

**BEFORE THE  
OIL & GAS COMMISSION**

|                                 |   |                                       |
|---------------------------------|---|---------------------------------------|
| L.D. JENKINS,                   | : |                                       |
|                                 | : | Appeal Nos. 938 & 939                 |
| Appellant,                      | : |                                       |
|                                 | : |                                       |
| -vs-                            | : | Review of Chief's Order 2016-437 &    |
|                                 | : | Chief's Order 2016-451; Hogston C &   |
| DIVISION OF OIL & GAS RESOURCES | : | A Units (Gulfport Energy Corporation) |
| MANAGEMENT,                     | : |                                       |
|                                 | : |                                       |
| Appellee,                       | : | <b><u>ORDER DENYING GULFPORT</u></b>  |
|                                 | : | <b><u>ENERGY'S MOTION TO</u></b>      |
|                                 | : | <b><u>DISMISS</u></b>                 |
| and                             | : |                                       |
|                                 | : |                                       |
| GULFPORT ENERGY CORPORATION,    | : | <b><u>ORDER ADDRESSING OTHER</u></b>  |
|                                 | : | <b><u>PENDING MOTIONS</u></b>         |
|                                 | : |                                       |
| Intervenor.                     | : | <b><u>ORDER LIFTING STAY OF</u></b>   |
|                                 | : | <b><u>DISCOVERY</u></b>               |

Appearances: L.D. Jenkins, Appellant *pro se*; Scott Myers, Gerald Dailey, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; Gregory D. Russell, Peter A. Lusenhop, Ilya Batikov, Counsel for Intervenor Gulfport Energy Corporation.

The above-captioned matters come before the Oil & Gas Commission upon appeal by L.D. Jenkins from Unitization Orders 2016-437 and 2016-451. Orders 2016-437 and 2016-451 approved applications for the creation of statutory units known as the Hogston C Unit and the Hogston A Unit, respectively. The applications for unitization were sought by Gulfport Energy Corporation ["Gulfport"]. Gulfport has been **granted** intervenor status in these matters.

On January 3, 2018, Gulfport filed a *Motion to Dismiss and Motion to Stay Discovery*. The Division supports Gulfport's *Motion to Dismiss*. Mr. Jenkins opposes the motions.

Other motions have also been filed or raised at oral arguments. All pending motions have been fully briefed and/or fully argued.

On April 20, 2018, the Commission issued an *Order Granting Gulfport's Motion to Stay Discovery*. Through this order, the Commission **stayed** all discovery pending oral arguments upon Gulfport's *Motion to Dismiss*. Arguments on Gulfport's *Motion to Dismiss* concluded on August 13, 2019. On August 13, 2019, the parties agreed that discovery would remain stayed until such time as the Commission decides Gulfport's *Motion to Dismiss*.<sup>1</sup>

## **Gulfport's Motion to Dismiss:**

On October 22, 2018, Gulfport's *Motion to Dismiss* these matters initially came on for oral arguments. Those arguments were interrupted, due to an issue surrounding Mr. Jenkins' reference to an internal Commission e-mail.<sup>2</sup>

Thereafter, the Commission scheduled oral arguments to resume on August 13, 2019. During the August 13, 2019 arguments, the transcript from the October 22, 2018 arguments was marked as *Commission Exhibit 1*. Therefore, the transcript from the October 22, 2018 arguments is a part of the Record of Proceedings relative to Gulfport's *Motion to Dismiss*.

Having heard the parties' arguments and having reviewed all filings, the Commission makes the following ruling upon Gulfport's *Motion to Dismiss*.

The Commissions **FINDS** that material factual and legal issues exist in these matters. Therefore, dismissal of these appeals would be inappropriate.

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<sup>1</sup> Also pending in these matters are: (1) Mr. Jenkins's *Motion to Compel Discovery*, and (2) Gulfport's *Motion for Protective Order*. These motions will be addressed in this Order.

<sup>2</sup> Gulfport has made an oral *Motion to Strike* this e-mail. That motion will also be addressed in this Order.

