BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the matter of resolving various regulatory violations associated with Ace Energy, LLC (Operator).	)	Docket Nos.: **23-CONS-3017-CPEN** 23-CONS-3029-CPEN 23-CONS-3087-CPEN 23-CONS-3135-CPEN
	)	CONSERVATION DIVISION
	)	License No.: 34998
In the matter of the application of Ace Energy, LLC (Operator) for an Operator's License Renewal.	)	Docket No.: 23-CONS-3143-CMSC
	)	CONSERVATION DIVISION
	)	License No.: 34998

OPERATOR'S POST-HEARING BRIEF

Pursuant to the order of the Commission upon the conclusion of the evidentiary hearing conducted on November 7th and 8th, 2023 in the above-captioned matter, Ace Energy, LLC ("Operator" or "Ace") submits its Post-Hearing Brief (this "Brief"), as set forth below.

INTRODUCTION

The scope of the above-captioned proceeding has spiraled out of control as the result of Staff's improper retroactive and pretextual investigation of Operator. This case is about violations of Commission regulations alleged by Staff at nine of Operator's wells, and Staff's groundless claim that Operator's license cannot be renewed due to a wholly contrived relationship with an out-of-state company called SX54, LLC. Each of these allegations are flawed and insufficient to meet Staff's burden of proof that Operator has engaged in the wrongdoing alleged in dockets 23-3017, 23-3029, 23-3087, 23-3135. As to the allegation of Operator's relationship with SX54, LLC under the combination rules of 55-155(c)(4) in 23-3143,

the evidence showed that Staff never had any factual basis or legally colorable justification to oppose Operator's license renewal application.

Instead of withdrawing its meritless objection to Operator's livelihood, Staff doubled down and dedicated a tremendous volume of its resources to conducting retroactive investigations for the sole purpose of finding post-hoc reasons to deny Operator's license renewal. Simply stated, Staff is putting the cart before the horse, and it comes at the price of Operator's due process and constitutional rights. Not only did the investigations of ***ALL*** of Operator's wells occur at the request of legal staff after the hearing in each and every one of the consolidated dockets had commenced, Operator was not even made aware of the scope of proceeding until hundreds of exhibit pages alleging hundreds of violations at hundreds of wells were attached to the pre-filed testimony of Staff's witnesses. That pre-filed testimony was provided to Operator on July 7, 2023 – more than six months ***AFTER*** the hearing commenced in this docket on December 20, 2022 and more than seven months ***AFTER*** Staff filed its motion opposing Operator's license renewal on November 30, 2022.

To demonstrate the impropriety of Staff's conduct, imagine a hypothetical scenario where a criminal defendant was first accused of hundreds of additional crimes when the State put on its case-in-chief in a criminal proceeding, all arising out of a large-scale investigation the State conducted after the case had started. In such a scenario there would undoubtedly be a mistrial and an unquestionable violation of the defendant's constitutional notice and due process rights. Prosecutorial misconduct of that magnitude would be plastered over the nightly news and the court would have no hesitation in admonishing the prosecutor responsible. Unfortunately, the exact same conduct is being carried out in this proceeding and it comes at the cost of the most sacred and fundamental constitutional rights this nation is built upon and which Operator is

entitled to by law: notice and due process. Constitutional rights are not cast aside when the State attempts to strip a party of its property and livelihood in an administrative agency proceeding versus a criminal court. This Commission should not tolerate an unconstitutional and retroactive attempt to drive Operator out of business when the exact same conduct would be detestable if undertaken by any other arm of the State.

Staff's strategy is very simple: to present so much evidence that the Commission is overwhelmed and is forced to draw the conclusion that Operator must be guilty of something given how much evidence Staff claims there is. But when the unconstitutional evidence is cast aside, this case is a much simpler and clear-cut one. Does Operator have a relationship with SX54 in a manner prohibited by statute? No it does not, and there was never any legitimate basis for this claim. Did Operator commit the violations alleged in the remaining four penalty orders? Either Operator did not conduct the violations it was accused of or Staff's own conduct – not Operator's – caused those violations to occur. The Commission must not let Staff's unconstitutional attempt to win by quantity over quality carry any weight. When this proceeding is boiled down to what is truly relevant and truly at issue, Staff's case falls apart and what remains is everything Operator has complained of from the beginning: Staff's hostile animus and unrelenting desire to drive Operator's sole member, Jonathan Freiden, out of business at any cost.

ARGUMENTS AND AUTHORITIES

1. The Commission Is Prohibited from Considering Staff's Evidence Arising Out of the January 2023 Investigations.

It is important to note the issues relating to Operator's license renewal application and when exactly those issues were raised by Staff. Operator filed its license renewal application on

November 28, 2022.[1] Staff filed its motion opposing Operator's license renewal commencing Docket 23-3143 two days later on November 30, 2022.[2] In that November 30, 2022 motion, Staff raised the following concerns in opposition to Operator's license renewal: (1) a purported history of non-compliance with Commission rules and regulations; (2) an alleged relationship with SX54, LLC ("SX54"); and (3) findings against Operator in *J and B Oil & Gas, LLC v. Ace Energy, LLC*, 493 P.3d 309 (2021) (Unpublished). Staff raised no other issues at that time in regards to Operator's license.[3]

In regards to allegations of non-compliance, it should be noted that Operator was in compliance at all wells at the time it filed its license renewal application and Staff witnesses testified on this subject and corroborated this fact. Ryan Duling testified:

> Q. … Isn't it correct that every well subject to these penalty orders was brought into compliance prior to this docket being commenced?
> A. I – I am going to say that I assume that is correct, because they would – the operator license would probably be suspended, if they had not brought those into compliance.
> Q. And all of these fines are – would have been paid as well for the same reason; correct?
> A. I – I don't – I'm going to assume yes…

A history of purported non-compliance is irrelevant and punitive to Operator for matters that have already been resolved and for which Operator had already suffered consequences for and corrected. The fact stands that at the time Staff opposed Operator's license renewal application, it was opposing an operator who was currently in compliance with all Commission rules and regulations.

[1] *Motion for the Designation of a Presiding Officer and the Scheduling of a Prehearing Conference*, Docket 23-CONS-3143-CMSC, at ¶ 1 (Nov. 20, 2022).
[2] *See generally, Id.*
[3] *See generally, Id.*

The proceeding in Docket 23-3143 is and always has been a tenuous excuse for Staff to conduct a post-hoc fishing expedition to find a reason to deny Operator's license from being renewed. Staff even admits that its intention was always to conduct a fishing expedition: "If the Commission grants this motion for a presiding officer and the scheduling of a prehearing conference, then Staff will have an opportunity to conduct discovery to determine whether Mr. Freiden or Ms. Dragon-Freiden have a significant relationship with SX54…"[4]

Staff had no evidence whatsoever to support its motion to deny Operator's license renewal when it filed it. Staff's motion was nothing more than a baseless knee-jerk reaction to Operator's license renewal application. Further, the timing of Staff's motion appears to be retaliation against Operator, given that Operator had successfully petitioned the Commission nine days earlier, on November 21, 2022, to reinstate Operator's license (over Staff's objections) in response to Staff's improper suspension of Operator's license.[5] Simply put, Staff's initial plan to suspend Operator's license failed and Staff's motion was its Plan B to run Mr. Freiden out of business.

