RAILROAD COMMISSION OF TEXAS

OFFICE OF GENERAL COUNSEL

OIL AND GAS DOCKET NO. 05-0265656

THE COMPLAINT OF BEN PROCTER AND OTHERS AGAINST CHESAPEAKE OPERATING, INC. ALLEGING THAT THEY WERE ENTITLED TO BUT DID NOT RECEIVE NOTICE OF RULE 37 SPACING EXCEPTION APPLICATION OF CHESAPEAKE CONCERNING WELL NO. 1-H ON THE UNIVERSITY WEST UNIT, NEWARK, EAST (BARNETT SHALE) FIELD, TARRANT COUNTY, TEXAS

OIL AND GAS DOCKET NO. 09-0266449

THE APPLICATION OF CHESAPEAKE OPERATING COMPANY PURSUANT TO THE MINERAL INTEREST POOLING ACT TO FORM A UNIT FOR WELL NO. 1-H, UNIVERSITY WEST UNIT, NEWARK, EAST (BARNETT SHALE) FIELD, TARRANT COUNTY, TEXAS

Heard by: Colin K. Lineberry, Hearings Examiner
Donna K. Chandler, Technical Examiner

Appearances:

For Applicant/Respondent
Chesapeake Operating, Inc.

Glenn Johnson
Brenda Clayton
Pete Vermillion
Steve Mills
Ray Oujesky
Stephanie Fleet
Jeff Ramsdell
Alan Jackson
Melissa Condley
David Brooks

For Protestants/Complainants
Unleased mineral owners

Ben R. Procter
Greg Hughes
R. Neel McDonald
Timothy Rios
Louis McBee
Allana Mann
Frank Stillwell
Dorothy Stillwell
David Higbee

Procedural history:

Notice of Hearing:	
Oil & Gas Docket No. 05-0265656	June 23, 2010
Oil & Gas Docket No. 09-0266449	July 16, 2010
Hearing held:	September 13, 2010
	November 1, 2010
Transcript date:	November 16, 2010
Record Closed:	December 13, 2010
PFD issued:	May 16, 2011

PROPOSAL FOR DECISION

STATEMENT OF THE CASE & PROCEDURAL HISTORY

This case concerns the permitting of Chesapeake's University West 1H. Chesapeake filed a series of six applications for this well. Applications three through six were identical in terms of surface location, wellbore location and wellbore length for the 1H but Chesapeake declared NPZs, removed NPZs, re-declared NPZs and then removed NPZs again over the course of these applications. The first time the NPZs were removed (Application # 4) eight protests were filed. Chesapeake then re-declared the NPZs (Application # 5), effectively mooting protests and obtaining a permit. Ten days later, on September 1, 2009, Chesapeake re-filed again (Application # 6), and removed all of the declared NPZs. Although the requested well and service list were identical to Application # 4, this time no protests were filed. Chesapeake also published notice of Application # 6 in the Commercial Recorder, a periodical published in Tarrant County. Because no protests were filed to the Notice of Application for Application # 6, the requested Rule 37 exception was granted administratively based on a lack of protests on October 20, 2011. Subsequently, beginning on March 23, 2010, twelve of the unleased mineral owners listed on the service lists filed complaints asserting that none of them had received the notice of Application # 6. Eight of the twelve had filed protests to the identical Application # 4.

Notice of hearing on the Complaint ("Complaint Hearing") was served by the Commission on May 5, 2010 scheduling the hearing for July 7, 2010. Shortly afterward, on May 13, 2010, Chesapeake filed a motion to make the Commission a party to the complaint hearing. That motion was opposed by Commission staff. On June 8, 2010, Ben Proctor and other complainants filed a motion to change the venue of the hearing from Austin to Fort Worth. The examiner issued rulings denying both Chesapeake's motion to add the

Commission as a party and the Complainants' Motion for Change of Venue. Chesapeake filed an interim appeal of the denial of its motion. Chesapeake's interim appeal was subsequently deemed denied by operation of law.

On June 23, 2010, Chesapeake filed an application under the Mineral Interest Pooling Act ("MIPA") seeking to force pool all of the unleased mineral owners within the boundaries of its newly proposed University West MIPA Unit (boundaries identical to the contractual pooled unit previously declared for Chesapeake's University West 1H Well). Chesapeake provided a service list and also published a notice of the MIPA application in the *Commercial Recorder*. Chesapeake also requested that its new MIPA application be joined with the pending Complaint Hearing regarding permitting of its University West 1H. Chesapeake's request for consolidation of the hearings was granted by the examiner. Also on June 23, 2010, Chesapeake filed a request for a continuance of the July 7th Complaint Hearing. Although Chesapeake titled the request as an "Agreed Motion for Continuance," in fact, not all parties had agreed as Chesapeake acknowledged within the body of the motion stating, "...Chesapeake has not had an opportunity to discuss with all complainants whether they would agree with the relief requested." Chesapeake's request for continuance was granted on June 25, 2010 and the hearing was rescheduled to September 13, 2010.

The consolidated hearing on the two dockets was held on September 13 and November 1, 2010. The record was closed on December 13, 2010 after the filing of closing statements and replies to closing statements.

Complainants'/Unleased Mineral Owners' Evidence and Position

Neel McDonald

Mr. McDonald is an attorney who is employed as a municipal judge for the City of Fort Worth. He testified that he owns property within the proposed pooled unit for Chesapeake's University West 1H. He was the only person who lived at that address during the relevant time period in 2009. He further testified that, "I have been highly aware and alert for any notices from either Chesapeake or from the Railroad Commission because I knew early on that those are notices that could affect my property rights." Mr. McDonald stated that he received the "first notice" of Chesapeake's application, dated July 8, 2009, for a Rule 37 exception for the University West 1H, filed a timely protest and subsequently received notice that the application had been withdrawn. He had discussions, in person and by e-mail, with other property owners who had filed protests and they all agreed that "we

all needed to be on high alert for any subsequent notices from the Railroad Commission or from Chesapeake that might have to do with a Rule 37. ... And so everyone who is listed on the complaint was keenly aware of and diligent in watching for notice of a Rule 37 application. And I never got one. I got the first one. I did not get a second one."

Mr. McDonald stated that he received a letter from Four Sevens and he believed one from Chesapeake telling him he ought to lease but he was never presented with a lease or an opportunity to discuss the terms of a lease. He did not call Chesapeake to ask about leasing as he was not interested in pursuing it unless Chesapeake was willing to come to him. It is his belief that a Rule 37 exception should not be granted because it would entitle Chesapeake to drain the minerals under his property without compensation. He believes the wellbore of the 1H trespasses on his property because it goes under it or " ...if it's not directly under my property, it's so close I can't tell the difference."

Greg Hughes

Mr. Hughes testified that he and his wife own property within the proposed pooled unit for Chesapeake's University West 1H well. He received the notice of the Rule 37 application for that well and filed a timely protest. He used the service list to contact interested persons by phone and encourage them to protest Chesapeake's Rule 37 application. He encouraged others to protest because he didn't want the Rule 37 to go forward and he didn't know if his protest alone was sufficient to stop it or if protests from a majority of affected persons was required. No one he contacted was in favor of the Rule 37 although a few were apathetic. He later received notice that the Rule 37 application had been withdrawn. After the initial Rule 37 application was withdrawn, Mr. Hughes never received any subsequent notice of Chesapeake's intent to seek a Rule 37 exception. He and his wife were aware of, and discussed, the notice and he would have received it if it had come to his house.

On cross-examination, Mr. Hughes testified that he was not opposed to hydrocarbon production in the area if production was accomplished in a safe and sound manner. He believes that the industry is used to producing in open spaces and is concerned that neither the industry nor the City of Fort Worth is paying enough attention to safety and environmental issues related to drilling and producing in an urban area. He acknowledged that he was aware that the well had been drilled and that he did not "suffer" because of the drilling itself. He thinks he saw the 1H being flared but does not know for sure as multiple wells can be drilled from one surface site and it could have been another well at that site that was being flared. Mr. Hughes did not seek a lease from Chesapeake. He was offered a lease by Chesapeake but he declined the offer.

Mr. Hughes did not talk to everyone on the service list - there were some who he could not contact and some are absentee owners. He is not aware of anyone who received the September notice [Application # 6] for the University West 1H. He is opposed to the granting of a Rule 37 exception for this well. Mr. Hughes is opposed to drilling and production in an environmentally unsound manner. He faults the City of Fort Worth, and the state to some degree, for not requiring the use of completion methods that reduce the output of harmful materials into the atmosphere. He questions why the service list provided by Chesapeake only lists him when public records reflect that he and his wife own the property jointly. Mr. Hughes has been fairly active in complaining about drilling in Tarrant County. He believes that drilling can be done safely and that there is a lot that goes into that but, if it is done in a responsible manner, he would have no objection to it. He is opposed to leasing at this time. There are multiple reasons for that, one of them being that gas is at a pretty low price and will probably be higher in the future.

Mr. Hughes has been a proponent of a moratorium on drilling in Tarrant County until a specific end point so that it could be studied, understood, planned for, and the appropriate regulations written. After that drilling could occur. He is opposed to drilling at the present, the way it is being done.

Allana Mann

Ms. Mann received the July, 2009 Rule 37 Application Notice for the Chesapeake 1H [Application # 4]. In response, she sent a certified mail notice of protest to the Railroad Commission with a copy to Chesapeake. She admitted into evidence a signed green card showing that the Commission received the protest on August 18, 2009. She received an e-mail from someone in the neighborhood about the notices. Ms. Mann was on the alert for future notices. She "knew it wasn't going to be over," and she would have filed another protest with the Railroad Commission and Chesapeake by certified mail if she received notice of another Rule 37exception application. She never received another notice of a Chesapeake Rule 37 application after the July 8, 2009 notice [for Application # 4]. Ms. Mann did not understand the notice totally but was opposed to the taking of her mineral rights. She is not necessarily opposed to the drilling of a well but is protesting the fact that she didn't get notice and is opposed to the Rule 37 exception.