In reaching this decision, the Commission notes that Mr. Jenkins' *Notice of Appeal* raises a novel issue relative to the reasonableness of "interest" rates applied by a unit operator (and approved by the Division Chief) in order to recover a forced landowner's share of costs associated with drilling a well within a statutory unit. Mr. Jenkins also raises an issue relative to Gulfport's failure to make an unleased landowner a *bona fide* offer to lease before pursuing unitization.<sup>3</sup>

So, while it is clear from Mr. Jenkins' *Notice of Appeal* that he is raising issues beyond the Chief's authority to establish interest rates, Gulfport and the Division argue that the Commission's review should be limited to the question of whether the Division Chief possesses authority to establish interest rates for statutory units.<sup>4</sup>

However, the Commission sees its jurisdiction in broader terms, and does not believe that the Commission's statutory jurisdiction is restricted in the manner argued by Gulfport and the Division.

The Commission's purpose under O.R.C. §1509.35 and O.R.C. §1509.36 is to

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<sup>3</sup> O.R.C. §1509.28 does not specifically require that an operator make a *bona fide* offer to an unleased landowner. However, the Commission is aware (from prior appeals) that the Division's Unitization Application Procedural Guideline anticipates that an applicant for unitization will include in its application for unitization an affidavit attesting to attempts made to obtain voluntary leases from any unleased landowners.

During oral arguments, analogies were drawn between the provisions of O.R.C. §1509.27 (mandatory pooling) and O.R.C. §1509.28 (unitization). These analogies were drawn to support the argument that the Division's application of a 200% interest rate is consistent with law. In this regard, the following language in O.R.C. §1509.27 was referenced:

If a mineral rights owner of a tract pooled ... does not elect to participate in the risk and cost of the drilling and operation of a well, the mineral rights owner shall be designated as a nonparticipating owner in the drilling and operation of the well on a limited or carried basis and is subject to terms and conditions determined by the chief to be just and reasonable ... The total amount receivable hereunder shall **in no event exceed two hundred per cent** of the share of costs charged to that nonparticipating owner ...

(Emphasis added.)

The mandatory pooling provisions of O.R.C. §1509.27 may or may not have application to unitization proceedings under O.R.C. §1509.28. These are two different procedures. However, the Commission interprets the O.R.C. §1509.27 requirements that attempts to reach leasing agreements be pursued "on a just and equitable basis" as an obligation to act treat in good faith. While we acknowledge that leasing all the owners in a large unit is a much different proposition than leasing all the owners in a small pool, we will consider in this matter arguments whether good faith leasing efforts may be an implied covenant in forming a unit, if not an express one.

<sup>4</sup> While Gulfport and the Division focus upon the issue of the Chief's authority to establish interest rates, Mr. Jenkins does not appear to contest the Chief's authority in this regard. Rather, Mr. Jenkins questions the reasonableness of the rates approved and applied by the Division Chief.

provide a forum where persons may seek an impartial review of certain enforcement and permitting decisions made by the Division Chief. (See O.R.C. §1509.35 & O.R.C. §1509.36.) And, it is essential to recognize that Commission hearings are *de novo* in nature. After conducting a hearing, the Commission may modify a Chief's decision under review or may enter "the order that [the Commission] finds the chief should have made." (See O.R.C. §1509.36; emphasis added.)

Both Gulfport and the Division seem to argue that issues brought before the Commission should be framed in terms of "assignment of errors." However, the Commission's jurisdiction is not confined to a record-review, as is the case with appellate courts. Indeed, no Record from the Division is transmitted to the Commission upon appeal.

The Commission possesses *de novo* jurisdiction. Therefore, the Commission can contemplate facts beyond those considered by the Division Chief.<sup>5</sup> The Commission has a statutory-imposed responsibility to examine all facts that underlie the Division's actions. The Commission also believes that it is possessed with the jurisdiction to assess the fundamental fairness of the processes applied by the Division. The greater latitude afforded to the Commission to accept evidence and information beyond what was considered by the Division Chief assists the Commission in coming to the fair and impartial decision anticipated by O.R.C. §1509.36.

Gulfport and the Division further argue that the Division is constrained by the Commission's previous opinion in *Teeter*, in which case the Commission found that a 200% interest rate on the first well, and 150% on subsequent wells, were reasonable recovery rates. See *Gary L. Teeter Revocable Trust v. Division and R.E. Gas Development*, (Oil & Gas Commission, #895; Sept. 17, 2015). This argument is specious on its face. Nothing in *Teeter* set recovery rates for all future units. Indeed, if it had, it would mean that the Division should have had set Mr. Jenkins royalty rate at 20% rather than 12.5%. Neither the Division nor Gulfport have explained how or why the Division should be constrained by

