

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

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

In the Matter of the Application of Palomino ) Docket No: 19-CONS-3078-CUIC  
Petroleum, Inc., to authorize the injection of )  
saltwater into the Arbuckle formation at the ) CONSERVATION DIVISION  
Carter Trust SWD #1 well in the SW/4 of )  
Section 23, Township 17 South, Range 26 ) License No: 30742  
West, Ness County, Kansas. )

**ORDER ON PROTESTANT'S MOTION FOR DEFAULT  
AND DISMISSAL OF APPLICANT**

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:

**Background:**

1. On July 13, 2018, Palomino Petroleum, Inc. (Applicant) filed an Application to authorize injection of saltwater into the Arbuckle formation at the Carter Trust SWD #1 well in Ness County, Kansas.<sup>1</sup> Notice of the Application was published in The Wichita Eagle newspaper on July 26, 2018,<sup>2</sup> and in the Ness County News newspaper on July 19, 2018.<sup>3</sup>
2. On August 17, 2018, Cindy Hoedel filed a letter of protest and request for hearing.<sup>4</sup>
3. On August 24, 2018, John G. Pike of Withers, Gough, Pike & Pfaff, LLC, entered his appearance in this docket on behalf of the Applicant.<sup>5</sup>

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<sup>1</sup> Application, p. 1 (Jul. 13, 2018).

<sup>2</sup> Legal Proof of Publication – The Wichita Eagle (Aug. 7, 2018).

<sup>3</sup> Affidavit of Publication – Ness County News (Aug. 7, 2018).

<sup>4</sup> Letter of Protest and Request for Hearing – Cindy Hoedel (Aug. 17, 2018).

<sup>5</sup> Entry of Appearance (Aug. 24, 2018).

4. On September 6, 2018, the Commission issued an *Order Designating Prehearing Officer and Setting Prehearing Conference*, setting a Prehearing Conference for September 27, 2018.<sup>6</sup> The Order was served on all parties, including Mr. Pike.<sup>7</sup>

5. On September 27, 2018, the scheduled Prehearing Conference was held. Commission Conservation Staff (Staff) attorney, Lauren Wright; Protestant, Cindy Hoedel; and the Prehearing Officer, Michael J. Duenes, appeared at the Conference, but counsel for the Applicant, Mr. Pike, did not appear. At the Prehearing Conference, Ms. Hoedel made a verbal motion to dismiss the Applicant on the basis of the Applicant's non-attendance and stated that she would follow up with a written motion.

6. On September 28, 2018, Ms. Hoedel filed a Motion for Default and Dismissal of the Application Filed Herein.<sup>8</sup>

7. On October 1, 2018, the Applicant filed a Response to Protester's Motion to Dismiss Application,<sup>9</sup> stating that "service was inadvertently overlooked and not entered into counsel's calendar, and therefore this counsel did not call in to the conference"<sup>10</sup> and arguing that "no prejudice has resulted or will result from a second pre-hearing conference."<sup>11</sup>

#### **Discussion:**

8. In her Default Motion, Ms. Hoedel asked that the Applicant be both defaulted *and* dismissed.<sup>12</sup> Although she provided a legal basis solely for default,<sup>13</sup> not for outright

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<sup>6</sup> *Order Designating Prehearing Officer and Setting Prehearing Conference*, Ordering Clause B (Sept. 6, 2018).

<sup>7</sup> *Id.* at p. 4 (Certificate of Service).

<sup>8</sup> Protestant's Motion for Default and Dismissal of the Application Filed Herein (Sept. 28, 2018) (Hoedel Default Motion).

<sup>9</sup> Applicant's Response to Protester's Motion to Dismiss Application (Oct. 1, 2018) (Applicant Response).

<sup>10</sup> Applicant Response, ¶ 2.

<sup>11</sup> Applicant Response, ¶ 7.

<sup>12</sup> Hoedel Default Motion, ¶ 4.

<sup>13</sup> Hoedel Default Motion, ¶¶ 2, 5.

dismissal of the Applicant, the Commission takes up both her dismissal and default requests pursuant to K.S.A. 77-520.<sup>14</sup>

9. K.S.A. 77-520(a) states that “[i]f 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, including a statement of the grounds.”