Ms. Mann received the June 2, 2010 letter from Chesapeake's attorney offering her the opportunity to join the University West Unit as a working interest owner. She did not necessarily understand the terms of the offer and did not receive a copy of the joint operating agreement ("JOA") referenced in the letter. She did respond to Chesapeake's attorney in writing and told him she did not believe the pooling offer was timely but did not ask him to explain the offer. She did not try to ask anyone else at Chesapeake about the

pooling offer either. She has tried to contact Chesapeake before but, "it's hard to get anybody to call you back. They wouldn't call me back." Ms. Mann does not remember any phone messages left for her by Chesapeake in March and April 2009 but it is very possible that they called and she didn't get the message. She doesn't think she has ever spoken to anyone from Chesapeake about leasing.

Ben Proctor

Mr. Proctor is a licensed attorney who has been retired about 10 years. He spent the majority of his career in Washington, D.C. doing government relations consulting work. For the past two years, he has been a care giver for his elderly parents and has been residing at their house in Fort Worth. Mr. Proctor's parents received an offer to lease in July 2007 from Four Sevens which he discussed with them. After some initial inquiries of their own, his parents asked Mr. Proctor to investigate the matter for them. Mr. Proctor's parents received the July 8, 2009 notice of Chesapeake's Rule 37 application [Application # 4]. Mr. Proctor personally delivered to the Railroad Commission notices of intent to protest that application on behalf of his parents and a neighbor, Tim Rios. Mr. Proctor subsequently called the Railroad Commission and learned that the Chesapeake Rule 37 application had been withdrawn.

After the withdrawal of the July, 2009 application, Mr. Proctor and his mother were both alert for further communications from the Railroad Commission but they never received notice of a subsequent Rule 37 application. Mr. Proctor spoke with each of the other eleven individuals who filed protests to the July 8, 2009 notice of application and each stated they did not receive a later notice and signed an affidavit attesting to that fact.

Mr. Proctor was primarily concerned about surface use and indemnity issues in the proffered leases but the representatives of Chesapeake he talked to only wanted to focus on the royalty and bonus amounts. He found the three meetings to be waste of his time and theirs.

On cross-examination, Mr. Proctor reiterated that neither he nor his mother received the September 4, 2009 Notice of Chesapeake's Rule 37 application (Application # 6) and he acknowledged that he had not contacted individuals listed on the certificate of service who he believed to be leased to see if they had received the notice. He is not aware of Chesapeake not following the rules regarding notice but believes that notice was not sent to the previous protestants due to" ... a terrible mistake made, no malfeasance, no dereliction of duty, nothing suspicious at all, that a simple mistake was made ..." He is not a geologist or engineer and has made no study of the reserves or alternate well bore paths. The only entities that have offered to lease his parents property are Four Sevens on behalf

of Chesapeake and Chesapeake itself. He agrees that prevention of waste is an important goal but believes Chesapeake should adhere to the prescribed 330 feet spacing around unleased property. Mr. Proctor is aware that Chesapeake proposed different surface locations over time for the well at issue.

David Higbee

Mr. Higbee is semi-retired. He and his wife live on Colonial Parkway within the boundaries of the University West Unit. They are unleased and received the July NOA [Application #4] from the Railroad Commission. They filed a notice of protest and heard subsequently that the application had been withdrawn. After that, they were on the alert for any other notices. They never received another notice of application. He would have immediately filed a notice of protest if he had received another notice. If his wife had received the notice, she would have told him about it. Mr. Higbee met with Four Sevens representatives briefly in December 2009 about leasing his property. He was told to take a lease home and look at it but that Chesapeake was going to drill whether he signed a lease or not. It was his understanding that Chesapeake was going to move the well outside of the 330 foot area. He didn't know it at the time but he now knows that Chesapeake had a permit for the well at that time. Mr. Higbee and his wife subsequently received Chesapeake's offer to pool their minerals but they "took it as sort of a threat." He did not consider it a good faith effort to negotiate.

On cross-examination, Mr. Higbee testified that he never contacted anyone at Chesapeake in response to the pooling offer or told anyone he felt threatened. Whether he would lease depends on the terms. He does not want to lease based on the terms he was offered by Chesapeake. The two problems with the offered lease were that he did not have any recourse if Chesapeake did not uphold its end of the lease and the signing bonus was only $240. He did not express his concerns about the lease to Chesapeake.

Dorothy Stillwell

Ms. Stillwell lives on Highview with her husband Frank. They received the first notice in July, 2009 [Application #4]. They were the first to file a protest to that application. After receiving the July, 2009 notice, they were on the alert for any communications from the Railroad Commission and Chesapeake. They have received numerous communications from the Railroad Commission and Chesapeake but never received the second notice [Application #6]. If they had, they would have filed a timely protest. They have talked to Chesapeake landmen about leasing but the lease they were offered was not acceptable to them. They were not offered a chance to negotiate, and were told , " ...take this lease or we will get a Rule 37."

Frank Stillwell

Mr. Stillwill agrees with his wife's testimony. He is certain they never received notice of the second Rule 37 application [Application #6]. His discussions about leasing were with Josh at Four Sevens, " ...and it was like there was no negotiation. It was like they were using the Railroad Commission, you know, to do their negotiation for them." It was like they didn't really have a choice. They were opposed to drilling at the TCU location and Chesapeake has not drilled there yet. He has seen a drilling rig and flare in the area but doesn't know for sure if it was this well. He did not call or write Chesapeake or Four Sevens seeking better lease terms or respond to the pooling offer. Mr. Stillwell thinks it is bad business to produce at the current prices. It bothered him that other neighbors had signed leases and wanted a well drilled but drilling at the TCU site was unacceptable. They knew Chesapeake had other places they could drill from but Chesapeake wouldn't admit it, "...for whatever reason they were playing it hard." Ultimately, they didn't drill at the TCU site. He remains opposed to them producing the well because, " ... I have a problem with them taking my property, I guess." On cross-examination, Mr. Stillwell acknowledged that they wouldn't take his property if he was part of the well, either as a lessor or a working interest owner. He would prefer to lease. A neighborhood committee negotiated a $20,000/acre signing bonus and 25% royalty lease but they couldn't sign up because it was for the high impact TCU site. The lease they were subsequently offered was not very attractive.

Louis McBee for Tim Rios

Mr. McBee sponsored a printout of Commission records showing both drilled and permitted (undrilled) well locations in the vicinity of the University West 1H. The existing and permitted wellbores are in various orientations and of various lengths. Mr. Spencer testified on rebuttal that the three Chesapeake wells shown with surface locations at the TCU site were never drilled and the permits have expired.

Respondent/Applicant Chesapeake's Evidence and Position

Bill Spencer

Mr. Spencer is a consultant who has practiced before the Railroad Commission for about 33 years. He has been a consultant and made filings for Chesapeake since 1995 or 1996. Chesapeake work accounts for 50-60% of his business. He files about 2400 drilling permit applications each year and about half of these seek Rule 37 exceptions. He filed Chesapeake's September 9, 2009 application for a Rule 37 exception that is at issue.

Mr. Spencer testified that the first Rule 37 application [Application # 4] was witthdrawn because it had been protested and Chesapeake's then-existing regular permit for the well [Application # 3] would expire before the protested Rule 37 application could be finally concluded. Prior to filing the application at issue [Application # 6], Chesapeake provided him with the list of names on the service list. He asked that the application be published even though he wasn't aware of any persons who couldn't be located just to "cover ourselves ... We just wanted to make sure. We were pretty sure about all the addresses, thought we had them all right, but, in an abundance of caution, we had it published anyway."

Mr. Spencer sponsored a copy of an September 24, 1985 judgment in Cause No. 96-83296-84. The one page judgment indicates that it is based on facts agreed to by the parties, the City of Fort Worth and Ben Ratcliff d/b/a Fort Worth Commercial Recorder. The judgment found that in 1985 the Fort Worth Commercial Recorder was a newspaper of general circulation published in the City of Fort Worth and was eligible for designation as the City of Fort Worth's official newspaper. Mr. Spencer initially testified that the Commercial Recorder is available to the public in racks at 11 locations in Fort Worth. After visiting and photographing the locations, he determined that there were actually 10 locations as one of the locations no longer existed. The office of the *Commercial Recorder* was one of the 10 locations. The remaining 9 locations consisted of three city hall buildings, four Tarrant County Sub-Courthouses, the Tarrant County Family Law Center and the Tarrant County Criminal Justice Center. The complainants noted that the photos appeared to show only one copy of the *Commercial Recorder* at each of the nine locations.

Mr. Spencer does not know the circulation of the *Commercial Recorder*. The Texas Press Association reports its circulation as 311 in its 2010 Texas Newspaper Directory but he does not know whether that is right. He does not know how many issues are sold from the racks he visited. He agrees that the Texas Newspaper Directory is accurate in reporting the *Commercial Recorder* to be a daily newspaper without a Sunday edition. Chesapeake primarily publishes notices in the *Commercial Recorder* but sometimes uses the *Fort Worth Stat Telegram.* Mr. Spencer does not decide which newspaper to use and he does not know who at Chesapeake makes the decision.