Staff had no legitimate evidence on November 30, 2022 to justify denying Operator's license renewal so it initiated this proceeding and sought to find evidence after the fact. This scramble to find evidence is demonstrated by the mobilization of the small army of field staff who conducted inspections of every single one of Operator's wells during the period of January 12, 2023 and January 25, 2023. The nature of this massive investigation was set forth by Ryan Duling's testimony:

> Q. So you testified that staff found – allegedly found violations at hundreds of wells on operator's leases based on inspections that took place between

[4] *Id.* at ¶ 5.
[5] *See*, Pre-Filed Direct Testimony of David Bideau at 2:25-3:26.

January 12th of 2023 and January 25th of 2023. That's a 13-day time period; correct?

A. No. That's correct.

Q. Who asked staff to conduct these inspections?

…

The Witness: It was requested by legal staff that inspections be performed.

Q. … Do you have a particular person or just legal staff?

A. No. Tristan Kimbrell.[6]

It should be noted that it was Tristan Kimbrell, the Staff attorney for this proceeding, who requested – after the proceeding was initiated – that inspections of every single one of Operator's wells be conducted. It should also be noted that the undisputed purpose for this large-scale investigation was solely to retroactively find evidence to support Staff's position that Operator's license renewal in this very proceeding should be denied. The "Reason for Investigation" given for each of those January 2023 inspection reports was listed as "Request from Wichita Legal Staff pertaining to Docket #22[sic]-CONS-3143-CMSC".[7] It should be noted that it was legal staff that spearheaded the effort to deny Operator's license renewal. In addition to the January inspections detailed above, it was legal staff who asked Nancy Borst to hold Operator's license. Nancy Borst's own testimony indicates this fact, as she states: "I was told to hold the license by legal"[8] and "[w]hen legal staff asked me to hold it, that's when I held it."[9]

Evidence gathered from the January 2023 inspections are improper, unconstitutional, and must be barred from consideration in this proceeding. There is a plethora of reasons as to why that evidence is wholly improper. First, every single finding contained in RD-1 is premised upon hearsay evidence. With the sole exception of Brad Bohrer, the individuals who actually inspected the wells and leases, and created the corresponding field reports were not available as witnesses. While Brad Bohrer was a witness in this proceeding, his testimony never discussed

[6] 11/7/2023 Transcript at 89:13-91:5.
[7] *See Generally*, Exhibit RD-1.
[8] 11/7/2023 Transcript at 178:22-23.
[9] *Id.* at 180:24-25.

the January 2023 inspections and his testimony centered on other penalty orders at issue in this proceeding. All of the evidence Staff has produced flows through Ryan Duling and is built upon evidence that he has no actual knowledge of. Ryan Duling even states this:

> "I located the – the violations that staff had found in the field reports and documents them into a database that my supervisor, Troy Russell, helped construct. I also document the violations in the field reports to the KCC rules and regulations. Troy helped me build some reports that are the exhibits that we can quarry [sic] out the violations of – per commission regulations. And that's what the exhibits are."[10]

Ryan Duling's role and knowledge of the evidence for all of the January inspections is that of a complier – he took the findings of others and combined them together. Mr. Duling did not go to the leases, he has no knowledge of the legitimacy of those reports and Operator is unable to ask him cross-examination questions to verify the truth of the allegations asserted by Brad Bohrer and others in the field reports. "[T]he right to the cross-examination of witnesses in quasi-judicial or adjudicatory proceedings is one of fundamental importance and is generally, if not universally, recognized as an important requirement of due process."[11] There is a reason hearsay evidence is generally disfavored in legal proceedings and this scenario demonstrates exactly why. Operator was denied the opportunity to question the true witnesses for these field reports – those who actually visited the leases. Instead, Operator was restrained to the knowledge of Ryan Duling, an individual who never went to the leases, never saw the purported violations, and merely complied the allegations of others into documents that could be queried.

Next, the scope of Docket 23-CONS-3143-CMSC cannot be retroactively expanded to include findings from the January 2023 inspections as it was not properly noticed at the onset of the proceeding. "K.S.A. 55–706(a) provides that the KCC may institute proceedings upon

[10] 11/7/2023 Transcript at 30:20-3.
[11] *Farmland Industries, Inc. v. State Corp. Com'n of State of Kan.*, 25 Kan.App.2d 849, 859 (1999) (*quoting, Adams v. Marshall*, 212 Kan. 595, 599-600 (1973)).

petition of any interested party, upon petition of the attorney general on behalf of the State, or on its own motion. These proceedings are to be commenced in the manner provided by K.S.A. 55–605 and amendments thereto. K.S.A. 55–605(a) requires the KCC to give reasonable notice to interested parties and that such notice should contain such information as will briefly and adequately disclose the matter to be considered or the relief sought."[12] Operator does not dispute that notice was provided for Docket 23-CONS-3143-CMSC, but as stated above, that notice was for only three items: (1) a purported history of non-compliance with Commission rules and regulations; (2) an alleged relationship with SX54; and (3) findings against Operator in *J and B Oil & Gas, LLC v. Ace Energy, LLC*, 493 P.3d 309 (2021) (Unpublished). The Commission even acknowledges the scope of these concerns in its Order Designating Presiding Officer and Setting Prehearing Conference.[13]

The notable term in the issues Staff raised was Operator's purported "*history of non-compliance*". Staff did not raise concerns about current or future non-compliance; Staff premised its motion on the ***HISTORY*** (before November 30, 2022) of non-compliance. The notice of the proceedings for Docket 23-CONS-3143-CMSC was that it was retrospective in nature as of November 30, 2022. Nothing in the notice provided would make Operator aware that it should be prepared to defend against any and all alleged violations Staff *may* find between November 30, 2022 and the uncertain date this proceeding would be finalized. The statutory requirement is that notice "contain such other information as will briefly and adequately disclose the matter to be considered or the relief sought".[14] There is a degree of absurdity in interpreting

[12] *Mobil Expl. & Producing U.S. Inc. v. State Corp. Comm'n of State of Kan.*, 258 Kan. 796, 842 (1995); *see also*, K.S.A. 55–605(a).
[13] *See, Order Designating Presiding Officer and Setting Prehearing Conference*, Docket 23-CONS-3143-CMSC, at footnote 1 (Dec. 20, 2022).
[14] K.S.A. 55-605(a).

that standard to include matters that are unknown and undiscovered at the time the notice was sent. Simply stated, the December 2022 notice for Docket 23-CONS-3143-CMSC did not adequately disclose the fact that Operator would have to defend itself from all of the allegations arising out of inspections to be conducted in January 2023 and therefore the notice was constitutionally deficient for those issues. It is contrary to the fundamental principles of due process to interpret the constitutional notice requirement that issues be adequately disclosed in a way that allows a notice to include matters that did not exist at the time of the notice.