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<sup>5</sup> The Commission's rules allow for discovery (see O.A.C. §1509-1-17), for amendment of notices of appeal (see O.A.C. §1509-1-11(H) and *Perkins Revocable Trust vs. Division & Antero Resources*, #946, Aug. 30, 2017, order allowing amendment of appeal), and for the submission of additional evidence (see O.A.C. §1509-1-19 (D)). Indeed, the Commission's practices provide for pre-hearing procedures intended specifically to define and narrow issues to be considered at hearing. Moreover, at hearing, the Commission is permitted to receive "all relevant evidence offered on the issue of whether the order under appeal is lawful and reasonable" (see O.A.C. §1509-1-20(C)). There are absolutely no limitations placed upon the Commission's review process that would suggest that the Commission's review is "record-based" in the manner of the appellate courts where "assignments of error" are required.

some parts of *Teeter*, but not others, in determining the recovery rate for forced landowners.

The Commission **FINDS** that Mr. Jenkins has successfully raised an issue relative to the reasonableness of the Division's designation of 200% and 150% recovery rates for the Hogston Units. Therefore, the Commission **FINDS** that Gulfport's *Motion to Dismiss* must be **DENIED**.

The denial of Gulfport's *Motion to Dismiss* will allow the Commission to fully consider the issue of appropriate "interest" rates. Moreover, even though O.R.C. §1509.28 does not specifically require an applicant seeking a statutorily-created drilling unit to make a *bona fide* offer to an unleased landowner, the Commission has an interest in determining the Division's position on this particular subject, given the Division's state policy guidelines and the analogies that have been drawn between the mandatory pooling procedures of O.R.C. §1509.27 and the unitization procedures of O.R.C. §1509.28.

Based upon the arguments presented, the Commission **FINDS** that neither Gulfport, nor the Division, has presented arguments to support the dismissal of appeals #938 and #939 without hearing.

## **Oral Motions Made at Hearing:**

While the primary motion in these matters is Gulfport's *Motion to Dismiss*, other motions are pending. During the oral arguments held on August 13, 2019 two oral motions were made. First, Mr. Jenkins orally made a "motion to dismiss Gulfport's motion to dismiss." The Commission understands that Mr. Jenkins is asking the Commission to strike Gulfport's *Motion to Dismiss*, noting that O.R.C. §1509.36 does not specifically provide for motions to dismiss.

Mr. Jenkins is correct in his reading of O.R.C. §1509.36. This statute does not specifically address the types of motions that may be considered by the Oil & Gas Commission. However, as a *quasi*-judicial administrative board, the Commission possesses certain inherent powers meant to ensure efficient, orderly and fair proceedings. As an example, O.R.C. §1509.36 does not

specifically provide for motions in *limine*. However, the Commission routinely addresses such motions in an attempt to promote efficient hearings. (See *Clarence Tussel, Jr., et al. vs. Division and Kastle Resources Enterprises*, #818 July 16, 2010, order on *Motion in Limine*.) This is also the case with motions to dismiss, motions for summary judgment or motions for reconsideration. While none of these motions are specifically provided for in statute, all of these motions are essential to the Commission's inherent power to ensure a fair hearing process.

In light of the fact that the Commission has **denied** Gulfport's *Motion to Dismiss*, Mr. Jenkin's motion to strike Gulfport's motion to dismiss has been rendered moot and need not be considered.

Gulfport also moved to strike from the record all discussion relating to an e-mail exchange between the Commission's Executive Director Osterman and Commission Member Thomas regarding Commission deliberations. This e-mail was exchanged internally and should have been protected as a *quasi*-judicial communication, but was inadvertently produced in response to a public records request from Mr. Jenkins. Mr. Jenkins discussed the Osterman / Thomas e-mail during his presentation at the October 22, 2018 oral arguments. During the August 13, 2019 oral arguments, Gulfport moved the Commission to strike the Osterman / Thomas e-mail from the Record in these proceedings.

Member Thomas has determined, after consultation with the Ohio Ethics Commission and the Ohio Board of Professional Conduct for attorneys, that any statements set forth in his e-mail to Ms. Osterman do not preclude him from participating on the *Jenkins* quorum.

The Osterman / Thomas e-mail should not have been part of Mr. Jenkins' presentation on October 22, 2018. Nevertheless, it was, and Gulfport has not articulated how it will be harmed by discussion of the email being part of the record. The communication was or will be part of the deliberative process among the Commissioners regardless. Therefore, the Commission **rejects** the motion to strike that discussion from the existing Record.