Mr. Spencer further testified that he had previously filed numerous permit applications which had been approved by the Railroad Commission after publication in the *Commercial Recorder.* As part of Application # 6 for the well at issue, he filed an affidavit from the publisher of the *Commercial Recorder* in which the publisher stated that the *Commercial Recorder* is a newspaper of general circulation in Tarrant County. He relies on that affidavit for his belief that the *Commercial Recorder* is a newspaper of general circulation in Tarrant County.

Mr. Spencer sponsored copies of each edition of the *Commercial Recorder* in which the Rule 37 Notice of application or the MIPA notice was published. On cross-examination, he stated that the newspapers he had submitted were representative of the publication to the best of his knowledge. He also sponsored a tabulation of legal notices that appeared in those editions including various meeting notices, requests for bids, notices of alcoholic beverage license applications, and similar notices. The *Fort Worth Star Telegram* now has the contract with the City of Fort Worth and publishes its notices in that paper rather than the *Commercial Recorder*.

Stephanie Fleet

Ms. Fleet is an employee of Chesapeake who works in the regulatory department. Notices from the Railroad Commission to Chesapeake are routed to her and she then forwards the notices to the Chesapeake landmen for the county to which the notice pertains and other Chesapeake personnel. On September 8, 2009, she received publishing instructions and the notice of application of September 4, 2009 [Application # 6] for the University West 1H. She forwarded the notice and publishing instructions to various people within the Chesapeake organization by e-mail and received confirmation that her e-mail had been opened by the recipients.

Gwen Ward

Chesapeake offered Gwen Ward's deposition testimony into the record. Ms. Ward is a self-employed certified public accountant. She owns two houses in the vicinity of the University West 1H. Only the property on Boyd Street is actually within the unit for the University West 1H. She received the July 8,2009 notice of application [Application # 4] for the University West 1H. At about the same time, in early July, she signed a lease on the Boyd Street property with Chesapeake. Ms. Ward stated that she remembered receiving the September 4, 2009 notice of application [Application # 6] as well. She had already leased her property to Chesapeake at that time. She stated that she "sure had seen a lot of pieces of paper" related to the well but that she remembers receiving two notice because she thought, " ... they already did that, and here comes another one." She wants her minerals developed.

Lorenzo Garza

Mr. Garza is the Program Manager of the Railroad Commission's Drilling Permit Section and he has been employed by the Commission since 2001 and in his current position since the Summer of 2008. Mr. Garza related in detail the process for seeking a Rule 37 exception drilling permit from the Commission. The applicant provides the service

list and, after review in the engineering queue, the application goes to the Notice of Application queue where the service list is generated, copies of the NOA and envelopes are printed, envelopes stuffed, and the packet placed in the outgoing mailbox. If 21 days pass without a protest, the application can be approved administratively. If a timely protest is filed, the application is forwarded to Docket Services for handling by the Office of General Counsel. It is common for operators to cancel a permit that is about to expire and apply for a new one.

Chesapeake filed an amended permit application for the University West 1H as a Rule 37 exception on August 19, 2009. Chesapeake paid the filing fee, attached a service list, and included a certified plat. Diana Lopez was the individual at the Commission who prepared the notice. Mr. Garza testified that it would be highly unlikely that Ms. Lopez would only prepare a certificate of service for the publishing department and not prepare other copies to go to people listed on the certificate of service. The Railroad Commission never received any returned envelopes for this application showing that mail was not received by a particular addressee. The only thing that was "kind of out of place" regarding the application was that the file was originally only set up for Notice of Application and after the drilling permit staff sent out confirmation that notice had been sent, Mr. Spencer called stating that he had forgotten to request that the application be noticed by publication. So staff then set it up so that it could be published. It is his understanding that the Commission followed its procedures in considering and granting the permit at issue.

Diana Lopez

Diana Lopez is an Engineering Tech II in the Drilling Permit Section. She has been employed by the Commission since 2000 and has been in her current job since 2007. Ms. Lopez processes Rule 37 and Rule 38 exception Notices of Application. Once an application gets to her she generates a Notice of Application and certificate of service. When the service list is provided on an Excel spreadsheet, it is transferred to a Word document. She prints copies of the NOA, certified service list, and envelopes and then manually folds and stuffs them. Although she would likely have been the one to prepare the NOA at issue for the University West 1H, she does not recall this specific one. She prepares the NOA and certificate of service for the publishing department at the same time as she issues and mails notices to the service list. No envelopes came back from this mailing and it is her understanding the the NOA was mailed out on September 4, 2009. It would be highly unusual for her to send a copy of the NOA to the publishing department but to just forget to mail out the NOA to the people on the service list.

Jeff Ramsdale

Mr. Ramsdale has been employed by Chesapeake for seven years. He has worked as a landman for Chesapeake for six years. The University West 1H is within his area of supervision. The well was originally permitted on August 21, 2007 as the Pearson 3H [Application #1]. In June 2009, the permit was amended and the well re-named as the University West 1H [Application #2]. This was done so that Chesapeake could use the surface location and drill a different lateral than originally planned using its existing permits from the City of Fort Worth and the Railroad Commission. After additional amendments [Application #3], the Rule 37 application was filed in July 2009 [Application #4] with an end to the protest period of August 19, 2009. When the first protest was received to that application, he advised Mr. Spencer to withdraw the application.

There are 122 tracts within the boundaries of the University West pooled unit. Out of the 122 tracts, 110 are leased and 12 are unleased. The entire unit area is 69.607 acres and the unleased tracts are 3.423 acres out of this total. All but one of the unleased tracts is within 330 feet of the wellbore. The wellbore passes within 11 feet of Mr. McDonald's tract but does not trespass on to the tract. Chesapeake sent letters to all unleased owners within the unit for the University West 1H withdrawing its previous offers to lease and offering, instead, participation in the unit as a working interest owner. The letter explained that the unleased owners would have to pay their proportionate share of the costs of the well and estimated those costs at $2,260,970.62. The offer requested a response within 14 days but no responses or inquiries were received. Chesapeake sent the offers by both regular and certified mail. None of the regular mail was returned but some of the certified mail notices were not claimed by the intended recipients.

On cross-examination, Mr. Ramsdale acknowledged that Chesapeake eventually received 12 protests to the first Rule 37 application [Application #4] but did not receive any protests to the second Rule 37 application [Application #6]. He stated that he didn't really find this strange as he doesn't keep track of how people respond. He doesn't know of any other instance in which there was a "double digit" number of protests to an application and then zero on the second go-round. Mr. Ramsdale also acknowledged, in response to questioning, that the joint operating agreement that was offered to the unleased owners("JOA") is Chesapeake's preferred form and is written "with the best interests of Chesapeake in mind ..." He stated that the JOA was not included with the offer letter because it is a lengthy document and it would be time consuming to do so but he was "gladly willing to discuss it" and would send a copy if contacted. He subsequently stated that he checked the pooling offer but Chesapeake's law firm actually sent it out and it would not have been time-consuming for him personally to ask them to include the JOA with the offer. The JOA governs how the owners of the well will work together through the life of the well.

Mr. Ramsdale also acknowledged that the MIPA offer letter literally stated that Chesapeake would forward a copy of the JOA to anyone who agreed to the deal after they signed the letter agreeing to be bound by the JOA. He stated, however, that it was his intention that anyone who had questions or concerns or wanted to negotiate anything call him. Although the JOA used in this case is Chesapeake's preferred form, it has numerous strike-outs of pre-printed provisions.

The list of unleased mineral owners for a notice of application is provided by Chesapeake's landmen to Mr. Spencer. Chesapeake uses Tarrant County Appraisal District records, in-house records, and a variety of private sources to determine ownership information for tracts of land. They make an effort to include all owners of each tract on the list. Mr. Ramsdale can't explain why Mr. Hughes' wife was not included in the list even though Mr. Hughes and his wife own the property jointly and this joint ownership is reflected on the Tarrant County Appraisal District records. Mr. Ramsdale is aware of this omission and has discussed it with his associate but hasn't determined how it happened. It is his assumption that Mr. Hughes' wife was removed from one of the spreadsheets by accident. Mr. Ramsdale stated that they don't get many returns and he does not have a metric to quantify the number of property owners that are not identified.

Mr. Ramsdale testified that, although the pooling letter states that all leasing offers are withdrawn, Chesapeake recently obliged Rebecca Badger, another owner within the unit, by entering a lease with her afterward when she approached Chesapeake about leasing. Chesapeake has offered to pool in all working interest owners on "the same yardstick basis" but the yardstick can be a "little flexible." Royalties paid by Chesapeake for leases within the University West unit range from 20% to 27%.

Alan Jackson

Mr. Jackson received a geology degree in 1980 and had been practicing geology for almost 30 years. He has been with Chesapeake for about three and a half years. He has performed a geological study of the area of the University West 1H well. In his opinion, the University West 1H is located such that it should reasonably drain the designated unit. The reservoir is of a fairly uniform thickness in this area varying from 316 to 334 feet. He has not seen any evidence of sub-surface faulting in the immediate area. The preferred orientation of wells in this area is generally northwest to southeast. Ultimately, optimal well location is a team determination. Mr. Jackson authored the development plan for the University West Unit. This development plan was put together knowing where the pad site would be located.

Stephen Mills

Stephen Mills is a reservoir engineer who has worked in the oil and gas business for 31 years. He has been employed by Chesapeake for the past eight years. The most recent cost estimate for the University West 1H is $2,950,739. Based on his study of the actual costs of other wells drilled within 2 ½ miles of the Univ ersity West 1H, in his opinion, that cost is reasonable. He has also done a study of the cost of a typical Barnett Shale well and concludes that a typical Barnett Shale well must produce approximately 1.6 Bcf to pay out the initial investment and 3 Bcf to achieve a 10% rate of return. His studies indicate that a vertical well can be expected to recover about 1.1 Bcf and 18% of existing producing wells will produce less than 1.6 Bcf while 62% will produce less than 3 Bcf.

