MAY 07 2013

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICANT:	**GANER OIL COMPANY**	)	
RELIEF SOUGHT:	**ENFORCEMENT OF COMMISSION RULES AND FILING OF REQUIRED FORMS**	)	**CAUSE EN 201100105**
LEGAL DESCRIPTION:	**GTI CATOOSA TEST FACILITY AMOCO CATOOSA TEST FACILITY, PARTS OF SECTION 25, TOWNSHIP 21 NORTH, RANGE 14 EAST AND SECTIONS 30 AND 31, TOWNSHIP 21 NORTH, RANGE 15 EAST, ROGERS COUNTY, OKLAHOMA**	)	

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APR 25 2013
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CORPORATION COMMISSION
OF OKLAHOMA

REPORT OF THE OIL AND GAS APPELLATE REFEREE ON ORAL APPEAL OF A MOTION TO DISMISS

This Cause came on for hearing before **David D. Leavitt**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 12th day of June, 2012, at 9:00 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Richard K. Goodwin**, attorney, appeared on behalf of applicant, Ganer Oil Company ("Ganer"); **Richard J. Gore**, attorney, appeared on behalf of Catoosa Test facility, LLC and GTI, Inc. (collectively "GTI"); **Rob F. Robertson** and **John M. Krattiger**, attorneys, appeared on behalf of BP America Production Company ("BP"); **Sally Shipley**, Deputy General Counsel, Oil and Gas Conservation Division, appeared on behalf of the Corporation Commission; and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The Administrative Law Judge ("ALJ") filed his Report of the Administrative Law Judge on the 10th day of January, 2013, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 8th day of March, 2013. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

GANER TAKES EXCEPTION to the ALJ's recommendation that the Motion to Dismiss of GTI be granted. The ALJ found that the Commission did not have subject matter jurisdiction over operations and facilities that test drilling equipment and are not being used or operated to explore, drill, develop, produce or process oil and gas. The ALJ further found that jurisdiction over the Catoosa Test Facility ("Facility"), lies with the Oklahoma Department of Environmental Quality ("ODEQ").

On December 15, 2011, Ganer filed an application requesting that the Commission conduct an investigation into the drilling and testing activities done by Amoco Production Company ("Amoco"), now BP and GTI at a test facility located in Rogers County, Oklahoma and requiring the Commission to: (1) direct the owners and operators of the Facility to file all of the proper forms required by the Commission's rules and regulations; (2) determine how drilling fluids were handled and disposed of; and (3) impose fines and penalties for the violation of the Commission's rules and regulations.

In its application, Ganer alleged that the operations that occurred at the Facility were under the jurisdiction of the Commission and that said operations were conducted by Amoco and GTI without compliance with the Commission's rules and regulations, and that such activities constituted a hazard for subsequent operations on its oil and gas leasehold that covered the same lands as the Facility.

Sometime in 2010 or 2011, Flint Drilling, LLC ("Flint"), along with its sister company, Catoosa Test Facility, LLC, entered into an agreement with the owner of the surface of a portion of the SE/4 of Section 8, T20N, R7E, Pawnee County, Oklahoma for the testing and development of new well techniques and the testing of drilling equipment and other related oilfield equipment.

On August 9, 2011, Flint filed an application with the Commission seeking to clarify its responsibilities with respect to OCC-OAC 165:10-3-1 for its operations and activities at the Pawnee County Test Facility ("PCTF"). The application stated that Flint and Catoosa Test Facility, LLC, would utilize the subject property to test certain drilling and other related oilfield equipment and that all wells commenced by them on the subject property would only be used for the testing and development of new well techniques and the testing of

drilling equipment and other related oilfield equipment, and would not be used to explore for or produce oil and gas.

On April 10, 2012, the Commission issued Order No. 596214 holding that the operations of Flint in drilling test holes at the PCTF are not for the exploration or production of oil and gas, injection, disposal or as a service well, reentry of a plugged well, re-completion of a well or the deepening of a well, and do not fall within the subject matter jurisdiction of the Commission. The Commission consequently held that a permit to drill pursuant to OCC-OAC 165:10-3-1 is not required for such activities.

On April 20, 2012, Ganer filed an Amended Application requesting the Commission conduct an investigation into the drilling and testing activities conducted by Amoco and GTI at the Facility and requiring them to comply with Commission rules and regulations. On that same day, Ganer filed a Motion to Vacate Order No. 596214. On May 7, 2012 the Commission issued Order No. 597313 denying Ganer's Motion to Vacate Order No. 596214.

