierce the corporate veil. In that case, the Kansas Supreme Court ousted a corporation from practicing optometry, but that action was taken in a quo warranto action brought on behalf of the licensing board by the attorney general. The Zale Jewelry case did not involve agency action.

CONCLUSION

When the transfer from Quito to Emerson is evaluated within the scope of the existing statutory and regulatory framework and in a manner which is consistent with those existing provisions, there simply is no basis to oppose transfer of the wells on the three leases in this docket from Quito to Emerson. The Commission should direct Staff to process the transfers.

SUBMITTED BY:

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File #3185
S.Ct. #09412

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true copy of the attached Brief of Quito, Inc. has been served to the following by means of electronic service on August 20, 2025.

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