Based on a study of producing wells within 10 miles of the University West 1H, Mr. Mills estimates that a vertical Barnett Shale well in the area will recover 1.1 Bcf. A horizontal well will recover the 1.1 Bcf plus an additional incremental recovery for each foot of horizontal drainhole that is drilled and completed. He estimates that the University West Unit has a total of 13.79 Bcf of gas in place and between 2.76 and 4.14 Bcf of recoverable gas in place. He further estimated that if Chesapeake was permitted to perforate, frac, and produce the entire wellbore the University West 1H would produce 3.89 Bcf of gas. However, if Chesapeake were restricted to producing the portions of the wellbore that are a regular distance (330 feet) from unleased tracts, he estimated that the well would only produce 2.03 Bcf of gas, leaving 1.85 Bcf of recoverable gas unrecovered. The full drainhole length is 3425 feet but only 1139 feet of the drainhole is a regular distance from all unleased tracts. Mr. Mills testified that if Chesapeake is not allowed to produce the entire wellbore there will be physical waste and confiscation of these unrecovered reserves. The location of the existing University West 1H is appropriate for the effective and efficient drainage of the University West Unit.

On cross-examination, Mr. Mills testified that the part of the University West Unit with multiple unleased tracts is inaccessible with a regular well regardless of the wellbore path. A wellbore located at a regular distance outside the unit would drain some of the gas from the unit but would not effectively and efficiently drain all of the recoverable gas from the unit. Three years ago, horizontal wells in the Barnett Shale typically had horizontal laterals of as much as three to four thousand feet. Today, better equipment and techniques have extended the upper end of that range so that Chesapeake now drills laterals to seven and eight thousand feet. Fracturing technology has also improved over the years so that the percentage of gas recovered has increased. If Chesapeake was not allowed to produce the irregular portion of the wellbore it would set a composite plug with cement on top to isolate the rest of the wellbore. It would be possible to drill through the plug at a later time and recover the gas in the plugged off portion of the wellbore. The gas behind the plugged off portion of the wellbore is not going anywhere currently. The University West 1H was inexpensive compared to the average of wells within two and a half miles. Given the

assumed recovery factors, it is possible that 70 - 80% of the total gas in place will be left in the ground even if the entire wellbore is produced. Mills does not consider this gas left in the ground wasted it is just unrecoverable with current technology.

Mr. Mills testified that more gas will be recovered from portions of the reservoir closer to the wellbore. Some gas molecules might travel to the wellbore from 1500 or 2000 feet away but distant portions of the reservoir would not be effectively and efficiently drained. Chesapeake determined the boundaries of the University West Unit. The wellbore path for the 1H, within a few feet either way, is the location that will most efficiently drain the unit. Mr. Proctor's tract, which is 31 feet from the 1H well, and the other tracts within the unit will be drained by the well.

Examiners' Opinion

Permitting History

The permitting history of this well is a convoluted string of multiple applications, re-filings, amendments, declaration of NPZs, removal of NPZs, permit withdrawals, and permit cancellations which the complainants characterize as "a shell game." Chesapeake initially filed an application for a well at the surface location at issue on August 20, 2007 [Application #1]. That proposed well was designated by Chesapeake as the 3H on the 439 acre Pearson Gas Unit. The well was represented as being 478' from the nearest lease line and a regular permit was issued for the well on August 22, 2007. On June 22, 2009, Chesapeake field a new W-1 [Application #2] for the well amending the name of the unit and well to the University West 1H on a 28 acre unit. The application indicated the well would now have a 750' lateral but would be 330 feet from all lease lines. The amended permit was approved as regular on June 24, 2009.

A week later, on July 2, 2009, Chesapeake filed another W-1 [Application #3] now indicating the University West Unit consisted of 60+ acres and increasing the lateral to about 3500' with about 2400' of the lateral declared as NPZ. As a result of declaring that it would limit its perforations to only 1100' of the long lateral, Chesapeake represented that no unleased tracts were within 330' of the perforated interval and Chesapeake's third permit for the well was approved on July 7, 2009. The same day it obtained approval, Chesapeake filed another amendment [Application #4] now removing the NPZs and seeking a permit to produce the entire 3500' lateral. Numerous unleased internal tracts were within 330' of the perforated zone in this newest configuration and Chesapeake supplied a service list of affected parties with 21 owners listed. The Notice of Application for this filing was issued on July 8, 2009 and eight protests to the application were filed. On July 27, 2009, Chesapeake withdrew its latest amendment and cancelled its existing permit for the University West 1H.

Three weeks later, on August 19, 2009, Chesapeake again re-filed [Application #5] seeking a permit for the University West 1H with the same surface location and wellbore track as in the previous two iterations but this time again declaring NPZs over 2/3 of the wellbore with only 1100' of the 3500' lateral to be perforated. With the NPZ limitations, Chesapeake represented that there were no unleased tracts within 330 feet and the permit was approved administratively on August 21, 2009. On September 1, 2009, Chesapeake filed yet another W-1 [Application #6] for the University West 1H with the same surface location and wellbore track as in the previous three iterations but this time removing the NPZs that were approved just 10 days earlier. The service list provided was identical to that provided with the July 7 application which had drawn 8 protests. Sometime after filing Application # 6, Chesapeake requested that the notice of application ("NOA") also be published. The NOA was issued September 4, 2009 and no protests or returned envelopes were received by the Commission prior to the protest deadline of October 19, 2009. On October 20, 2009, Application # 6 was approved administratively. A copy of the plat for the well is attached.

Beginning on March 23, 2010, twelve of the owners listed on the service lists filed complaints asserting that they did not receive the NOA for Application #6. Eight of the twelve had filed protests to the substantially identical Application #4.

Legally Required Notice

The initial factual issue that must be decided is whether or not the complainants received the NOA for Chesapeake's Application #6. It is undisputed that no timely protest was filed. If proper notice was received by all persons entitled to notice then the complainants have waived their right to protest and the Rule 37 exception permit was properly granted without a hearing. On the other hand, if legally sufficient notice of the application was not given to all persons entitled to notice, the Commission lacks jurisdiction to grant the requested permit. *See Turman Oil Co. v. Roberts*, 96 S.W.2d 724, 726 (Tex Civ. App. – Austin 1936, *writ ref'd*); *Kerrvile Bus Co. v. Continental Bus System*, 208 S.W.2d 586, 589 (Tex. Civ. App. – Austin 1947, *writ ref'd n.r.e.)*

The constitutional due process guarantee applies to administrative proceedings in which a protected interest is implicated. *See Lewis v. Metropolitan Savings & Loan Association*, 550 S.W.2d 11, 13 (Tex. 1977); *J.B. Advertising, Inc. v. Sign Board of Appeals*, 883 S.W.2d 443, 449 (Tex. App. -- Eastland 1994, *no writ*); *Francisco v. Board of Dental Examiners*, 149 S.W.2d 619, 622 (Tex. Civ. App. -- Austin 1941, *writ ref'd*). The Texas Supreme Court has concluded that due process attaches to the property rights that arise from a mineral estate. *Railroad Commission v. Torch Operating Company*, 912 S.W.2d 790, 792 (Tex. 1995); *Railroad Commission v. Graford Oil Corp.*, 557 S.W.2d 946, 953 (Tex. 1977). As a result, the Commission may not constitutionally authorize the deprivation of that property interest without appropriate procedural safeguards. *Cleveland Board of*

Education v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659, 661,n.3 (Tex. 1990).

The Supreme Court has held that, "The essence of due process is the requirement that `a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Matthews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976) (citation omitted). The Texas Natural Resources Code specifically provides that, "No rule or order pertaining to the conservation of oil and gas or to the prevention of waste of oil and gas may be adopted by the commission except after notice and hearing as provided by law." Tex. Nat. Res. Code §85.205.

In almost all cases,[1] there must be notice of the proposed deprivation and the opportunity for some type of hearing *before* an individual is deprived of any significant property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493; *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Eguia v. Tompkins*, 756 F.2d 1130, 1139 (5th Cir. 1985). This right to a hearing of some type prior to any significant deprivation of property has been described as the "root requirement" of the Due Process Clause. *Cleveland Board of Education v. Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493; ***see also*** *Roth*, 408 U.S. at 569-70, 92 S.Ct. at 2705 (" ... the right to some kind of prior hearing is paramount.").

Mailed Notice of Application

In this case, there is indirect evidence indicating that the NOAs were mailed in the form of a certificate, generated by Commission personnel, indicating that notice was sent to the addresses provided by the applicant. Staff personnel involved in the sending of NOAs testified as to their normal routine and the fact that the certificate would not have been attached if they believed they had not sent notice. However, thousands of NOAs are sent each year and, not surprisingly, the staff person had no specific memory of sending this notice. Given the sheer volume of notices and the numerous very similar applications by Chesapeake on this well, it would be very surprising if an individual claimed to remember sending this specific NOA so many months after the fact. Nonetheless, the certificate of mailing is some proof on the issue and proof that letters, notices or other communications were properly addressed and deposited in the mail, postage pre-paid, creates a presumption that the missive was received by the addressee in due course. *See Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987); *Stanley Stores, Inc. v. Chavana*, 909 S.W.2d

[1] There are some exceptional circumstances, usually involving imminent threat to public health and safety, in which a pre-deprivation hearing is not required by due process. ***See*** *Cleveland Board of Education v. Loudermill*, 470 U.S. at 542, n.7, 105 S.Ct. at 1493, n.7; *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018 (1970); *Eguia v. Tompkins*, 756 F.2d 1130, 1139 (5th Cir. 1985).

