

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

In the matter of the application of Quito,)	Docket No: 22-CONS-3115-CMSC
Inc. ("Operator") for an operator's license)	
renewal.)	CONSERVATION DIVISION
)	
_____)	License No: 33594

REPLY BRIEF OF QUITO, INC.

Pursuant to the Commission's Order on Briefing, and Requiring Staff Report and Further Investigation of March 8, 2022, Quito, Inc. submits its Reply Brief concerning the appropriate interpretation of K.S.A. 55-155(c)(4) and K.A.R. 82-3-120(g)(2).

In pertinent part, K.S.A. 55-155(c)(4) provides:

"(c) No application or renewal application shall be approved until the applicant has:

(4) demonstrated to the commission's satisfaction that the following comply with all requirements of chapter 55 of the Kansas Statutes Annotated, and amendments thereto, all rules and regulations adopted thereunder and all commission orders and enforcement agreements, if the applicant is not registered with the federal securities and exchange commission: (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;"

Also relevant to this discussion is K.S.A. 55-155(c)(6) and (d). Subsection (c)(6) requires the applicant to comply with subsection (d). Subsection (d) addresses the financial

responsibility which each operator shall annually demonstrate. Pertinent to this case are the provisions of subsection (d)(3) as follows:

“(d) In order to assure financial responsibility, each operator shall annually demonstrate compliance with one of the following provisions:

(3) The operator: (A) Has an acceptable record of compliance, as demonstrated during the preceding 36 months, with commission rules and regulations regarding safety and pollution or with commission orders issued pursuant to such rules and regulations; (B) has no outstanding undisputed orders issued by the commission or unpaid fines, penalties or costs assessed by the commission **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;** and (C) pays a nonrefundable fee of \$100 per year.” (emphasis supplied)

K.A.R. 82-3-120(g) is in substance identical to K.S.A. 55-155(c)(4).

I. Basic Facts.

Mark W. McCann was the sole officer and sole stockholder of McC Oil Company, Inc. (“McC”). McC was issued an operator’s license #31411. The operator’s license for McC was last renewed March 30, 1998 and on March 30, 1999 the license became inactive. At the time McC’s license became inactive, McC was the operator responsible for the four wells identified in the Brief of Commission Staff.¹ Mark W. McCann is the sole officer and sole stockholder of Quito, Inc. (“Quito”)² As noted in Quito’s Opening Brief, in Docket No. 16-CONS-361-CSHO, an Order to Show Cause Designating a Pre-

¹ Stipulations of Fact Nos. 2 through 5.

² Stipulations of Fact No. 11.

Hearing Officer and Setting a Pre-Conference was issued finding that the four wells were unplugged; that they were listed on McC's license, and that it appeared to be responsible for plugging the wells, ultimately resulting in the entry of a Default Order.

II. Statutory Construction.

In the present action, Commission Staff seeks to deny renewal of the operator's license of Quito, Inc. ("Quito") due to the association between McC and Quito. The common nexus between McC and Quito is Mark W. McCann.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. Bergstrom v. Spears Manufacturing Co., 289 Kan. 605, 607, 214 P.3d 676 (2009). A corollary principle is that legislative intent should initially be ascertained based on the language enacted. Patron v. Lopez, 289 Kan. 1089, 1097, 220 P.3d 345 (2009). Legislative intent should be ascertained where possible by focusing solely on the statutory language, giving common words their plain and ordinary meanings. State v. Raschke, 289 Kan. 911, 914, P.3d 481 (2009).

K.S.A. 55-150 contains definitions applicable to the act governing licensure of operators. The two definitions of aid in construing K.S.A. 55-155 are:

"(e) "Operator" means a person who is responsible for the physical operation and control of a well, gas gathering system or underground porosity storage of natural gas."

(f) "Person" means any natural person, partnership, governmental or political subdivision, firm, association, corporation or other legal entity."

It would appear evident that the legislature intended that either a natural person, a partnership, a corporation, or other form of artificial legal entity would qualify to hold an operator's license.

In this matter, Quito is the "applicant". McC is not an officer, director, partner or member of Quito. McC is not a stockholder owning in the aggregate more than 5% of the stock of Quito. McC is not a spouse, parent, brother, sister, child, parent-in-law, brother-in-law or sister-in-law of Quito. In fact, McC is a dissolved corporation; an entity that no longer exists. Mark W. McCann, an officer and owner of the applicant, individually is a compliant natural person. Even if the liability of McC for the four unplugged wells passed in some manner to Mark W. McCann (there is no information in the Stipulations of Fact to support that proposition, and it is contrary to K.S.A. 17-6801 et seq.), as noted in Quito's Opening Brief, he has individually been discharged from that obligation.

K.S.A. 55-155 generally establishes an entitlement to a license which the Commission must confer if the applicant meets the requirements set forth in the statute. Because K.S.A. 55-155 contains no criteria for the exercise of discretion, issuance of a license is ministerial in nature. The issuance of an oil operator's license is analogous to the issuance of a license to operate a daycare center in the context of

the due process rights emanating therefrom. See: Rydd v. State Board of Health, 202. Kan. 721, 451 P.2d 239 (1969).

Under the plain reading construction of K.S.A. 55-155(c)(4), the parameters of the prohibited relationships can be ascertained. An illustrative example is the creation, by a non-compliant natural person of a corporation, limited liability company or other artificial entity in which the natural person serves as an officer, director, partner or member; owns more than 5% of the applicant, or acts indirectly through the class of relatives listed, for the purpose of securing a license. The legislature clearly intended to prohibit this practice.