The question must be posed: if the cut off for new allegations is not the date the proceeding started and the notice was issued, then when is it? Could Staff even now after the evidentiary hearing launch new non-compliance allegations against Operator in this proceeding? Staff's interpretation appears to be that the deadline is the date it files its pre-filed testimony, because that is what occurred. Pre-filed testimony is ordinarily filed only a few weeks before the hearing, which would put any operator in a bind to defend itself from large-scale attack if this is how proceedings are to be conducted before this Commission. The existence of the January 2023 inspections – and their allegations – was only revealed to Operator on July 7, 2023 via the pre-filed testimony of Ryan Duling. That pre-filed testimony is Staff's case-in-chief and is the equivalent to the first half of any traditional trial. If the proceeding did not include the use of pre-filed testimony and the exact same witness statements and evidence was presented in an in-person hearing, there would be no question that a due process and notice violation occurred. Staff's disclosure for the first time of hundreds of pages of documents alleging hundreds of new violations at hundreds of wells in Ryan Duling's testimony is frankly shocking. Somehow Staff believes that simply because this disclosure was made via pre-filed testimony instead of live

testimony, there is no notice violation here. That is wrong and these allegations are just as improper as if they were asserted for the first time at an in-person hearing.

Simply stated, the January 2023 inspections dramatically expanded the scope of this proceeding from four penalty orders at nine wells and a license renewal application to hundreds of violation allegations at hundreds of different wells. Staff did more than simply inspect Operator's wells – this was a calculated and premeditated effort to ***find*** violations. Staff scrutinized every single one of Operator's wells and twenty plus other wells not in Operator's inventory. Staff then leveraged every single violation it found as if each was some indication that Operator is an abnormally poor operator – the reality is that it is unlikely that any operator in this State could survive the level of scrutiny that Staff imposed upon Operator.

The allegations and the corresponding issues arising out of the January 2023 inspections were not properly noticed before they were asserted in the pre-filed testimony of Ryan Duling on July 7, 2023. If these inspections were to be legitimately included in this proceeding then they should have been noticed before the Order Designating Presiding Officer and Setting Prehearing Conference and certainly before Ryan Duling's pre-filed testimony. To consider any of the evidence arising out of the January 2023 lease inspections is to invite a constitutional violation.

2. Staff's Remaining Evidence to Oppose Operator's License Renewal is Insufficient.

Once the unconstitutional noise of the January 2023 inspections is filtered out, Staff's arguments against Operator's license renewal falls apart. As for SX54, there is not now, nor was there ever any evidence that Operator or Jonathan Freiden is related to that entity under the combination rules of K.S.A. 55-155(c)(4). Despite all of Staff's fishing expedition efforts, no evidence exists that Jonathan Freiden or his wife have any ownership or management role with SX54, they were only the local consultant for SX54 and served as the emergency contact,

occasional KOLAR form-filer, and resident agent (i.e., a legally required in-state address) for SX54.

K.S.A. 55-155(c)(4) states the combination parties at issue:

> "(A) The applicant; (B) any officer, director, partner or member of the applicant; (C) any stockholder owning in the aggregate more than 5% of the stock of the applicant; and (D) any spouse, parent, brother, sister, child, parent-in-law, brother-in-law or sister-in-law of the foregoing."[15]

Operator, Jonathan Freiden, nor Mr. Freiden's wife, Rebecca Dragon-Freiden, are any of those parties in regards to SX54. Staff produced absolutely zero evidence that the Freidens or Operator had any ownership or management role with SX54. It should be noted that Ms. Borst's testimony changed over the course of this proceeding. First, she alleged the relationship at issue was because Mr. Freiden was listed as the "emergency contact for SX54"[16] and Rebecca Dragon-Freiden was the "resident agent for SX54"[17]. Then in the evidentiary hearing, Ms. Borst's focus became that "Mr. Freiden is listed on that license as a contract operator, and I think that is the – the origination of the concern…"[18] A contract operator is not a combination party as set forth in K.S.A. 55-155(c)(4), in fact it implies the opposite – that a *contract* operator is not the owner but rather an operator under an arms-length agreement, and hence the qualifier is attached to indicate the non-ownership nature of the operator to SX54's well.

As for allegations that Mr. Freiden submitted T-1 forms wherein Staff claims that Mr. Freiden held himself out to be a "Member" of SX54. A license renewal form and T-1 forms are not sufficient evidence that Mr. Freiden has an ownership or managerial role in SX54 – that is not even circumstantial evidence of an ownership or managerial role. Further, those forms do

[15] K.S.A. 55-155(c)(4).
[16] *Pre-Filed Direct Testimony of Nancy Borst*, at 4:16-17
[17] Id. at 4:17-18.
[18] 11/7/2023 Transcript at 174:13-15.

not show what Staff purports those forms show. A close inspection of the T-1 forms Staff provided reveal that the title of "Member" for SX54 is tied to an entirely different individual altogether: *Casey Mensue*. The form clearly calls for the name of the "Contact Person" for SX54 and the name provided is "Casey Mensue". In the place on the form for Casey Mensue's title, that is listed as "Member". Mr. Freiden's name only appears in the signature line for Casey Mensue – a clear indication that Mr. Freiden was signing the form on Casey Mensue's behalf and that the information contained in the form (including the title "Member") was in reference to Casey Mensue. This form indicates that Mr. Freiden was acting as an agent for Casey Mensue and signing the form on Casey Mensue's behalf, nothing more.

It should also not be gone unnoticed that Ms. Borst's credibility is highly suspect as she submitted false testimony in the evidentiary hearing in regards to Operator's license renewal application:

> Q. Okay. What – at whose direction did you put [Operator's license renewal application] on hold?
> A. Initially, I put it on hold at my own because it was incomplete.
> Q. Okay, What was incomplete?
> A. He's asking for two rig tags, and he has failed to provide me any proof that he owns these rigs.
> Q. Okay. Has that been corrected to this date?
> A. No, it has not. [19]

Ms. Borst's testimony was conclusively disproven by Mr. Freiden and Exhibit AX-12, showing undisputedly that Operator did provide the pertinent proof of ownership for the rig tags and Ms. Borst's testimony was false.[20]

As for the findings against Operator in *J and B Oil & Gas, LLC v. Ace Energy, LLC*, 493 P.3d 309 (2021) (Unpublished), that matter is simply irrelevant to this proceeding. That was a

[19] 11/7/2023 Transcript at 171:25-172:10.
[20] 11/8/2023 Transcript at 101:4-104:10; *see also*, Exhibit AX-12.

dispute between Operator and an unrelated third party which was litigated and is now resolved. There is no relationship to Operator's license, and Staff's attempt to inject that prior proceeding into this one is simply a prejudicial tactic to unfairly prejudice operator with whatever Staff can find which purportedly reflects Operator in the worst possible light. Similarly with Operator's compliance history with the Commission, those are past and settled matters – which as set forth by Ryan Duling's testimony above, all fines were paid and compliance had been achieved. It is highly prejudicial to strip away Operator's license for matters that have already been resolved and for which Operator has already faced consequences for. Those two issues carry no weight and no good reason exists to deny Operator's license renewal, especially because despite Staff's claims – no evidence of any prohibited relationship with SX54 exists.