554, 558 (Tex. App. -- Corpus Christi 1995, writ denied); *Hot Shot Messenger Service, Inc. v. State*, 798 S.W.2d 413, 415 (Tex. App. -- San Antonio 1984, writ denied); *Terminix International, Inc. v. Lucci*, 670 S.W.2d 657, 665 (Tex. App. -- San Antonio 1984, writ re'd n.r.e.). The matters of proper addressing, stamping, and mailing may be proved by proof of customary mailing routine in a business. *Hot Shot Messenger Service*, 798 S.W.2d at 415.

The presumption of receipt is rebuttable, however, and may be rebutted by a simple denial of receipt by the purported recipient. *See Cliff v. Huggins*, 724 S.W.2d at 780; *Hot Shot Messenger Service*, 798 S.W.2d at 415; *Gulf Insurance Co. v. Cherry*, 704 S.W.2d 459, 461 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.); *Valley Forge Life Insurance, Co. v. Republic National Life Insurance Company*, 579 S.W.2d 271, 277 (Tex. Civ. App. -- Dallas 1979, writ ref'd n.r.e.). The presumption of receipt is not evidence and it vanishes when rebutted by probative evidence of non-receipt of the communication in question. *Cliff v. Huggins*, 724 S.W.2d at 780; *State and County Mutual Fire Insurance Co. v. Williams*, 924 S.W.2d 746, 749 (Tex. App. -- Texarkana 1996, no writ); *Pete v. Stevens*, 582 S.W.2d 892, 895 (Tex. Civ. App. - - San Antonio 1979, writ ref'd n.r.e.).

In the face of the legal presumption of receipt, complaints have been filed by, not just one or two, but twelve of the intended recipients of the notice alleging that they did not receive the notice. Further, at least eight of these twelve filed protests less than 60 days earlier to the previous notice of application for Application # 4 which was identical in all material respects to the application at issue, Application # 6. Clearly, these individuals understood how to respond to the NOA. There was unrefuted testimony at the hearing that the individuals who had previously protested expected Chesapeake to re-file yet again and that they were on the look out for a new NOA. It strains credibility beyond the breaking point to suggest that all of these individuals received the NOA but neglected to respond and now are perjuring themselves by denying receipt.

Chesapeake did produce testimony that one of the 21 intended recipients claimed to have received the notice. However, the actual notice she claimed to have received was not produced. It is unclear why this individual would have been sent the notice at all as, at the time the NOA for Application # 6 was sent out, she had signed a lease with Chesapeake and was no longer an unleased owner with a right to protest. It seems likely that this individual was confused and recalled receiving one of the earlier identical or nearly identical NOAs for this well.

The great weight of the evidence indicates that the NOA for Application # 6 was never mailed to the unleased owners or, possibly, was mailed but due to some mishap the entire bundle was lost or destroyed by the Commission's agent, the General Services Commission, or the U.S. Postal Service. Interestingly, there is a bit of corroborating evidence from the file that does not rely on the memory or veracity of any individual. Application # 4, sent about 60 days prior to Application # 6, was for an identical well location

and had an identical service list. The envelopes for two of those 21 notices were returned to the Commission as undeliverable. One was marked "Temporarily Away" and the other was marked "Not Deliverable as Addressed - - Unable to Forward." Presumably, these returned envelopes were at least part of the reason Chesapeake requested that the NOA for Application # 6 be published when it had not requested publication of the NOA for identical Application # 4. The same addresses were provided by Chespeake for the mailing of the NOA of Application # 6 that had been provided for Application # 4. If the 21 notices for Application # 6 had actually been mailed out, one would expect that the same two notices would have been returned - or at least the one that was undeliverable and could not be forwarded. However, the file contains no returned envelopes for the NOA for Application # 6.

The complainants successfully rebutted the presumption that they received the mailed NOA for Application # 6. There is no direct evidence of the reason for this failure of notice and it cannot be determined with certainty what went wrong. The examiners believe the most likely culprit was mis-communication and misunderstanding, on the part of Chesapeake, Commission Staff or both, resulting from the barrage of filings and re-filings concerning the same well. The well location and service list for Application # 4 and Application # 6 were identical. The only material difference between the two was the fact that Chesapeake requested that the NOA for Application # 6, but not Application # 4, be published. Further, the evidence was that Chesapeake did not request publication of Application # 6 at the time of filing but requested publication out of the usual course after the notice had been filed. It seems possible that someone, due to misunderstanding or confusion, believed that the mailed notice, identical in all respects to the mailed notice for Application # 4 had been accomplished for Application # 6, and, upon receiving the tardy publication request, only sent out the NOA for Application # 6 to those entities that routinely receive the publication NOA - the applicant (Chesapeake) and the Commission staff. Regardless of the reason, the evidence is overwhelming that none of the unleased owners within the Univerrsity West Unit received the NOA for Application # 6.

Notice by Publication

Chesapeake urges that even if the mailed notice was not received, each of the unleased owners was notified by publication. The file contains an affidavit from the publisher averring that the NOA for Application # 6 was published on September 9, 16, 23 and 30, 2009 in the *Commercial Recorder of Fort Worth*. The Form Affidavit further states that the *Commercial Recorder* is, "... a newspaper of general circulation which has been published in Tarrant County regularly and continuously for a period of one year prior to the first day of publication of this notice ..." Notice by publication is addressed by Commission Rule 1.46 of the Commission's General Rules of Practice and Procedure. That rule states, in relevant part,

> When an applicant ... is unable, after due diligence, to locate the whereabouts of any person who is required to be notified of an application ... the applicant shall publish the Commission's Notice of Application ... in a newspaper of general circulation in the county or counties where the land or facility that is the subject of the application or hearing is located ...

16 Tex. Admin. Code §1.46.

Initially, Chesapeake lacks authority to publish under this rule as a means of service since Chesapeake asserts that it had accurate addresses for all of the complainants and they were not, therefore, persons whose whereabouts could not be determined. Chesapeake asserts, nonetheless, than the publication was substitute service and provided the notice to which the unleased owners were entitled.

As acknowledged by Chesapeake, the notice given must be reasonably calculated, under all the circumstances, to apprise interested parties of the pending action and afford them an opportunity to present their objections. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978); ***see also*** *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983). When significant property interests are involved and the addresses of the persons affected are known, it is doubtful whether publication (as opposed to actual delivery of notice to the person) would ever by considered sufficient. In this case, where publication was in a periodical that does not meet the minimum requirements of state laws or Commission rules, publication notice was clearly inadequate.

The Texas Government Code sets the minimum standard for publication of notices[2] by governmental entities. The newspaper must:

(1) devote not less than 25 percent of its total column lineage to general interest items;
(2) be published at least once each week;
(3) be published as second-class postal matter in the county where published; and
(4) have been published regularly and continuously for at least 12 months before the governmental entity or representative publishes notice.

Tex. Gov't Code §2051.044(a).

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[2] The requirements are the minimum for publication of any type of notice by any governmental entity and the subchapter is expressly applicable "only to the extent that the general or special law requiring or authorizing the publication of a notice ... does not specify the manner of the publication ..." Tex. Gov't Code 2051.042. For example, Rule 1.46 specifically requires that the notice be published once a week for four weeks rather than the one time specified in this subchapter. Further, Rule 1.46 requires that the publication be in a newspaper of general circulation

Rule 1.46 requires that publication be in a newspaper of general circulation in the county.[3] The notices of application and notices of hearing required to be published by the Railroad Commission under Rule 1.46 are fundamentally different than most "legal notices" required to be published by municipalities and other governmental entities. Those notices by local governmental entities are to give notice to the general public of the workings of government. The Commission requires notice to be published as a substitute for direct service when a specific known person whose property interests are in jeopardy cannot be located after a diligent attempt to do so. The notice is intended to be published in a newspaper that the average person could be expected to read for the news of the day in the belief that the affected person or an acquaintance, although not looking for a notice regarding his or her property, will see the notice and thereby be informed about the pending application that may profoundly affect his or her property rights.

The Texas Attorney General has, by formal opinion, defined the requirements for a "newspaper of general circulation":

(1) a newspaper as defined by section Government Code §2051.044;
(2) that has "more than a de minimis number of subscribers among a particular geographic region"; and,
(3) "a diverse subscribership."

Att'y Gen. Op. No. JC-0223 (2000) at 2, 10

The *Commercial Recorder - Court and Commercial Daily* ("*Commercial Recorder*") fails all three of the required criteria for a newspaper of general circulation. A review of the evidence in the record reveals that the Commercial Recorder does not devote at least 25% of its total column lineage to general interest items. The four editions in which the NOA for Application # 6 was published were placed in evidence as Chesapeake's Exhibit No. 25. All four adhered to the same layout with the first page devoted to three or four brief items that could be considered of general interest. None of the articles continue beyond the first page or have a reporter byline indicating authorship. All appear to be press releases prepared by the subject of the article. All of the pages following the first page of each edition consist of column after column of legal or public notices with an occasional small ad,

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[3] Chesapeake's assertion that it is only required to publish in a newspaper, not a newspaper of general circulation because the staff-prepared instruction sheet does not repeat the general circulation requirement is spurious, at best. The instructions do not state that a newspaper of general circulation is not required. The requirement that the newspaper be one of general circulation is explicitly stated in Rule 1.46, it is not necessary that the requirement be re-stated in the unofficial instructions that are merely intended to supply ministerial details, not set out every requirement in the rule. In any event, as detailed the Commercial Recorder does not even meet the minimum statutory requirements for a "newspaper" that can be used by a governmental entity.

usually for the Commercial Recorder. This is consistent with the full name of the paper as shown on the mast head: "*Commercial Recorder - Court and Commercial Daily.*" Three of the four editions had just over 10% of the column lineage devoted to general interest items and one had about 14%. None were even close to statutorily required 25%. Chesapeake also placed in evidence the four editions in which notice of its MIPA application concerning the University West 1H was published as Exhibit 26. Each of those editions adhered to the format described above and each had between 8% and 11% of the column lineage devoted to items of general interest - less than half of the statutory requirement of 25%.