On May 10, 2012, GTI moved the Commission to dismiss Ganer's application. GTI alleged that the operations conducted at the Facility were the same as that to be conducted at the PCTF located in the SE/4 of Section 8, T20N, R7E, Pawnee County, Oklahoma. GTI further alleged that the Commission determined in Order No. 596214 that the Commission has no jurisdiction over the PCTF because the wells or holes being drilled there are not done so for the purpose of "exploration or production of oil and gas, injection, disposal or as a service well, re-entry of a plugged well, re-completion of a well or the deepening of a well."

GANER TAKES THE POSITION:

1) The ALJ Report is contrary to the law and contrary to the facts.

2) The Report considers matters not relevant to the Motion to Dismiss filed May 10, 2012. On May 10, 2012, GTI filed its Motion to Dismiss based upon proceedings and Order No. 596214 entered in Cause CD 201103909-T. On May 17, 2012, GTI file its Supplemental Motion to Dismiss that incorporated the prior Motion to Dismiss and added additional issues concerning the lack of Commission jurisdiction under OCC-OAC 165:10-3-1, 52 O.S. Section 97 and 17 O.S. Section 52. The ALJ Report fails to note the Supplemental Motion to Dismiss filed on May 17, 2012. This is important because the initial Motion to Dismiss was only based upon the proceedings and actions taken in the Flint cause. The applicant was not through with its case. See Transcript for August 24, 2012, Page 9, line 22, through Page 10, line 11.

3) The Supplemental Motion to Dismiss raised additional jurisdiction grounds that required the taking of testimony and evidence. The ALJ Report on the last sentence on page two states that the hearing on the Motion to Dismiss was commenced on June 12, 2012, with additional testimony and evidence presented on July 11, 12, 13, 25, and 26 and August 15, 16 and 24, 2012 (The ALJ shows a date of August 25, but the correct date is August 24, transcript filed September 19, 2012.) and that after hearing the evidence and testimony, the ALJ took the matter under advisement upon receiving the transcripts on October 24, 2012. This is not a correct picture of what has occurred. Applicant was not through presenting its case and had additional witnesses to present to the Commission when GTI moved to reassert its Motion to Dismiss filed May 10, 2012. Those discussions on the Motion to Dismiss are in the Transcript for August 16, 2012 at pages 70-76. GTI reasserted it original Motion to Dismiss based upon Order No. 596214 entered in the Flint cause, Cause CD 201103909-T and asked for a Motion to Stay until argument was completed on the Motion to Dismiss. The Arguments on the Motion to Dismiss were continued to August 24, 2012.

4) Prior to the hearing on August 24, 2012, Sally Shipley sent the ALJ a copy of an e-mail from Sarah E. Penn, an attorney at the ODEQ. A discussion of the email was had as shown on pages 2-7 of the Transcript for August 24, 2012. The ALJ did not admit the email as an exhibit but accepted the email as a communication to the ALJ. This piece of hearsay and ex parte communication to the ALJ apparently played a big part in the ALJ conclusion that jurisdiction lies with the ODEQ. What actions that have or will be taken by the ODEQ cannot be assumed by the Commission or the ALJ. The Commission cannot determine by order what jurisdictional issues involve the ODEQ. The ALJ's acceptance of an email describing what actions are being taken by the ODEQ is error.

5) The Motion to Dismiss presented to the ALJ was based solely upon the application of Order No. 596214 in the Flint cause to the application filed by Ganer in this cause. See Transcript for August 24, 2012 at page 7, lines 5-7. The vast majority of the Report is not applicable to the limited scope of the Motion to Dismiss presented for determination.

6) The ALJ Report fails to properly describe the actions taken in the Flint cause, Cause CD 201103909-T. In paragraphs 6 and 7 on page 10, the ALJ notes the filing of the application in paragraph 6 and then jumps to Order No. 596214 issued on April 10, 2012. The records of the Flint cause, including transcripts, were filed as part of this record in this cause on August 22, 2012 and as Exhibit HHH. Those records show that there were no hearings in the Flint cause at which any evidence or testimony was presented to the Commission to support any order. At the hearing on the merits for both emergency Order No. 588898, and final Order No. 596214, only statements by Mr. Huffman, the attorney for Ganer, are shown in the transcripts. Statements

by the attorney are not evidence and were not taken under oath. The ALJ Report in footnote 5 on page 10 makes the statement that Flint apparently agreed to take responsibility for the plugging of the test holes and stated it has a plugging bond on file with the Commission. There is no such testimony in the record for the Flint case. There are statements by Mr. Huffman concerning his contact with the Commission staff and attorney and their agreement to plug the wells. The agreement between Commission staff and its attorneys and the attorneys for applicants is nice but does not constitute evidence.

7) In this cause by Ganer, there has been considerable testimony and evidence about the wells drilled by GTI and very little about the well drilled by Amoco, now BP. The ALJ is apparently accepting the evidence in this case as the evidence that should have been presented in the Flint cause to support Order No. 596214.