3. The Violation in Docket 23-3017 Arises from Staff's Own Conduct.

The Penalty Order in Docket 23-3017 alleges that Operator operated on a suspended license. That violation was manufactured by Staff's unwillingness to process Operator's TA applications, specifically the TA application for the DR Nelson V2 well. Ryan Duling testified the application for the DR Nelson V2 well was submitted on June 11, 2022.[21] That was the last step Operator needed to undertake to bring the wells at issue in Docket 22-3410 into compliance. At that point, the matter was out of Operator's hands, but notwithstanding that fact, Operator's license was suspended on June 21, 2022 for non-compliance with Docket 22-3410.[22] The TA application then languished in the custody of Staff for more than 25 days before Staff ultimately changed the shut-in date on the form and then subsequently denied the TA application solely on the basis of a changed shut-in date.[23]

[21] 11/7/2023 Transcript at 144:23-25.
[22] Staff's Exhibit 5, at 3.
[23] Staff's Exhibit 1, at 1; see also, 11/7/2023 Transcript at 60:8-68:12.

There are three key reasons why Staff's conduct was improper. First, Staff suspended Operator's license for non-compliance with Docket 22-3410 ten days *AFTER* Operator had done everything it could have done to come back into compliance with Docket 22-3410. Second, the reason the sole remaining issue for compliance, the DR Nelson V2 TA application, languished in Staff's custody for almost a month before Staff took any action. Staff somehow found the time to suspend Operator's license for purported non-compliance with Docket 22-3410 during this period but could not find the time to simply review the sole document standing between Operator and compliance. This demonstrates Staff's priorities, as Staff was able to inspect all of Operator's 400+ wells during a 13-day period in January 2023 but could not process a single TA application in a 25-day period. Staff moved with lightning speed when it comes to penalizing Operator but drug its feet when undertaking an action that would actually be beneficial to Operator. Third, when it came time to review that document, Staff changed information on the form in order to create a reason to justify denying the application.

If there was a violation in Docket 23-3017 for operating on a suspended license, it occurred solely because Staff's own conduct was undertaken to manufacture the violation and is extremely prejudicial to Operator.

4. Operator Did Not Violate K.A.R. 82-3-407 In Relation to the Allegations in Docket 23-3029 And It Attempted In Good Faith to Comply With Commission Regulations In All Attempts to Repair the Subject Wells.

The testimony of Ryan Duling establishes that Operator was attempting in good faith to comply with Commission regulations in regards to the MITs on the EC Larson #2 and EC Larson #6. For a period of two and a half months, Operator was actively working on repairing the two EC Larson wells in a good faith attempt to save the well before the 90-day deadline.[24] Staff was

[24] 11/7/2023 Transcript at 70:5-73:10.

fully aware of the work Operator was attempting to undertake on the two wells and even witnessed multiple MIT tests during Operator's attempts to fix the wells.[25] The 90-day deadline to bring the wells into compliance was July 4, 2022 – a Federal holiday.[26] Operator did ultimately plug and abandon the EC Larson #2 and EC Larson #6 and only mere days after the poorly-timed deadline passed. As the 90-day deadline approached, Operator unfortunately conceded that the wells could not be saved turned its attention to plugging the wells. The EC Larson #6 was plugged and abandoned on July 6, 2022[27] and the EC Larson #2 was plugged and abandoned on July 19, 2022.[28]

Staff claims Operator did not accomplish what it needed to prior to the 90-day deadline, but that is false. K.A.R. 82-3-407 states "(c) The operator of any well failing to demonstrate mechanical integrity by one of the above methods shall have no more than 90 days from the date of initial failure in which to perform one of the following: (1) Repair and retest the well to demonstrate mechanical integrity; (2) plug the well; or (3) isolate the leak or leaks to demonstrate that the well will not pose a threat to fresh or usable water resources or endanger correlative rights."[29] Operator did not plug the well before the 90-day deadline but that does not mean that Operator did not comply with the 90-day deadline.

Operator shut-in the EC Larson #2 and EC Larson #6 wells upon their failure to pass MIT. Staff has provided no evidence of continued injection or operation at those wells after the failed MIT. That is noteworthy because operator complied with K.A.R. 82-3-407 by shutting in the wells. That action allowed Operator to isolate the leak or leaks to demonstrate that the well

[25] *Id.*
[26] 11/7/2023 Transcript at 74:21-25.
[27] 11/7/2023 Transcript at 73:6-10.
[28] 11/7/2023 Transcript at 77:15-21.
[29] K.A.R. 82-3-407(c).

did not pose a threat to fresh or usable water resources or endanger correlative rights – as set forth under K.A.R. 82-3-407(c)(3). By shutting in the well and isolating the leak, Operator ensured that there was no threat to water and no danger posed by the EC Larson #2 and EC Larson #6. Operator did this within the 90-day time period set forth by regulation. The regulation expressly states three options and operator may take to come into compliance, and Operator selected the option under subsection (c)(3). Staff's hyper-fixation on subsection (c)(1) and (c)(2) disregards the word "*or*" in the regulation. Operator did eventually plug and abandon the wells after the 90-day period, but at that time Operator had already complied with the regulation and that action was solely to cooperate and foster good relations with Staff.

Further, it is inequitable to hold Operator liable when all Operator was attempting to do was comply with Commission regulations and save the wells. Operator did not want to walk away from wells that could potentially be saved and tried in good faith to fix the wells in collaboration with Staff. Unfortunately when the time came to transition to plugging the wells, it took time to get a third-party out to the wells to plug them. Ryan Duling even testifies to how difficult it would be to get a plugging contractor out to the wells after the most recent failed MIT:

> Q. Is 15 days a reasonable or maybe even exemplary example of – a reasonable period of time to obtain a plugging contractor after a well fails an MIT? In your experience?
> A. It – it might be tough to get a plugging contractor in two weeks, but there's several plugging contractors out there. So, you know, obviously, I don't have any production, so I – I do not – I can't say that if I can get a – somebody to plug it in two weeks or not.
> Q. Okay. Well, that's – to me, that sounds like an awfully quick period of time to get a plugging contractor out there; is that your experience – particularly, in summer of 2020 [sic (2022)] –
> A. I'm going to answer that as yes. It is – two weeks is a time frame that would – you know, it would be tough probably to get a plugging contractor to drop everything and come do it…[30]

[30] 11/7/2023 Transcript at 73:25-74:17.

Operator was trying its best to save the two EC Larson wells, and immediately after the last failed MIT, Operator was able to secure a plugging contractor to come out and plug the two wells in an abnormally quick timeframe. Operator attempted to move quickly to bring the wells into compliance – unfortunately it was not quick enough to plug the wells within 90 days, but Operator had already achieved compliance under subsection (c)(3). Operator's good faith efforts at compliance must stand for something, it is wholly inequitable to penalize Operator for simply trying to save a well and then moving with lightning speed to plug the well when it became apparent the wells could not be saved. Missing an arbitrary deadline by two days for plugging which was not required by regulation should not outweigh the body of evidence that indicates Operator was doing all it could to be in compliance as quickly as it could – and did comply within 90 days. Operator's compliance with subsection (c)(3) and the principles of equity shield Operator from being found in violation of the allegations set forth in Docket 23-3029.

5. Operator Did Not Conduct Unauthorized Injection In Relation to the Allegations in 23-CONS-3087-CPEN, as the Wells Were Merely Hooked Up to Inject and No Injection Occurred.