10. K.S.A. 77-520(b) provides the defaulted party seven days after service of a proposed default order to file a written motion asking for the proposed default order to be vacated and stating the grounds relied upon. K.S.A. 77-520(c) states that any proposed default order shall become effective after expiration of the seven day period allowing the defaulted party to file a written motion, unless the defaulted party files a written motion in opposition to the default order within the seven day period. If the Commission receives a motion to vacate a proposed default order, the presiding officer shall either vacate the proposed default order or issue the default order.<sup>15</sup>

11. K.S.A. 77-520(d) provides that, should the Commission issue the default order and it become effective after the seven day period for written responses, the presiding officer shall then conduct further proceedings necessary to complete the adjudication without the participation of the defaulted party. In such a case, the presiding officer “shall determine all issues in the adjudication, including those affecting the defaulting party,”<sup>16</sup> or “[t]he presiding officer in lieu of determining the issues affecting the defaulting party may, unless otherwise prohibited by law, dismiss such party’s application for an adjudicative

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<sup>14</sup> See Hoedel Default Motion, ¶ 5.

<sup>15</sup> K.S.A. 77-520(c).

<sup>16</sup> K.S.A. 77-520(d).

proceeding.”<sup>17</sup> Thus, outright dismissal of a defaulted party’s application is only warranted after the seven day response period, where the proposed default order has become effective.

12. In the instant case, it is undisputed that the Applicant received notice of the September 27, 2018 Prehearing Conference, was required to attend that Conference, and did not do so.<sup>18</sup> The Applicant conceded Ms. Hoedel’s “right to file her Motion.”<sup>19</sup>

13. In her Default Motion, Ms. Hoedel referenced the Commission’s October 19, 2017 *Order on Default and Standing* in the Cross Bar docket (17-CONS-3689-CUIC) as an example of a case where certain Protestants were found to be in default for failure to attend the Prehearing Conference.<sup>20</sup> The Commission’s *Order on Default and Standing* in the 17-3689 Docket did indeed find that eleven (11) of the Protestants did not attend the Prehearing Conference, and therefore, were in default pursuant to K.S.A. 2016 Supp. 77-520.<sup>21</sup> However, the Order also gave these Protestants seven (7) days to file a written motion requesting that the Order be vacated and informed the Protestants that the Order would become effective and final “[i]f the Commission does not receive a motion to vacate.”<sup>22</sup> None of the eleven (11) Protestants who were defaulted for non-attendance at the Prehearing Conference filed a written motion requesting the Order be vacated and their Protestant status be restored.

14. As in the Cross Bar docket, there has been a motion for a default order in the instant proceeding, but unlike the Cross Bar docket, no default order has yet been issued, and unlike the defaulted Cross Bar Protestants, the Applicant has already provided a written explanation why it believes it should be allowed to remain in the proceeding and attend a

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<sup>17</sup> K.S.A. 77-520(d).

<sup>18</sup> See Applicant Response, ¶¶ 1, 7.

<sup>19</sup> Applicant Response, ¶ 7.

<sup>20</sup> See Hoedel Default Motion, ¶ 5.

<sup>21</sup> 17-3689 Docket, *Order on Default and Standing*, ¶¶ 9-10.

<sup>22</sup> 17-3689 Docket, *Order on Default and Standing*, ¶

second Prehearing Conference.<sup>23</sup> Thus, the relevant facts of the Cross Bar docket are not parallel to the relevant facts of the instant proceeding.

15. In Docket Nos. 18-CONS-3208-CUIC and 18-CONS-3210-CUIC, the Commission issued default orders against the Protestants based on their failure to attend the Prehearing Conference.<sup>24</sup> The Protestants did not file written motions requesting the default orders be vacated. Hence, these dockets are not parallel to the instant docket.

16. However, the Commission notes two dockets that do parallel the instant docket. In Docket No. 18-CONS-3262-CMSC, Staff moved the Commission for a default order against the Operator because the Operator failed to appear at the Prehearing Conference.<sup>25</sup> The Commission issued a *Default Order* based on the Operator's failure to attend the Prehearing Conference.<sup>26</sup> The Operator filed a written motion to vacate the *Default Order*, alleging that he failed to receive notice of the Prehearing Conference and that he attempted to contact various Commission personnel.<sup>27</sup> The Commission subsequently vacated the *Default Order* "based upon the Operator's prima facie allegations in its Motion to Vacate," and scheduled a new Prehearing Conference.<sup>28</sup> In Docket No. 18-CONS-3356-CPEN, Staff again moved for a default order against the Operator because the Operator failed to appear at the Prehearing Conference.<sup>29</sup> Before a default order was issued, the Operator filed a letter requesting a re-hearing, explaining that for health reasons, he had not attended the Prehearing Conference.<sup>30</sup> Indeed, a default order was never issued because, based on the Operator's alleged medical condition, the Prehearing Officer continued the proceeding and

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<sup>23</sup> See Applicant Response, ¶ 7.

<sup>24</sup> 18-3208 Docket, *Default Order*, ¶ 8 (Feb. 27, 2018); 18-3210 Docket, *Default Order*, ¶ 7 (Feb. 8, 2018).

