

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

Before Commissioners: Dwight D. Keen, Chair
 Shari Feist Albrecht
 Susan K. Duffy

In the Matter of the Application of TDR) Docket No: 20-CONS-3043-CUIC
Construction, Inc. for a permit to authorize the)
enhanced recovery of saltwater into the) CONSERVATION DIVISION
Moldenhauer #W-42 well, located in Franklin)
County, Kansas.) License No: 32218

**ORDER RESCHEDULING PREHEARING CONFERENCE
AND PARTIALLY DENYING MOTION TO DISMISS PROTESTS**

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

I. Procedural Background

1. On July 10, 2019, TDR Construction, Inc. (Operator) filed an Application seeking authorization for injection of saltwater into the Moldenhauer #W-42 well in Franklin County.¹
2. On August 5, 2019, Scott Yeargain and Polly Shteamer (Protesters) filed a protest.²
3. On August 15, 2019, the Commission issued an order scheduling a prehearing conference for September 5, 2019. Yeargain and Shteamer failed to attend the prehearing conference.
4. On September 9, 2019, Operator filed a motion to dismiss Protesters.³
5. On September 10, 2019, Protesters filed a response to the motion to dismiss, also motioning for the prehearing conference to be rescheduled.⁴ In addition, Protesters asked that this docket be “combined” with KCC Docket 20-CONS-3079-CUIC.⁵

¹ See Application, pp. 1, 3 (Jul. 10, 2019).

² Protest of TDR Construction, Inc.’s Application – Scott Yeargain and Polly Shteamer (“Protest”) (Aug. 5, 2019).

³ Motion to Dismiss Protests (Sep. 9, 2019)

⁴ See Response to Motion to Dismiss and Motion to Reschedule Prehearing Conference (Sep. 10, 2019).

⁵ *Id.* at Prayer for Relief.

6. As described below, the Commission shall partially deny Operator’s motion, hold the remainder of Operator’s motion in abeyance, and shall reschedule the prehearing conference.

II. Substantive Background

7. Operator makes three arguments. First, Operator briefly argues Protesters’ non-attendance at the prehearing conference should result in default under K.S.A. 77-520(a).⁶ Second, Operator makes a somewhat more detailed argument that Protesters failed to make the specific allegations required by K.A.R. 82-3-135b.⁷ Finally, Operator most substantively argues Protesters’ protest failed to assert a direct and substantial interest as required under K.A.R. 82-3-135b.⁸

II. Findings of Fact

Protesters’ Non-Attendance at the September 5, 2019, Prehearing Conference

8. The Commission declines to find Protesters in default due to their non-attendance at the prehearing conference. While it is true that under K.S.A. 77-520(a) the Commission has discretion to issue a proposed default order for non-attendance,⁹ it is also true that the law disfavors default.¹⁰ Here, Protesters promptly re-engaged via email,¹¹ admitted to and apologized for their non-attendance,¹² and provided a plausible explanation for their error.¹³ The Commission also notes Protesters’ recent participation in multiple other Commission dockets, none of which have been marked by disregard for the procedural schedule.¹⁴ While there can certainly be situations calling for default,¹⁵ the Commission in its discretion does not find this to be one of them. Accordingly, to the

⁶ Motion to Dismiss Protests, ¶¶ 16-18.

⁷ *Id.* at ¶¶ 11-13.

⁸ *Id.* at ¶¶ 4-10, 14-15.

⁹ K.S.A. 77-520(a): “If a party fails to attend or participate in a prehearing conference . . . the presiding officer may serve upon all parties written notice of a proposed default order”

¹⁰ *See Garcia v. Ball*, 303 Kan. 560, 568 (2015).

¹¹ *See Prehearing Officer Order Regarding Electronic Service*, ¶ 3 (Sep. 11, 2019).

¹² Response to Motion to Dismiss and Motion to Reschedule Prehearing Conference, ¶ 1.

¹³ *Id.* at ¶ 2.

¹⁴ *See, e.g.*, KCC Dockets 19-CONS-3167-CUIC and 19-CONS-3168-CUIC.

¹⁵ *See, e.g.*, KCC Docket 19-CONS-3191-CUIC, Order Denying Motion to Vacate Default Order (Apr. 11, 2019).

extent Operator relies on Protesters' non-attendance at the September 5, 2019, prehearing conference as a basis for dismissal or default of Protesters, Operator's motion is denied.

Operator's Arguments Regarding Specific Allegations and Direct, Substantial Interest

9. The Commission shall hold the remainder of Operator's arguments for dismissal of Protesters in abeyance pending additional proceedings. The Commission believes additional development of the record will provide for a better opportunity to consider Protesters' standing. The Commission notes that it may deem a hearing should be held on an application¹⁶ and may allow interested persons to intervene and participate.¹⁷ Thus, the Commission has wide discretion regarding development of the record and consideration of standing, with or without an evidentiary hearing.

Consideration of Protesters' Requests

10. Since the Commission shall deny Operator's request to find Protesters in default and shall hold the remainder of Operator's motion in abeyance, the Commission finds it appropriate to reschedule the prehearing conference in this matter.

11. Regarding Protesters' request to combine this docket with Docket 20-CONS-3079-CUIC, the Commission finds it would be best for parties to discuss and develop the utility of joining or consolidating these dockets during the scheduled prehearing conferences, rather than for the Commission to take up the issue at this time.

THEREFORE, THE COMMISSION ORDERS:

A. Operator's motion to dismiss or default Protesters due to Protesters' non-attendance at the September 5, 2019, prehearing conference is denied. The remainder of Operator's motion shall be held in abeyance.

¹⁶ K.A.R. 82-3-135a(e).

¹⁷ See K.S.A. 77-521.

B. Protesters' request to reschedule the prehearing conference is granted. Protesters' request to join or consolidate dockets is denied, although the Commission encourages further discussion of such possibility during scheduled prehearing conferences.

C. A Prehearing Conference is scheduled for **Tuesday, October 15, 2019, at 1:30 p.m.** by telephone, under the same terms as outlined in the Commission's *Order Designating Prehearing Officer and Setting Prehearing Conference* in this docket.¹⁸ The conference call information is: telephone number (866) 620-7326, Conference Code PIN: 3902542751.

BY THE COMMISSION IT IS SO ORDERED.

Keen, Chair; Albrecht, Commissioner; Duffy, Commissioner

Dated: 10/01/2019



Lynn M. Retz
Executive Director

Mailed Date: 10/01/2019

JRM

¹⁸ *Order Designating Prehearing Officer and Setting Prehearing Conference* (Aug. 15, 2019).

CERTIFICATE OF SERVICE

20-CONS-3043-CUIC

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of first class mail and electronic service on 10/01/2019.

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