K.A.R. 82-3-400 states that "[i]njection shall be permitted only after both of the following conditions are met: (1) The operator has filed an application for injection authority… (2) The conservation division has issued a written permit granting the application."[31] The regulation goes on to state "[t]he failure to obtain a written permit from the conservation division before beginning injection operations shall be punishable by a penalty…"[32] The Commission's regulations define "injection" as "'[i]njection' means injection of fluids or natural gas for enhanced recovery, or disposal of brines or fluids into an injection well."[33]

[31] K.A.R. 82-3-400(a).
[32] K.A.R. 82-3-400(b).
[33] K.A.R. 82-3-101(a)(40).

The Commission's regulations clearly stand for the understanding that if fluid was not being injected into a well, then there can be no unauthorized injection. Naturally a well being hooked up to potentially inject is not inherently evidence of injection. That understanding is corroborated by Staff's witness, Brad Bohrer:

> Q. … Mr. Boyer [sic (Bohrer)], can a well be hooked up for injection, but not actually injecting fluid?
> A. Can a well be – you said hooked up but not –
> Q. Hooked up for injection, but not actually injecting fluid; is that possible?
> A. Yes. That is possible, yes.[34]

In regards to the five wells at issue in Docket 23-3087, Staff has provided no evidence that any of those wells were actively injecting fluid – all that exists is evidence that the wells were hooked up at the wellhead to potentially receive injection fluids. That is not evidence of injection and it is consistent with the testimony of Jonathan Freiden:

> Q. Okay. There was testimony about a Gale Mullen or Mullen I22-A. I believe that's on the Gale Mullen lease with the C3 – C43-E43 and I43. You mentioned those wells were incapable of injection because a trunk line was turned off; is that correct?
> A. Yeah. We put in a trunk line and that trunk line was for future use to allow flipping of wells as needed – as permitting allowed to add more injection over time and that needed to be physically done in order to – and that was not done for those wells, so it would have been impossible for those wells to be injecting.[35]

As for the Underwood 6 R90, the well could not have been injecting because there was no production on the lease.[36] The Gale Mullen C43, E43, I43, the Mullen I22-A, and the Underwood 6 R90 wells may have been hooked up as potential injector wells, but they were not injecting fluid. The trunk line that led to the various Mullen wells was turned off and Brad Bohrer never investigated that trunk line. Further, no portion of Mr. Bohrer's field report ever

[34] 11/7/2023 Transcript at 205:25-206:6.
[35] 11/8/2023 Transcript at 262:2-13.
[36] *See*, Exhibit AX-9.

states that fluid was actively being injected – only that the wells were hooked up for injection purposes.[37] To contrast Staff's allegations, there is ample evidence that there was not actually any injection, including a complete lack of production at the Underwood 6 lease, which makes it physically impossible for injection operations to have occurred on that lease.[38] Mr. Bohrer acknowledges that a lack of production indicates that the Underwood 6 R90 could not have been injecting:

> Q. To operate a water flood, don't you need some production?
> A. Correct.
> …
> Q. … Where was the water coming from that was being injected into the well at the Underwood 6 lease, if there was no production?
> A. I've – I do not have an answer for that.
> Q. Is it more likely that the Underwood 6 lease was not injecting?
> A. It's – it appears it could be, yes.
> …
> Q. … Mr. Boyer [sic (Bohrer)], do you believe based off this information [Exhibit AX-9] of the Underwood 6 lease was injected?
> A. Based off this information.
> Q. Yes.
> A. No.[39]

As for evidence of injection because lines may have been "cool to the touch", that evidence only appears on two wells: the Gale Mullen I43 and the Gale Mullen E43.[40] It is not indicative of anything, as Mr. Bohrer testified that he has no knowledge of what temperatures oil and water is at during the water flood and injection process.[41]

Simply stated, Staff has not met its burden of proof that Operator was injecting at the Gale Mullen C43, E43, I43, the Mullen I22-A, and the Underwood 6 R90 wells. There has been no evidence produced that the lines were actually injecting fluid and there is unrebutted

[37] 11/7/2023 Transcript at 212:15-213:18.
[38] *See*, Exhibit AX-9.
[39] 11/7/2023 Transcript at 234:4-235:13.
[40] 11/7/2023 Transcript at 265:16-21.
[41] 11/7/2023 Transcript at 201:3-202:18, 210:5-8, 211:6-9

testimony from Mr. Freiden that the trunk line for all of those wells was not set up to allow for those wells to inject fluid. The evidence that Mr. Bohrer provided is that he merely witnessed the wells being hooked up for injection, a fact that is consistent with the status of Operator's trunk line structure and Mr. Freiden's testimony. Evidence of a well being hooked up for injection is not injection and Staff has provided no evidence that any actual injection was occurring.

6. Operator did not Violate Either K.A.R. 82-3-400 or K.A.R. 82-3-409 in Relation to the Allegations in Docket 23-3135 and the Nature of the Allegation is Unconstitutional.

The most peculiar of the allegations made against Operator is that in Docket 23-3135. Staff alleges that Operator either: (1) violated K.A.R. 82-3-400 via unauthorized injection at the Grundy B #5 SWD well; or (2) Operator violated K.A.R. 82-3-409 by submitting an inaccurate U3C Report. The reality is Operator did neither.

As stated above, K.A.R. 82-3-400 provides "[i]njection shall be permitted only after both of the following conditions are met: (1) The operator has filed an application for injection authority… (2) The conservation division has issued a written permit granting the application."[42] The regulation goes on to state "[t]he failure to obtain a written permit from the conservation division before beginning injection operations shall be punishable by a penalty…"[43] The allegations of unauthorized injection stem from the alleged injection at pressures greater than gravity at the Grundy B #5 SWD well. Staff witness, Todd Bryant, even admits that Staff has no evidence other than the U3C form to base its allegations off of:

> Q. Okay. Are you aware that Mr. Freiden will testify that the Grundy well is not even equipped to take water at pressure?
> A. I was not aware of that.

[42] K.A.R. 82-3-400(a).
[43] K.A.R. 82-3-400(b).

Q. Are you aware that it takes special equipment to inject at pressure?
A. I am.
Q. Do you have any evidence that that equipment is present at the Grundy well?
A. I do not.
Q. So if you have no other evidence that there's an unauthorized injection other than this form [Grundy B #5 SWD U3C Form], your initial reaction was that it was a reporting error, the Grundy well is not even equipped to inject at pressure. Do you still believe that it was an unauthorized injection?
A. As I stated before, I'm in charge of 16,000 wells. I have to take the operator at his word, and in the last paragraph of this form, it says at that – like, after the deadline of August 29th, at that time, if the data on this form indicates that you exceed your – the terms of your injection permits, that staff may recommend penalty. It was clearly laid out. He did nothing. This is all we have to go off of.
Q. But does that mean that it was an unauthorized injection?
A. It's a self-reporting form. All we can do is go off of what he has reported.[44]

Jonathan Freiden testified that the Grundy B #5 is not equipped to inject at pressure.[45] Accordingly, a well cannot inject a pressure if it is not equipped to do so. Staff has absolutely no evidence whatsoever that unauthorized injection (i.e., injecting at pressure) occurred at the Grundy B #5, and Operator has provided evidence that it is impossible for injection at pressure to occur. Naturally, Operator could not have violated K.A.R. 82-3-400.