The evidence in the record was that the *Commercial Recorder* has 311 subscribers while Tarrant County has a population of approximately 1,789,900 - indicating less than 2/100 of 1% of the residents of Tarrant County subscribe to the Commercial Recorder. By comparison, the evidence in the record indicated the Fort Worth Star Telegram has 195,245 subscribers with a little less than 11% of Tarrant County residents subscribing. The number of subscribers to the *Commercial Recorder* is *de minimis* compared to the number of residents of Tarrant County. The *Commercial Recorder* does not meet the second requirement for a newspaper of general circulation.

The diverse readership inquiry " ... requires a factual examination of whether the newspaper serves a "special or limited" audience, such as "medical, literary, religious, scientific or legal journal," See Great S. Media, Inc.v. McDowell County, 284 S.E.2d 457, 464 (N.C. 1981) (quoting Lynn v. Allen, 44 N.E. 646, 647 (Ind. 1896)), or whether it "circulates among all classes and is not confined to a particular class or calling in the community." Id. (quoting People v. South Dearborn Street Bldg. Corp., 24 N.E.2d 373, 374 (Ill. 1939))." Tex. Att'y Gen. Op. No. JC-0223, at 7 (2000). The *Commercial Recorder* is clearly geared to a special audience as its full name attests - "*Commercial Recorder - Court and Commercial Daily.*" Its tightly spaced columns of listings of Suits Filed, Sales Tax Permits, Liens Filed, Trustee Sales, Assumed Names and assorted Public Notices are of no interest to the general reader but of interest to a specialized legal and commercial readership. The fact that it is only available at the *Commercial Recorder* offices and nine other locations in Tarrant County - all of them sub-courthouses or municipal buildings - is further evidence of limited audience for the publication. The *Commercial Recorder* does not cater to a "diverse readership."

Notice was not given by mail to the unleased mineral owners within 330 feet as required by Rule 37. Constructive publication notice could not be used as a substitute for mailed notice where the names and addresses of the affected parties were known or could have been known through the exercise of due diligence. Further, publication in the *Commercial Recorder* could not provide required notice as that periodical is not a newspaper for notice publication, as defined by the Government Code §2051.044, or a newspaper of general circulation as required by Commission Rule 1.46. It is well established that a Rule 37 permit issued without notice in compliance with the notice requirements of Statewide Rule 37 is void. *Magnolia Petroleum Co. v. New Process*

Production Co., 104 S.W.2d 1106, 1109 (Tex. 1937); *see also Greer v. Railroad Commission*, 117 S.W.2d 142, 145 (Tex. Civ. App. - - Austin 1938, writ dsim'd w.o.j.)("Where the statute requires notice and hearing, such prerequisite is jurisdictional, and its omission renders the order void.") citing *Rabbit Creek Oil Co. v. Shell Petroleum Corp.*, 66 S.W.2d 737 (Tex. Civ. App. - - Austin 1933, no writ); *State v. Blue Diamond Oil Corp.*, 76 S.W.2d 852 (Tex. Civ. App. - - Austin 1934, no writ).

Failure of Notice and Estoppel Claim

Chesapeake's assertion that the mailed notice was sufficient even if it was not actually received because the Commission's procedure was "reasonably calculated" to afford notice is without merit. Chesapeake primarily relies on *Dusenbery v. United States*, 122 S.Ct 694 (2002). *Dusenbery* involved a forfeiture of $22,000 in cash seized pursuant to a search warrant after the arrest of a suspected drug dealer. After the drug dealer pled guilty and was incarcerated in federal prison, the federal government initiated forfeiture proceedings as to the cash. Notice of the forfeiture was validly published and was sent by certified mail to three different addresses for Dusenbery: the prison where Dusenbery was incarcerated, the address where the cash was seized and Dusenbery's mother's house. The certified mail to the prison was signed for by a prison employee. The FBI did not receive a response and forfeited the cash. Nearly five years later, Dusenbery filed a petition claiming he did not receive any of the notices. *Id.* In weighing the due process challenge to the adequacy of notice, a majority of the court applied a test of "reasonableness under the circumstances" and concluded that certified mail to the prisoner at the prison complied with due process.
Id. at 699-702.

Dusenbery v. United States is of little, if any, relevance. The case at hand is not a criminal forfeiture of cash used in an illegal drug operation. The complainants are property owners in Fort Worth, not convicted felons. This case involves the permitting of a well and whether that well should be allowed in an irregular location in spite of the adverse effect it may have on the real property rights of adjacent individual property owners. Further, unlike the circumstances in *Dusenbery*, the notices in this case were not validly published, were not sent by certified mail and there was no direct proof that any of the notices were actually received at the addresses of the complaining parties.[4]

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[4] The other cases briefly cited by Chesapeake on this point are equally far afield. None involve the Railroad Commission. All involve criminal forfeitures, bankruptcy proceedings or tax foreclosures. Most involve notice by certified mail combined with valid notice by publication and those that don't have other factors not present in this case. For example, ***Weigner v. City of New York***, involved a tax foreclosure suit, in which a majority of the court found mailed notice sufficient even without proof of receipt because the notice had also been validly published multiple times in three different publications and Weigner had not paid her property taxes for a number of years and had received multiple other notices from the city about

Chesapeake's estoppel arguments are not persuasive. Chesapeake acknowledges that ordinarily a governmental entity cannot be estopped. However, Chesapeake cites *City of White Settlement v. Super Wash, Inc.* for the proposition that a governmental entity may be estopped "where justice demands application of the doctrine of estoppel and its application does not interfere with the exercise of governmental functions." 198 S.W.3d 770, 774 (Tex. 2006). Chesapeake neglects to reveal, however, that in the *Super Wash* case, the Texas Supreme Court actually reversed the Court of Appeals and ruled that estoppel could not legally be applied against the governmental entity in that case, the City of White Settlement. Id. at 778.

The *Super Wash* case involved neighbor complaints when the city erroneously issued a permit to a car wash contrary to its own ordinance without requiring a fence and limited egress to protect an adjacent neighborhood. In looking at the estoppel claim, the Supreme Court stated that the kind of cases which might fall under the "justice requires" exception are those in which government officials have affirmatively misled the parties and the misleading statements resulted in permanent loss. Id. at 775. There has been no allegation that any misleading statements were made in this case by any Railroad Commission staff member. Rather, it appears there was a mutual mistake. The court further noted that estoppel could not apply when Super Wash had other potential remedies "such as seeking a variance or repeal of the ordinance ... the existence of alternative remedies weighs strongly against the doctrine." Id. at 775. In this case, Chesapeake clearly does have alternative remedies including seeking a Rule 37 exception permit based on waste or confiscation or seeking relief under the Mineral Interest Pooling Act - both of which it is actively pursuing.

The *Super Wash* court also addressed the question of whether applying estoppel would interfere with the exercise of governmental functions and found that it would, as granting estoppel "would impede the City's attempt to answer the concerns of residents in the neighborhood [adjacent to the car wash]. Id. at 777-778. Similarly, in this case, granting estoppel would preclude the Commission from giving unleased mineral owners and opportunity for hearing to present their concerns regarding the irregular location of the University West 1H. Further, there is no indication that the ordinance at issue required notice to adjacent neighbors while it is undisputed the Rule 37 requires notice and opportunity for hearing to unleased mineral owners within 330 feet of the University West 1H.

Chesapeake cites on the estoppel issue *Maguire Oil Co. v. City of Houston* and describes it as "remarkably similar" to this case. 69 S.W.3d 350, 368 (Tex. App. – Texarkana 2002, pet. denied). Chesapeake seems to suggest that the *Maquire* court ruled that estoppel was appropriate but that is not accurate. Initially, the case does involve the revocation of a drilling permit but otherwise the case is not very similar to this one. The

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the delinquency. 852 F.2d 646, 651 (2nd Cir. 1988).

permit was issued by the City of Houston, not the Railroad Commission. Most importantly, there does not appear to have been any issue about whether proper notice was given- the City of Houston simply decided it had made a mistake in granting a drilling permit so close to the lake that happened to be the city's main source of drinking water and revoked the permit. Also of significance, Maguire did not even contend that the city was estopped from revoking the drilling permit. Instead, Maguire sued for damages and contended that the city was estopped from claiming sovereign immunity as a defense to Maguire's damages claim. *Id.* at 365. The trial court granted summary judgment for the city. Id at. 356-57. The Court of Appeals did not find that estoppel applied, only that there was insufficient evidence to grant summary judgment for the city and the issue should be remanded for further proceedings. Id at 370. In short, the *Maquire Oil* case does not support Chesapeake's contentions in this case.