By grafting an “associational” element on to K.S.A. 55-155(c)(4), the limits or boundaries of the proscribed relationships are challenging to identify. Are those limits confined to two separate artificial entities with a common natural person as the nexus, such as the case presented here? Are separate artificial entities connected by separate natural persons within the relationships identified in item (D) prohibited? Is there any substantial association component applicable to the prescribed relationships set forth in subsection (c)(4) similar to the provision in subsection (d)(3)? Quito submits that applying such limitless scope to the plain language of subsection (c)(4) is beyond what the legislature intended when it adopted K.S.A. 55-155. This is best illustrated by the following example: Alerted to the recent appropriation of federal funds for well

plugging in this state, Ima Hustler wants to go into the well plugging business. Recognizing the various legal advantages which an artificial entity affords, Ima sets up a limited liability company, and applies to the Commission for an operator's license for Hustler, LLC. Unfortunately, her brother-in-law Dan was a minority owner of 20% of Deadbeat, Inc., an insolvent production company which failed many years ago. There remain unplugged wells on the operator's license of Deadbeat, Inc.. Did the legislature really intend to prohibit creation of new businesses in this state by denying Ima a license via her "association" with Dan?

As noted in State v. Thurber, 492, P3d. 1185, 1187-1188 (2021):

"The principal rule governing interpretation of statutes is that the legislatures intent governs if this Court can ascertain that intent. The court presumes that the legislature expressed its intent through the language of the statutory scheme. When the statutory language is plain and unambiguous, the Courts therefore do not need to resort to statutory construction",

citing State v. Bee, 288 Kan. 733, 737, 207 P.3d 244 (2009). Here, the language of K.S.A. 55-155(c)(4) is plain and unambiguous. Denial of Quito's license renewal application based solely upon its association with McC improperly conflates subsection (c)(4) with subsection (d)(3). If the legislature had intended the "associational" interpretation of K.S.A 55-155(c)(4) urged by Commission Staff, appropriate language could have been included to make that intention clear.

III. Agricultural Energy Services.

In Docket No. 17-CONS-3529-CMSC, In the Matter of the Notice of Denial of License Renewal Application to Agricultural Energy Services, the Commission was presented a factual situation virtually identical to the present case. In Agricultural Energy, Montgomery Escue and his brothers were directors of First National Oil, Inc.. Montgomery's father was an officer of First National Oil, Inc.. Montgomery was also an officer of Agricultural Energy. The operator's license of First National Oil, Inc. was suspended for non-compliance with the Commission's Penalty Orders in prior dockets. The Application for Renewal of Agricultural Energy's license was denied based upon its association with First National Oil, Inc..

The Commission determined in Agricultural Energy, based upon a plain reading of K.S.A. 55-155(c)(4), that there was no language providing or implying that the applicant's association with a different non-compliant entity provided a basis for denial of license renewal. The Commission noted in that case that the "associated with" language appears only in K.S.A. 55-155(d)(3). Subsection (d) deals with the alternative means by which an operator may provide assurance of financial responsibility. Although providing financial assurance is a condition of license renewal under subsection (c)(6), in the present case, Quito, Inc. has not been notified that the fee it provided for renewal of its license was inadequate.

Commission Albrecht dissented from the majority opinion in *Agricultural Energy*, but that case still appears to be the governing precedent which the State Corporation Commission has established. The Brief of Commission Staff does not address how this case is distinguishable from *Agricultural Energy*. As noted in *Southwest Kansas Royalty Owners Ass'n v. State Corp. Com.*, 244 Kan. 157, 190, 769 P2d. 1 (1989), where the State Corporation Commission rules in a manner inconsistent with a previous decision, the law requires it explain its change in position.

IV. Due Process.

Although not directly on the topic of statutory construction, Quito desires to address one final point. Since May 2, 2005, Quito has held an operator's license.³ The renewal of its operator's license is a protected property interest of which it may not be deprived without requisite procedural and substantive due process.

Following compliance with Commission's Order in Consolidated Docket Nos. 19-CONS-3271-CPEN and 19-CONS-3272-CPEN, Quito was advised that its license was reinstated.⁴ Quito notes the due process issue because, prior to issuance of the Order Denying Application for License issued in this matter, Quito had received no notice that any errors in its application for license renewal, as noted in paragraph 6 of such Order,

³ Stipulations of Fact No. 12.

⁴ Stipulations of Fact No. 24.

would be a basis for denial of renewal of its license. Nor has Quito been offered an opportunity to correct any such errors. Quito submits non-renewal of its license absent an opportunity to cure by correction would be an arbitrary, unreasonable or capricious exercise of administrative authority.

SUBMITTED BY:

JOHN R. HORST, P.A.

By /s/ John R. Horst
JOHN R. HORST
207 W. FOURTH AVE.
P.O. BOX 560
CANEY, KS 67333
Attorney for Quito, Inc.
Our File #2844
S. Ct. #09412

CERTIFICATE OF SERVICE

22-CONS-3115-CMSC

I, the undersigned, certify that a true copy of the attached Reply Brief of Quito, Inc. has been served to the following by means of electronic service on April 14, 2022.

Nancy Borst
Kansas Corporation Commission
Central Office
266 N. Main St, Ste 220
Wichita, KS 67202-1513
n.borst@kcc.ks.gov

Kelcey Marsh, Litigation Counsel
Kansas Corporation Commission
Central Office
266 N. Main St, Ste 220
Wichita, KS 67202-1513
k.marsh@kcc.ks.gov

Jonathan R. Myers, Assistant General Counsel
Kansas Corporation Commission
266 N. Main St., Ste. 220
Wichita, KS 67202-1513
j.myers@kcc.ks.gov

/s/ John R. Horst
JOHN R. HORST