The Commission agrees, however, that the email may not be part of any evidentiary

record, and any attempt by Mr. Jenkins to introduce into the proceedings will be rejected. However, to date, there have been no proceedings before the Commission in this matter that have been evidentiary in nature. Accordingly, no formal request to admit the Osterman / Thomas e-mail into evidence has been made.

The Commission **FINDS** that discussion of the Osterman / Thomas e-mail from October 22, 2018 shall **remain** part of the Record in these appeals. The actual copy of that e-mail is not and will not be an actual evidentiary exhibit.

## **Lifting of the Stay of Discovery & Rulings upon the Pending Discovery Motions:**

Discovery is allowed in Commission appeals pursuant to O.A.C. §1509-1-17. This Commission rule directs litigants to the Ohio Civil Rules on discovery.

On April 20, 2018, the Commission issued an order **staying** discovery. Discovery has remained **stayed** until such time as Gulfport's *Motion to Dismiss* is decided. The Commission's immediate decision **denies** Gulfport's *Motion to Dismiss*. Therefore, discovery between the parties shall **immediately resume**.

Currently, two motions addressing discovery are pending: (1) Mr. Jenkins' *Motion to Compel Discovery*, and (2) Gulfport's *Motion for Protective Order*.

Ohio Civil Rule 26(C) addresses motions for protective orders, and provides in part:

Before any person moves for a protective order under this rule, that person shall make a **reasonable effort to resolve the matter through discussion** with the attorney or unrepresented party seeking discovery. A motion for a protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

(Emphasis added.)

Gulfport's *Motion for Protective Order* filed on March 2, 2018, recites Gulfport's efforts to engage Mr. Jenkins in discussions relative to entering into an "Agreed Protective Order," which would preemptively address certain discovery issues.

Consistent with the provisions of Ohio Civil Rule 26(C), before ruling upon the pending discovery motions, the Commission will again encourage the parties to attempt to resolve their outstanding discovery dispute.

The parties should be aware that Commission precedent suggests that where a party claims that certain documents should not be disclosed in discovery due to the documents' confidential, proprietary or sensitive nature, this Commission has ordered that such documents be produced to the Commission for an *in camera* review. Following such *in camera* review, the Commission would determine whether – and under what conditions – such information will be produced in discovery. (See *Clewell Family Farm LLC vs. Division*, #862, February 8, 2016, *Order Denying Motion for Protective Order & Granting Motion to Compel*.)

The Commission will expect the parties to resolve their discovery disputes by **December 27, 2019**. If disputes are not resolved by that deadline, the parties may request that the Commission re-consider their pending discovery motions.

At its February 11, 2020 meeting, the Commission will review, and attempt to decide, any outstanding discovery issues or motions. After the Commission's February 11, 2020 meeting, a merit hearing will be scheduled. The merit hearing will be set at a date and time that will provide all parties with adequate time to complete discovery.

## **ORDER**

**WHEREFORE**, consistent with the foregoing discussion:

1. The Commission hereby **DENIES** Gulfport's written *Motion to Dismiss* these matters.



2. The Commission also **DENIES** Mr. Jenkins' oral *Motion to Strike Gulfport's Motion to Dismiss*.
3. The Commission **DENIES IN PART** and **GRANTS IN PART** Gulfport's oral *Motion to Strike* the Osterman / Thomas e-mail. Specifically, any verbal discussion of this e-mail made during oral arguments shall **remain** as part of the Record and will not be redacted from the October 22, 2018 and/or the August 13, 2019 transcripts. However, an actual copy of the Osterman / Thomas e-mail has not been admitted into evidence and shall not be considered to be part of the Commission's evidentiary Record at this point in the proceedings. Should any party move for the admission of this e-mail as part of the merit hearing, the Commission will consider evidentiary objections at that time.
4. The Commission **EXPECTS** the parties to attempt to resolve outstanding discovery disputes by **December 27, 2019**.
5. If discovery disputes are not resolved by December 27, 2019, the Commission **ORDERS** the parties to, by **January 3, 2020**, request that the Commission reconsider Mr. Jenkins' *Motion to Compel Discovery* and Gulfport's *Motion for Protective Order*. Such requests may be filed with the Commission, and served upon the parties, via e-mail transmission.

Date Issued:

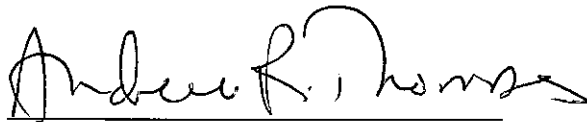
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