Railroad Commission precedent on this issue is clear. The Commission has previously declared a Rule 37 permit *void ab initio* where notice as required by Rule 37 was not given even though it was undisputed that the complainant had actual notice of the well location prior to drilling and the well had already been drilled at the time the complaint regarding lack of notice was brought. *See* Oil & Gas Docket No. 06-0229019; *Commission Called Hearing on the complaint of the Long Trusts* (Final Order Sept. 12, 2002). The Austin Court of Appeals recently affirmed the Commission's declaration that the Rule 37 permit at issue in the Long Trusts Case was void *ab initio* where proper notice was not given. *Anadarko E & P Co. v. Railroad Commission*, 2009 WL 47112, p7 (Tex. App. -- Austin Jan. 7, 2009, no pet.) (mem. op., not designated for publication). The Austin Court specifically found that even actual knowledge of the well location could not save the permit where the complainant did not receive the notice required by Rule 37 which would allow it "an opportunity to protest the application." *Id.* at p 9. Given the failure to give undisputedly affected parties notice as required by Rule 37, the Railroad Commission lacked jurisdiction over the matter and the permit issued to Chesapeake on October 20, 2009, was *void ab initio*.

Rule 37 Application

The 2009 Rule 37 permit issued for the University West 1H was void for lack of proper notice. However, the hearing was also noticed for consideration of Chesapeake's renewed application for a Rule 37 exception and Chesapeake put on evidence in support of its application. Although Chesapeake asserts that it is entitled to a Rule 37 exception based both on protection of correlative rights and prevention of waste, its evidence and arguments primarily concern waste. The technical evidence put on by Chesapeake was largely undisputed and no competing technical evidence was sponsored by the protestants.

Chesapeake's evidence established that the thickness of the Barnett Shale in the area of the subject leases varies only slightly. The expected gross thickness of the Barnett Shale on the University West unit is approximately 330 feet. The preferred zone of

completion in wells is the lower portion of the Barnett Shale. The maximum stress orientations in the area are known to be generally northeast/southwest, and the preferred orientation of wellbores is northwest/southeast, which is perpendicular to the maximum stress orientation. The existing subject wellbore is oriented in that direction in order to obtain maximum benefit of fracture stimulation and would effectively and efficiently drain the entire unit.

The cost to date of drilling the University West No. 1H is $2.95 million. This is comparable to the costs associated with drilling and completing other wells within 2 ½ miles of the University West No. 1H. Chesapeake believes that the $2.95 million is therefore a reasonable cost. Chesapeake estimates total gas in place beneath the area of the University West unit is approximately 13.79 BCF of gas and recoverable gas in place is approximately 2.76 - 4.14 BCF of gas. Chesapeake estimates that the entire University West 1H with a drainhole length of 3,425 feet, would produce 3.89 Bcf of gas. If limited to a wellbore length of 1,139 feet of producible drainhole, the expected recovery from the well is approximately 2 BCF of gas. The other 1.85 BCF of gas would not be recovered in the absence of the requested Rule 37 exception. Chesapeake's unrefuted testimony was that these reserves could not be recovered from any horizontal well at a regular location or from any vertical well.

The term "waste" is not defined in Rule 37. The Texas Supreme Court has defined waste as "the ultimate loss of oil." As stated by the Supreme Court, "If a substantial amount of oil will be saved by the drilling of a well that otherwise would ultimately be lost, the permit to drill such well may be justified under ... Rule 37 to prevent waste."[5] An exception based on waste can only be granted upon a showing of unusual conditions underlying the tract for which a permit is sought that are different from conditions in adjacent parts of the field[6] coupled with a showing that a substantial amount of oil would be saved by drilling the additional well.[7]

Accordingly, an applicant seeking an exception to rule 37 based on waste must establish three elements:

1) that unusual conditions, different from conditions in adjacent parts of the field, exist under the tract for which the exception is sought;
2) that, as a result of these conditions, oil will be recovered by the well for which

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[5] *Hawkins v. Texas Co.*, 209 S.W.2d 338, 343 (Tex. 1948) ***quoting***, *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73, 80 (Tex. 1939).

[6] *Hawkins v. Texas Co.*, 209 S.W.2d 338, 343 (Tex. 1948); *Railroad Commission v. Shell Oil Co.*, 161 S.W.2d 1022, 1026 (Tex. 1942)(known as the "Trem Carr case").

[7] *Hawkins v. Texas Co.*, 209 S.W.2d 338, 343-44 (Tex. 1948).

a permit is sought that would not be recovered by any existing well or by an additional well drilled at a regular location; and,

3) that the amount of otherwise unrecoverable oil is substantial.

In a "standard" waste case, Chesapeake's evidence fails as there was no evidence of an unusual condition under the University West Unit, different from other parts of the field. In fact, Chesapeake's own evidence tended to show that the field was uniform with little variance in thickness or characteristics in the area of the University West Unit. It appears to the examiners, however, that the unusual facts of this case justify the granting of an exception based on so-called economic waste. This type of claim is based on *Exxon Corp. v. Railroad Commission*, 571 S.W.2d 497 (Tex. 1978). In short, the *Exxon* court noted that inclusion of economic considerations in Rule 37 proceedings is "neither unjustified nor unprecedented" and ruled that the "unusual conditions" required to prove waste were not limited exclusively to geologic conditions but could include the presence of an existing wellbore, if it is not economically feasible to drill in a regular location and the existing wellbore was drilled in good faith. Id. at 501-02.

It is undiputed that a substantial amount of gas is involved - approximately 3 to 4 Bcf of recoverable gas. Chesapeakes' experts presented unrefuted testimony that the gas under the University West 1H will not be recovered by any existing well or by any regularly located well. On these very specific facts, the existing wellbore may be considered an unusual condition under the precedent of the *Exxon* case. It is crucial that the permit Chesapeake obtained in good faith authorized it to drill and complete the entire wellbore. The good faith requirement would be meaningless if an operator could obtain a permit by declaring NPZs and subsequently get them removed by simply claiming economic waste. In fact, a claim that requiring the permittee to comply with its permit (by leaving the NPZs in place) would cause waste would raise a serious issue as to whether the Commission's issuance of the permit with NPZs was proper. One of the Commission's primary statutory mandates is to prevent waste. In this case, there is no evidence that the well was not drilled in good faith at a cost of nearly $3 million based on the facially valid permit which had been issued allowing unrestricted production of the entire wellbore.

Mineral Interest Pooling Act Application

The Notice of Hearing for Chesapeake's application pursuant to the MIPA for the University West MIPA Unit was issued on July 16, 2010. A subsequent ruling consolidating that application with the complaint proceeding was issued on July 22, 2010. The envelopes containing the notices of the MIPA Application directed to at least three different lot owners were returned to the Railroad Commission marked "Return to Sender/Unable to Forward" or some similar notation. The notice of the MIPA application was also published. However, it was published in the *Commercial Recorder*. As detailed above, the *Commercial Recorder* is not a newspaper permissible for use by governmental entities under the Government Code and is not a newspaper of general circulation as required by Railroad Commission

General Rule of Practice and Procedure 1.46. Accordingly, the Commission lacks jurisdiction to address the merits of this application and it should be dismissed.

A fair and reasonable offer to pool is also a jurisdictional prerequisite to consideration of an MIPA application by the Commission and this must be judged from the viewpoint of the party being forced to pool. The examiners note that there is substantial doubt as to whether Chesapeake's offer in this case was fair and reasonable from the view point of the unleased mineral owners. Among other issues, all lease offers were expressly withdrawn and the only option given the offerees was to decide within 14 days to become working interest owners under the terms of a Joint Operating Agreement which they were told they could see after agreeing to its terms. Further, as working interest owners they would have been required to pay substantial upfront costs whereas other mineral owners in the unit had come in as lessees with no upfront costs.

Conclusion

In the opinion of the examiners, the Rule 37 exception permit issued for the University West 1H was void *ab initio* for failure of required notice. However, Chesapeake demonstrated an entitlement to an exception permit based on prevention of waste. Finally, Chesapeake's MIPA application should be dismissed for a failure of required notice. Based on the record in this case, the examiners recommend adoption of the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. At least thirty (30) days notice of the September 13, 2010 hearing was provided to all persons affected by these dockets.

2. In Oil and Gas Docket No. 05-0265656 ("Rule 37 Complaint Hearing") Ben Proctor and others complain that they were entitled to, but did not receive notice of Chesapeake Operating, Inc.'s Rule 37 Spacing exception Application concerning Well No. 1-H on the University West Unit, Newark, East (Barnett Shale) Field, Tarrant County, Texas.

3. In Oil and Gas Docket No. 09-0266449 ("MIPA Hearing") Chesapeake Operating, Inc. seeks, pursuant to the Mineral Interest Pooling Act, a Commission order force pooling tracts into Well No. 1H, University West MIPA Unit, Newark, East (Barnett Shale) Field, Tarrant County, Texas.

4. Special field rules for the Newark, East (Barnett Shale) Field ("NEBS") provide for 330' lease line spacing with no between well spacing requirement and 320-acre proration units with the option of forming 20-acre units.

5. Chesapeake initially filed an application for a well at the surface location at issue on August 20, 2007 [Application #1]. That proposed well was designated by Chesapeake as the 3H on the 439 acre Pearson Gas Unit. The well was represented as being 478' from the nearest lease line and a regular permit was issued for the well on August 22, 2007.

6. On June 22, 2009, Chesapeake field a new W-1 [Application #2] for the well amending the name of the unit and well to the University West 1H on a 28 acre unit. The application indicated the well would now have a 750' lateral but would be a regular distance, 330 feet from all lease lines. The amended permit was approved and issued as regular on June 24, 2009.