Next, Staff's safety-net argument was that if Operator did not violate K.A.R. 82-3-400, then Operator must have violated K.A.R. 82-3-409 for filing an inaccurate U3C form. K.A.R. 82-3-409 provides as follows:

(a) Each operator of an injection well shall perform the following:
(1) Keep current, accurate records of the amount and kind of fluid injected into the injection well; and
(2) preserve the records required in paragraph (a)(1) above for five years.
(b) Each operator of an injection well shall submit a report to the conservation division, on a form required by the commission, showing for the previous calendar year the following information:

[44] 11/8/2023 Transcript at 13:2-14:4.
[45] 11/8/2023 Transcript at 263:12-21.

(1) The monthly average wellhead pressure;
(2) the maximum wellhead pressure;
(3) the amount and kind of fluid injected into each well; and
(4) any other performance information that may be required by the conservation division.

The report shall be submitted on or before March 1 of the following year.

(c) The failure to file or timely file an annual injection report shall be punishable by a $100 penalty.[46]

Staff's witness Todd Bryant stated that Operator filed its U3C on February 22, 2022 – before the deadline and there was no issue with the timing of the report.[47] Mr. Bryant stated there was no issue with subsection (c):

Q. Okay. So we don't have an issue with subsection C of this regulation; do we?
A. No.[48]

Subsection (b) of the regulation merely requires that information be provided for various categories, including (1) the monthly average wellhead pressure; and (2) the maximum wellhead pressure. Subsection (b) of the regulation provides no requirement that that information be accurate. Mr. Bryant even stated that Operator did not violate subjection (b):

Q. So he couldn't have violated subsection B either; could he?
A. Correct.[49]

The accuracy requirement of the statute is set forth in subsection (a), but the regulation only requires that an Operator "[k]eep current, accurate records of the amount and kind of fluid injected into the injection well."[50] The regulation never sets forth any requirement, in any portion of it, that an Operator must keep accurate records of (1) the monthly average wellhead pressure; and (2) the maximum wellhead pressure. Mr. Bryant even acknowledged this:

Q. … Based off the way this subsection A is written, can you identify what part of subsection A operator violated?

[46] K.A.R. 82-3-409.
[47] 11/8/2023 Transcript at 17:17-18:5.
[48] 11/8/2023 Transcript at 18:6-8.
[49] 11/8/2023 Transcript at 22:4-6.
[50] K.A.R. 82-3-409(a).

A. I mean, no.[51]

The fact is that Operator could not have violated K.A.R. 82-3-409 because there is no part of that regulation as it is written that Operator could have violated. Operator provided the U3C timely under subsection (c). Operator provided all information requested under subsection (b) and there is no requirement in subsection (b) that that information is accurate. Operator kept accurate all information mandated by subsection (a). The exclusion of (1) the monthly average wellhead pressure and (2) the maximum wellhead pressure, as items an operator must keep accurate in subsection (a) means that Operator could not have violated any portion of K.A.R. 82-3-409. If Staff is dissatisfied with how the regulation is written, that is not the fault of Operator.

The most interesting aspect of the allegations in 23-CONS-3135-CPEN, is that Staff simply accused Operator under the wrong regulation. The letter Staff initially sent to Operator stated:

> "After August 29, 2022, Staff will review your form(s), including any corrections. At that time, if data on the form(s) indicates you exceed the terms of your injection permit(s), then Staff may recommend a penalty under K.A.R. 82-3-400 (unauthorized injection), K.A.R. 82-3-409 (submission of injection data), or K.A.R. 82-3-128 (failure to verify information)."[52]

That last regulation, K.A.R. 82-3-128, is conspicuously absent from the allegations in Docket 23-3135, yet it is the regulation that is actually applicable to the facts. K.A.R. 82-3-128 provides "Verification of any information necessary to administer these rules and regulations or any commission order may be required by the conservation division. The failure to verify requested information shall be punishable by a $100 penalty."[53] The testimony of Todd Bryant establishes that Staff sent the aforementioned letter but Operator did not respond to correct the

[51] 11/8/2023 Transcript at 23:11-14.
[52] *Penalty Order*, Docket 23-CONS-3135-CPEN, at Exhibit B (Dec. 1, 2022).
[53] K.A.R. 82-3-128.

information.[54] The facts at issue do not establish any violation of K.A.R. 82-3-400 for unauthorized injection, they do not establish a violation of K.A.R. 82-3-409 because the information that was purportedly inaccurate was never required to be accurate by the express language of the regulation.

What the facts do appear to be is a textbook situation where K.A.R. 82-3-128 would be applicable – Staff requested Operator verify information in the U3C and Operator failed to respond to verify the requested information. That is important for two reasons. First, K.A.R. 82-3-128 sets the monetary penalty at $100 – not the $500 imposed in the penalty order in Docket 23-3135.[55] A $500 penalty is inappropriate and excessive for a potential violation that would incur merely $100 if any other operator committed it. Staff's attempt to quintuple the fine from what is prescribed by regulation is a textbook example of unreasonable, arbitrary, and capricious conduct. Second, a violation of K.A.R. 82-3-128 was not noticed nor alleged against Operator and Operator cannot be found to have violated that regulation now – that time has passed. It is not Operator's fault if Staff attempted to shoehorn a fact pattern into a violation of a regulation that simply did not apply.

Further, the very nature of how Staff launched its allegations against Operator in this penalty order was unconstitutional. Staff's allegations arise in an "either-or" context: either Operator violated K.A.R. 82-3-400 or it violated K.A.R. 82-3-409. Undoubtedly Staff intended to catch Operator between a rock and a hard place and wanted to play a reactionary game – once Operator defended against one claim then Operator would inherently have admitted to the other and Staff's legal theory would be reactive to however Operator would defend itself. That is not adequate due process notice. Operator is entitled to know the claims against it – and for this

[54] 11/8/2023 Transcript at 10:9-12:23.
[55] *Penalty Order*, Docket 23-CONS-3135-CPEN, at Ordering Clause A (Dec. 1, 2022).

entire proceeding Staff has been evasive on what exactly it was alleging against Operator. Staff needed to pick a lane and its outright refusal to do so was incredibly prejudicial to Operator and at the expense of Operator's constitutional right to notice of the issues.

> "An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence."[56]

Staff never once during this entire proceeding notified Operator of what exactly Operator was being accused of. Instead Staff kept the allegation amorphous and unclear and the reason why is likely because Staff never had any evidence of unauthorized injection in the first place. Staff's either-or penalty order was for the purpose of heightening a fine. The either-or nature of the allegation allowed for – by admission – the ability to split the difference between a regulation which Staff had no evidence of a violation of (K.A.R. 82-3-400) and which allowed it to fine Operator $1,000, and a regulation which provided for no fine amount (K.A.R. 82-3-409).[57] It is unacceptable to arbitrarily increase fine amounts simply because Staff won't acknowledge that half of its either-or claim was meritless from the very beginning.