<sup>25</sup> 18-3262 Docket, Motion for Default Order, ¶¶ 4-5 (June 4, 2018).

<sup>26</sup> 18-3262 Docket, *Default Order*, ¶ 7 (June 12, 2018).

<sup>27</sup> 18-3262 Docket, Motion to Vacate (June 21, 2018).

<sup>28</sup> 18-3262 Docket, *Order Vacating Default Order and Scheduling Prehearing Conference*, ¶ 8 (July 17, 2018).

<sup>29</sup> 18-3356 Docket, Motion for Default Order, ¶ 3 (July 19, 2018).

<sup>30</sup> 18-3356 Docket, Letter Requesting a Re-Hearing, p. 1 (July 26, 2018).

scheduled a Status Conference.<sup>31</sup> Thus, the Operator was not defaulted out of the proceeding. These two dockets demonstrate that the Commission sets a low bar for allowing parties to cure a default.

### **Findings and Conclusions:**

17. The Commission finds that Ms. Hoedel's request for an order dismissing the Applicant in this docket should be denied. Pursuant to K.S.A. 77-520(d), dismissal of the Applicant from the docket is only warranted if the Commission issued a default order and such default order became effective after the expiration of the seven day period allotted to the Applicant for filing a written motion requesting the default order to be vacated. In the instant case, the Commission has not issued a default order, and as in the 18-3356 Docket, the Applicant has already filed a response which would adequately address a default order had it been issued. Thus, the Commission finds there is no ground for dismissal under K.S.A. 77-520.

18. Regarding default, the Commission finds that pursuant to K.S.A. 77-520(a), the issuance and service of a proposed default order is discretionary with the Commission, as evidenced by the fact that the presiding officer "may" take such action. Thus, the Commission is *not required* to issue a default order upon a party's non-attendance at a Prehearing Conference. Moreover, as noted above, the Commission has traditionally required a party that was defaulted for failure to attend a Prehearing Conference to hurdle a very low bar for curing the default.<sup>32</sup> In the instant case, although the Applicant was required to appear at the Prehearing Conference, a fact which the Applicant concedes,<sup>33</sup> the Applicant

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<sup>31</sup> 18-3356 Docket, *Prehearing Officer Order Scheduling Status Conference*, ¶ 6 (Aug. 23, 2018).

<sup>32</sup> See ¶ 17 of this Order, *supra*. See also 18-3262 Docket, *Order Vacating Default Order and Scheduling Prehearing Conference*, ¶ 8.

<sup>33</sup> See Applicant Response, ¶ 7.

has provided a reasonable basis for its failure to appear and a valid assertion that the Protestant will not be prejudiced by allowing the Applicant to attend a second Prehearing Conference.<sup>34</sup> In addition, the Commission finds Staff's unwillingness to seek default in this instance weighs against doing so. Therefore, the Commission finds the Applicant has met the basic *prima facie* standard for avoiding default.

19. Additionally, the Commission finds the circumstances of this proceeding mirror the relevant circumstances in the 18-3356 Docket, and the Commission therefore treats this matter in the same fashion. That is, the Commission will not expend unnecessary administrative resources to go through the formality of issuing a default order when the Applicant has already provided a response to Ms. Hoedel's Motion to Dismiss that would suffice as a request to vacate a default order had one already been issued. The result would be the same. Thus, the Commission denies the Protestant's Motion for Default and Dismissal of the Application Filed Herein and finds that a second Prehearing Conference shall be scheduled.

20. The Commission schedules a second Prehearing Conference for **Thursday, November 8, 2018, at 9:00 a.m.** The conference call information shall be the same as provided in the Commission's September 6, 2018 *Order Designating Prehearing Officer and Setting Prehearing Conference*.

**THEREFORE, THE COMMISSION ORDERS:**

- A. Protestant's Motion for Default and Dismissal of the Application Filed Herein is denied.
- B. A Prehearing Conference is scheduled for November 8, 2018, at 9:00 a.m.

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<sup>34</sup> See Applicant Response, ¶¶ 2, 7.


C. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).<sup>35</sup>

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.

**BY THE COMMISSION IT IS SO ORDERED.**

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 10/23/2018

  
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Lynn M. Retz  
Secretary to the Commission

Mailed Date: 10/23/2018

MJD

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<sup>35</sup> K.S.A. 55-162; K.S.A. 55-606; K.S.A. 55-707; K.S.A. 77-503(c); K.S.A. 77-531(b).

## CERTIFICATE OF SERVICE

19-CONS-3078-CUIC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of electronic service on 10/23/2018.

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