7. On July 2, 2009, Chesapeake filed another W-1 [Application #3] now indicating the University West Unit consisted of 60.603 acres and increasing the lateral to approximately 3500' with about 2400' of the lateral declared as NPZ. As a result of declaring that it would limit its perforations to only about 1100' of the lateral, Chesapeake represented that no unleased tracts were within 330' of the perforated interval and Chesapeake's third permit for the well was approved and issued as regular on July 7, 2009.

8. On July 7, 2009, the same day it obtained approval of Application #3, Chesapeake filed another amendment [Application #4] now removing the NPZs and seeking a rule 37 permit to produce the entire 3500' lateral. Numerous unleased internal and external tracts were within 330' of the perforated zone in this newest configuration and Chesapeake supplied a service list of affected parties with 21 owners listed. The Notice of Application for this filing was issued on July 8, 2009 and protests to the application from eight lot owners were filed. Protests were filed by:Sean & Sherilyn Ricketts, Robert N. McDonald, Terry B. and Allana A Mann, Gregory W. Hughes, David A. Higbee, Frank Stillwell, Ben R. Proctor, and Timothy Rios. Two notices were returned marked "undeliverable."

9. On July 27, 2009, Chesapeake withdrew its latest proposed amendment [Application #4] and cancelled its existing permit for the University West 1H.

10. On August 19, 2009, Chesapeake again re-filed [Application #5] seeking a permit for the University West 1H with the same surface location and wellbore track as in the previous two iterations but this time again declaring no perforation zones ("NPZs") over 2/3 of the wellbore with only about 1100' of the 3500' lateral to be perforated. With the NPZ limitations, Chesapeake represented that there were no unleased tracts within 330 feet and the permit was approved administratively as regular on August 21, 2009.

11. On September 1, 2009, Chesapeake filed yet another W-1 [Application #6] for the

University West 1H with the same surface location and wellbore track as in the previous three iterations but this time removing the NPZs that were approved 10 days earlier. With the NPZ's removed, the application again required an exception to Statewide Rule 37. The application was docketed as Rule 37 Case No. 0262798. The service list provided was identical to that provided with the July 7 application (Application # 4) which had drawn 8 protests.

12. Although Chesapeake did not request that the notice be published at the time of filing, its representative subsequently notified the Commission that Chesapeake desired to publish the notice of application ("NOA").

13. The Notice of Application for Application #6 was published in the *Commercial Recorder - Court and Commercial Daily* ("*Commercial Recorder*") on September 9, 16, 23, and 30, 2009.

14. The NOA for Application #6 was issued by Commission staff on September 4, 2009 and no protests or returned envelopes were received by the Commission prior to the protest deadline of October 19, 2009. On October 20, 2009, the application was approved administratively.

15. The University West Unit contains 60.607 acres and 122 tracts within its borders. Twelve of these tracts, collectively comprising 3.423 acres are unleased.

16. Chesapeake drilled, perforated and frac'd the University West 1H in accordance with the permit issued on October 20, 2009.

17. Beginning on March 23, 2010, owners of twelve of the unleased lots listed on the service list filed complaints asserting that they did not receive the NOA for Application #6. Eight of the twelve had filed protests to the identical Application #4. The complainants were: Sean Ricketts, Robert N. McDonald, Allana A Mann, Gregory W. Hughes, David A. Higbee, Frank & Dorothy Stillwell, Ben R. Proctor, Patricia D. Gorher, Dara & Brent Royer, Kathryne S McDorman, Barbara L Adkins, Richard A. Moore and Timothy Rios.

18. On June 23, 2010, Chesapeake filed an application under the Mineral Interest Pooling Act ("MIPA") seeking to force all of the unleased mineral owners within the boundaries of its newly proposed University West MIPA Unit (boundaries identical to the contractual pooled unit previously declared for Chesapeake's University West 1H Well). Chesapeake provided a service list and also published a notice of the MIPA application in the *Commercial Recorder.*

19. The envelopes containing the notices of the MIPA Hearing directed to at least three different lot owners were returned to the Railroad Commission marked

"Return to Sender/Unable to Forward" or some similar notation. None of those owners entered an appearance in the hearing.

20. Notice of the MIPA application was published in the *Commercial Recorder* on July 21, July 28, August 4, and August 11, 2010.

21. On July 22, 2010, Chesapeake's opposed request for consolidation for hearing of Oil & Gas Docket No. 05-0265656, the Rule 37 Complaint Hearing and Oil & Gas Docket No. 09-0266449, the MIPA Hearing was granted by the examiner.

22. The hearing on the consolidated dockets was held on September 13 and November 1, 2010. The record was closed on December 13, 2010 after the filing of closing statements and replies to closing statements.

23. Chesapeake had valid addresses for the owners of the 21 unleased lots within 330 feet of the track of the University West 1H and provided the names and addresses of the owners to the Railroad Commission as part of Application #6.

24. The owners of at least six unleased tracts who were entitled to notice and an opportunity to protest Chesapeake's Application #6 did not receive actual or constructive notice of the application. Robert Neel McDonald, Allana A Mann, Gregory W. Hughes, David A. Higbee, Frank Stillwell, and Ben R. Proctor are each owners or representatives of owners who were entitled to notice of Application #6 but did not receive it.

25. The *Commercial Recorder* does not devote at least 25% of its total column lineage to general interest items. The *Commercial Recorder* typically devotes about 10% of its column space to general interest items. The approximate column space devoted to general interest items in editions relevant to these proceeding was as follows:

September 9, 2009	-	10.3%
September 16, 2009	-	10.3%
September 23, 2009	-	13.8%
September 30, 2009	-	10.2%
July 21, 2010	-	10.4%
July 28, 2010	-	10.1%
August 4, 2010	-	10.9%
August 11, 2010	-	8.2%

26. The *Commercial Recorder* has only a *de minimus* number of subscribers in Tarrant County. The *Commercial Recorder* has 311 subscribers while Tarrant County has a population of approximately 1,789,900. Less than 2/100 of 1% of

the residents of Tarrant County subscribe to the *Commercial Recorder*.

27. The *Commercial Recorder* serves a special or limited audience. The vast majority of the column space is devoted to tightly spaced columns of listings of Suits Filed, Sales Tax Permits, Liens Filed, Trustee Sales, Assumed Names and assorted similar matter that is of no interest to the general reader but of interest to a specialized legal and commercial readership. It is only available at the *Commercial Recorder* offices and nine other locations in Tarrant County - all of them sub-courthouses or municipal buildings.

28. Neither Commission personnel nor the unleased mineral owners made any misleading statements to Chesapeake regarding the validity of its permit.

29. The NOA for Application #6 was issued by Commission staff on September 4, 2009 and no protests or returned envelopes were received by the Commission prior to the protest deadline of October 19, 2009. On October 20, 2009, the application was approved administratively.

30. Chesapeake drilled the University West 1H in good faith in reliance on the permit issued on October 20, 2009. The drilling costs for the well are approximately $2.95 million.

31. The reservoir quality and thickness of the Barnett Shale formation in the area of the Universitiy West Unit varies only slightly. The expected gross thickness of the Barnett Shale on the University West unit is approximately 330 feet.

32. The maximum stress orientations in the area are known to be generally northeast/southwest, and the preferred orientation of wellbores is northwest/southeast, which is perpendicular to the maximum stress orientation. The existing subject wellbore is oriented in that direction in order to obtain maximum benefit of fracture stimulation and would effectively and efficiently drain the entire unit.

33. The entire University West 1H with a drainhole length of 3,425 feet, would produce 3.89 Bcf of gas. If limited to only the length of the wellbore that is regularly located, 1,139 feet of producible drainhole, the expected recovery from the well is approximately 2.05 Bcf of gas. The remaining 1.85 Bcf of gas would not be recovered in the absence of the requested Rule 37 exception.

34. The 1.85 Bcf of gas that cannot be recovered from the regular section of the University West 1H also could not be recovered from any horizontal well at a regular location or from any regularly located vertical wells.

35. 1.85 Bcf is a substantial amount of gas.

36. The existing wellbore for the University West 1H constitutes an unusual condition beneath the University West Unit.

CONCLUSIONS OF LAW

1. Proper notice of the September 13, 2010 hearing was timely issued by the Railroad Commission to appropriate persons legally entitled to notice.

2. All things necessary to the Commission attaining jurisdiction over the subject matter and the parties in this hearing have been performed.

3. The Commercial Recorder is not a "newspaper" in which governmental entities are authorized to publish notices by Tex. Gov't Code §2051.044(a).

4. The Commercial Recorder is not a newspaper of general circulation as required by Railroad Commission General Rule of Practice and Procedure 1.46. [16 Tex. Admin. Code §1.46].

5. Publication in the Commercial Recorder did not provide substitute or constructive notice to individuals who did not received mailed notice of any hearing notice regarding Chesapeake's University West 1H.

6. The Railroad Commission lacked jurisdiction to issue the permit issued administratively to Chesapeake on October 20, 2009 for the Universty West 1H and the permit was void *ab initio*.

7. The Railroad Commission lacks jurisdiction to address the merits of Chesapeake's MIPA application for the University West 1H as the owners of at least three lots entitled to receive notice of the application did not receive actual, substitute, or constructive notice of the application.

8. Approval of a Rule 37 exception for existing Well No. 1H on Chesapeake's University West Unit is necessary to prevent waste.

Recommendation

Based on the foregoing, the examiners recommend that the Commission enter the attached proposed order ruling that: the existing permit for the University West 1H is void *ab initio* for failure of required notice; that Chesapeake is entitled to a permit for the University West 1H to prevent waste, and dismissing Chesapeake's MIPA application, without prejudice, for lack of jurisdiction.

Respectfully submitted

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Hearings Examiner

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Technical Examiner