7. Staff Improperly Withheld Evidence in Discovery.

Throughout the course of the evidentiary hearing, multiple discovery violations were uncovered and it became quite apparent that Staff improperly withheld evidence which was clearly relevant, discoverable, and requested by Operator. In her testimony, Nancy Borst stated

[56] *Suburban Med. Ctr. v. Olathe Cmty. Hosp.*, 226 Kan. 320, 320 (1979).
[57] *Penalty Order*, Docket 23-CONS-3135-CPEN, at ¶ 10 (Dec. 1, 2022).

"I keep very detailed phone records of the phone calls I receive."[58] When Operator's counsel stated that "I believe those were requested in discovery but were not furnished" Mr. Kimbrell stated "Those were furnished to you in discovery".[59] Operator's counsel also stated that "We did not receive any records. We receive a – sort of a recreated version of two phone calls… We received what appeared to be – I don't know what it was. It looked like a – something that was created for the purposes of responding to discovery."[60] Mr. Kimbrell stated "I believe Ms. Borst handwrites her notes, so I typed in what she had written. I could copy off the actual notes and send them to Mr. Schlatter, if he would like to see those…"[61]

Mr. Kimbrell, by his own admission failed to produce Ms. Borst's call records in their original form – what he produced was recreated by Mr. Kimbrell himself for the purposes of production in discovery. The law requires that "[a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request… if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained…"[62] The handwritten call notes should have been produced – or at least a photocopy of the handwritten call notes. A document prepared by Mr. Kimbrell for the purposes of production in discovery raises serious concerns about the legitimacy of the information it contains. At an absolute minimum, Mr. Kimbrell should have disclosed that he recreated and altered the document and that the actual document was not produced.

[58] 11/7/2023 Transcript at 181:16-17.
[59] 11/7/2023 Transcript at 182:1-4
[60] 11/7/2023 Transcript at 188:25-189:8.
[61] 11/7/2023 Transcript at 189:12-15
[62] K.S.A. 60-234(b)(2)(E)(i)-(ii).

Next, Duane Sims testified that he maintains phone records on his work phone.[63] Mr. Sims also testified that he was never asked for his phone records and they were never given to Operator.[64] Operator's counsel brought attention to the issue of phone records that were requested but not produced, stating "You [Tristian Kimbrell] didn't furnish any of the records that you – your witnesses relied upon, and we asked for those phone records."[65] Mr. Kimbrell's response to this statement was that "You [Operator's counsel] didn't ask for that. You asked for phone logs."[66] It appears Mr. Kimbrell's justification for refusing to produce requested information in discovery was that there is supposedly a difference between "phone records" and "phone logs". That is a frivolous exercise in semantics, as logs and records are synonyms for each other and the definitions included in Operator's data requests are drafted broadly enough to cover both "phone records" and "phone logs" – if any difference even exists.

One sore subject of this proceeding has been the absence of Dennis Peerenboom, whose employment with the Commission terminated following the filing of his pre-filed testimony. Operator filed a motion to compel seeking the production of any records of correspondence between Jonathan Freiden and Dennis Peerenboom, or between Dennis Peerenboom and any other individual concerning Mr. Freiden or Operator.[67] Staff provided no records other than a series of emails on an unrelated matter regarding an unrelated operator about a complaint from an unrelated landowner about a field staff member. Staff denied the Peerenboom records existed and even stated that "Despite Operator's assertion, Mr. Peerenboom did not in fact create any records regarding his conversation with Mr. Freiden. Staff cannot provide documents that do not

[63] 11/7/2023 Transcript at 297:12-298:1.
[64] 11/7/2023 Transcript at 298:2-299:3.
[65] 11/7/2023 Transcript at 312:16-18.
[66] 11/7/2023 Transcript at 312:19-20.
[67] *Operator's Motion to Compel*, at p. 3 (Oct. 25, 2023).

exist."[68] Operator countered that "[t]here must be some sort of call log, notes, files, email or something whereby Mr. Peerenboom took Mr. Freiden's complaint and did something with it."[69] Operator's motion to compel was denied outright.[70]

It is quite alarming to learn throughout the course of the proceeding that despite Staff's claims to the contrary, Mr. Peerenboom's records do in fact exist, were not provided to Operator, and Tristan Kimbrell apparently engaged in conduct to conceal the fact that discoverable evidence was withheld from Operator. Troy Russell's testimony revealed the full extent of this discovery violation:

> Q. … [D]id Mr. Peerenboom ever communicate to you that this complaint had been lodged?
> A. I had – I had a record request to know of communications, which I believe we put together, but eventually, we were made aware of that, yes.
> Q. When were you made aware of that?
> A. I do not know the exact time frame. I think it's something that we could find out.
> …
> Q. My question is, were you – were you made aware of that complaint and – and when?
> A. I don't have that right in front of me, but I was made aware of it, but I would assume it was probably, you know, fairly recent to the complaint being made.
> Q. Do you remember how you were made aware of that?
> A. I can't recall if it was by e-mail or by phone call.
> Q. And would that –
> A. Probably both.
> Q. Okay. And those e-mails or phone calls were from Mr. Peerenboom or somebody else?
> A. I believe that they would be from Mr. Peerenboom and probably the response from me was probably made through e-mail to him would be my guess, but like I said, I do not have that information in front of me.[71]

[68] *Response to Operator's Motion to Compel*, at ¶ 7 (Oct. 27, 2023).
[69] *Operator's Reply in Support of Motion to Compel*, at p.2 (Oct. 30, 2023).
[70] *See, Presiding Officer Order Denying Motion to Compel* (Oct. 31, 2023).
[71] 11/8/2023 Transcript at 79:21-81:5.

Mr. Russell's testimony altered dramatically after a short break where the proceeding went off the record. Following that, Mr. Russell's testimony when he was being questioned by Mr. Kimbrell was the complete opposite of his prior testimony:

> Q. All right. There was also some discussion of Dennis Peerenboom. Do you recall – you've had a chance to think about it now. Do you recall, did you receive an e-mail or send an e-mail to Dennis Peerenboom regarding Mr. Freiden, giving him a call?
> A. I would think that would be highly unlikely being as IT would have done a sweep of all e-mails, looking for all that for the discovery request. It could be related to another issue that we were having with a – a landowner was filing a complaint, too, or a grievance against one of our field staff in Elk County, and I was probably juxtaposing the two.[72]

Mr. Russell's complete change in his testimony and the specifics of the information he provided was incredibly bizarre and contradictory to the testimony he had just provided prior to the break and going off the record. Mr. Russell gave further testimony on why he changed his testimony:

> Q. Mr. Russell, you were placed under oath at the time your pre-filed direct testimony was offered; correct?
> A. Yes, sir.
> Q. And through the 10-minute break we took and until now you've remained under oath; correct?
> A. Yes.
> Q. Did you discuss your testimony concerning Mr. Peerenboom's email correspondence with your counsel during that time period?
> A. Yes, sir.[73]

What happened could not be more obvious: during the short break, Mr. Kimbrell consulted with Mr. Russell and instructed him to change his testimony. Mr. Russell was then provided a copy of the discovery documents that were provided to Operator – an email chain regarding an unrelated operator and a complaint from a landowner about a field staff member. Mr. Russell then returned to the stand and Mr. Kimbrell ask him a pre-meditated question which

[72] 11/8/2023 Transcript at 96:1-12.
[73] 11/8/2023 Transcript at 96:21-97:6.

was discussed by the two during the break and allowed Mr. Russell the opportunity to rescind his prior testimony which indicated that the Peerenboom record did in fact exist. This conduct must been seen for what it is: an attempt by Mr. Kimbrell to compel a witness to change their testimony in order to continue to conceal the Peerenboom emails and phone records which Staff denied exist. Operator has always believed these emails and call records exists, Operator even filed a motion to compel to that effect, and Mr. Russell's testimony – before he was coached by Mr. Kimbrell to change it – confirms what Operator has claimed.

"When a trial court is told of a possibility that a witness' testimony may have been improperly influenced by a bystander's conduct in the courtroom, the trial court is required to initiate an investigation to ensure that the defendant's rights to a fair trial have not been violated."[74] There is ample evidence that Mr. Kimbrell improperly influenced Mr. Russell's testimony and the question of what call records or emails exist between Mr. Russell and Mr. Peerenboom needs to be revisited. At a minimum – the Commission must investigate whether or not Mr. Kimbrell did in fact improperly influence Mr. Russell's testimony.

Frankly, this collection of discovery violations would create a mistrial if this occurred in a district or municipal court – and the same outcome should occur here. There is evidence now that support's Operator's contention that the Peerenboom records do in fact exist and were either destroyed or withheld from Operator. Kansas law mandates that if evidence is withheld, it imparts a presumption that is unfavorable to the party withholding it.[75] Given the evidence that Mr. Peerenboom's records do in fact exist and were withheld – the Commission must presume they did exist and were favorable to Operator.

[74] *State v. Dayhuff*, 37 Kan.App.2d 779, Syl. ¶ 12 (2007).
[75] *See*, PIK Civ. 4th 102.73.

8. Select Individuals Within the Commission Harbors a Hostile Animus Toward Jonathan Freiden.

The hostile animus which Mr. Freiden complains of is real and it is demonstrated time and time again by various Commission Staff. Mr. Kimbrell's aforementioned discovery violations, instigation of the large-scale January 2023 investigation of *ALL* of Operator's wells, and his instruction to Ms. Borst to hold Operator's license renewal indicated that he is certainly one of the individuals who harbor that hostile animus, but he is not alone. Mr. Duling's refusal to timely process Operator's TA applications and change forms causing Operator to not become timely compliant is another. Mr. Duling has built up a substantial resume of hostile animus toward Mr. Frieden, as he also unapproved TA application in Docket 22-3124 after it was possible to cure a defect solely to prejudice Operator. Mr. Freiden has testified at length about the bias and hostile animus against him from various individuals within the Commission.[76] If anything, the extent of the massive mobilization of Staff's resources to investigate *ALL* of Operator's wells in the span of 13 days when Staff could not bother to process a TA application in 25 days is indicative of a strong hostile animus toward Mr. Freiden and a desire to drive him out of business. This desire to drive Mr. Freiden out of business above actually bringing the wells into compliance was demonstrated by Troy Russell, as he rejected a settlement agreement which would have allowed Operator to stay in business and enable all the wells to come into compliance.[77]

The bias against Mr. Freiden appeared to manifest itself during the evidentiary hearing itself through multiple series of leading questions from the Commission itself aimed at rehabilitating Staff witnesses. These series of commissioner questions to multiple witnesses led

[76] *See generally*, 11/8/2023 Transcript at 98:14-273:19.
[77] 11/8/2023 Transcript at 58:25-65:23.

to speculative and conclusory statements, unsupported by evidence and intended to support the findings of violations of Commission regulations.

Unfortunately, there were multiple example of this. There was a line of commissioner questions focused on rehabilitating the testimony of Brad Bohrer and the lack of production records at the Underwood 6 lease. Despite evidence of a lack of production at said lease provided by Operator and a lack of tangible evidence to the contrary, a series of leading commissioner questions enabled unsupported and speculative evidence – from a witness with no first-hand knowledge – to be entered into the record.[78] There was also a line of leading questions to Brad Bohrer about the temperature of fluids in pipes to indicate potential injection when Mr. Bohrer had previously testified that he had no knowledge of what the temperature of the fluid was.[79]

There was a line of leading commissioner questions to Todd Bryant on the Grundy B #5 SWD well – questions from a commissioner who lacked actual knowledge of the evidence to Mr. Bryant, who also lacked actual knowledge of the evidence, about a field report prepared by an individual who was not available to testify. The evidentiary value of that line of questioning is highly suspect – especially given that no participant in that line of questioning had any actual knowledge of the substance or legitimacy of those field reports.[80] It should be noted that the purported image of the Grundy B #5 SWD well contained in the January 2023 field report[81] looks completely different from the purported image of the Grundy B #5 SWD well in Staff's March 2023 field report.[82] The images appear so radically different that they are likely not the

[78] *See*, 11/7/2023 Transcript at 254:1-258:2.
[79] *See*, 11/7/2023 Transcript at 250:10-253:2.
[80] 11/8/2023 Transcript at 29:4-32:23.
[81] *See*, Exhibit RD-1 at p. 257.
[82] *See, Penalty Order*, at Exhibit C p. 5, Docket 23-CONS-3268-CPEN (Apr. 13, 2023).

same well. There exists a genuine question of whether or not it is actually the Grundy B #5 SWD well in the January 2023 field report referenced by the commissioner, but the line of questioning assumes the accuracy this questionable evidence and solidifies it in the record without the ability of Operator to ask questions to an individual with actual knowledge to determine the legitimacy of whether it is indeed the Grundy B #5 SWD well in the photo.

There was also line of commissioner questions during Mr. Freiden's testimony apparently to raise concerns about a spill that occurred at a well which did not belong to Operator.[83] Spills that occur at wells that do not belong to Operator and are not under Operator's control cannot justifiably be held against Operator.

This evidence was prejudicial to Operator and no comparable line of questioning was ever entered into which could be construed as favorable to Operator and not Staff. Unfortunately, these lines of questioning give rise to the appearance of bias from the Commission itself and a legitimate question exists as to whether Operator truly received a fair proceeding.

Make no mistake; the hostile animus toward Mr. Freiden is real and it drives certain individuals within the Commission to find ways to prejudice Mr. Freiden and Operator – and that hostile animus is unreasonable, arbitrary, and capricious conduct which entitles Operator to relief.

CONCLUSION

The admissible evidence shows that there was never a colorable basis to hold Operator's license renewal application. The relationship with SX54 has always lack legitimate support and it was merely a pretext for Staff to conduct a fishing expedition. Staff has not carried its burden

[83] 11/8/2023 Transcript at 239:17-241:7.

of proof for the violations alleged in the various Penalty Orders set forth above and properly before the Commission. Moreover, the retroactive scrutiny of *ALL* of Operator's wells cannot be considered because those allegations were not properly noticed and are unconstitutionally present in this proceeding. If Staff wishes to pursue penalties for those alleged violations, then Staff must separately do so in the proper procedure – via a constitutionally noticed matter and hearing. For the above reasons, Operator respectfully requests that the Commission order Staff to process and approve Operator's license renewal application, rescind the penalty order, and order 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 4th day of December, 2023, 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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