8) Order No. 596214 and the proceeding in the Flint cause cannot be applied to Ganer in this cause and the Catoosa facilities in Rogers County, Oklahoma. Ganer's attempt to intervene in the Flint cause was denied and Ganer never was allowed to participate in the Flint cause.

9) Since Order No. 569214 is not a rule, Order No. 596214 is an order issued in an adjudicative action. It could only be used if the issues, facts and parties were the same and the order was a valid order.

Ganer asserts (1) the order in the Flint cause cannot be used in the Ganer cause here as the order is void on the record or procured by fraud upon the Commissioners; (2) Order No. 569214 exceeds the relief requested and the facts as alleged in the application in the Flint cause; and (3) the application of the order in this case violates due process.

Mr. Gore, on behalf of GTI, supplied the ALJ with copies of the Commission rule OCC-OAC 165:5-7-1 which sets forth the requirements of an application filed with the Commission. The body of the application is required to contain a paragraph containing (i) allegation of facts; (ii) legal authority, and (iii) the relief sought.

The plain reading of the Allegation of Facts in the Flint application state that Flint was requesting an order exempting the test wells on the Flint site from the requirement to file an intent under OCC-OAC 165:10-3-1 or a clarification that Flint did not have to file any such intent under OCC-OAC 165:10-3-1. There was no request for any determination that test wells were not subject to Commission jurisdiction.

The Flint application cited OCC-OAC 165:5-1-2(d) as the legal authority for the application. There is no such section, but there is OCC-OAC 165:5-1-2(c) which states: "The rules of this Chapter shall not be construed as limiting the Commission's authority to grant an exception, for good cause shown, to

any rule contained herein unless otherwise precluded by law." The reliance upon this rule as legal authority to justify the relief requested by Flint is wrong. The words "this Chapter" refers to Title 165. Corporation Commission, Chapter 5, Rules of Practice. The legal authority cited only applies to relief from any rule contained in Chapter 5 and does not apply to relief from any rule under Chapter 10. The Flint application and Order No. 506214 fail to give any legal basis for the Commission to assume or have jurisdiction over the Flint cause.

The relief sought section of the Flint application states as follows:

> Applicant requests the Oklahoma Corporation Commission to enter an order:
>
> a) Applicant requests that OCC-OGR Rule 165:10-3-1 being clarified and that the Applicant not be required to file an intent to drill on any of the test wells which are located on the SE/4 of Section 8, Township 20 North, Range 7 East, Pawnee County, Oklahoma, pursuant to the express terms and conditions of its application herein.
>
> b) The Applicant requests this clarification and exception to utilize the subject property for testing purposes only and will accept any reasonable requirements by the Commission to protect any environmental considerations that may arise from its testing operations.

Again, the plain reading of the relief sought is clarification or exemption from compliance with OCC-OAC 165:10-3-1 and an acknowledgment that the Commission has jurisdiction over environmental conditions. There is no request for a determination that a test well or a test facility is exempt from Commission jurisdiction and there is no definition of what a test well or test facility is.

Next we need to look at the notice given and published in the Flint cause. Notice by publication was published in Oklahoma County and Pawnee County, Oklahoma and gave notice to "offset units namely in portions of Sections 8, 9, 16 & 17 of Township 20 North, Range 7 East, Pawnee County, Oklahoma." There is no affidavit of mailing showing that the notice was mailed to anyone. The meat of the notice states as follows:

> NOTICE IS FURTHER GIVEN that the Applicant, Flint Drilling, LLC, is requesting a clarification and exception to OCC-OGR Rule 165:10-3-1 being the required filing of an intent to drill for any test well which is drilled in the SE/4 of Section 8, Township 20

> North, Range 7 East, Pawnee County, Oklahoma. The Applicant, Flint Drilling, LLC, as well as its sister company, Catoosa Test Facility, LLC, further have agreed that any wells drilled in the SE/4 of Section 8, Township 20 North, Range 7 East, Pawnee County, Oklahoma, are being drilled for testing purposes only and that the Applicant or any other party will have no right whatsoever to produce oil and/or gas from any well which is drilled on the subject property. Further, that the Applicant will comply with all rules set by the Commission in order that any test well is environmentally safe.

Nothing in the notice says anything about test wells generally or universally being exempt from Commission jurisdiction and, in fact, states that Flint will comply with all rules set by the Commission in order that any test well is environmentally safe. If anything can be drawn from this notice, it would be that Flint recognized the Commission had jurisdiction over the test wells regarding environmental safety.

Now we can look at the order, Order No. 596214. Mr. Gore also supplied the ALJ with a copy of OCC-OAC 165:5-15-1(a) (describing what needs to be in the order) which states:

> (a) Contents of orders. The Commission may prescribe a standardized format for all orders. Every order of the Commission shall contain the following where appropriate or except where the Commission determines otherwise:
>
> (1) Caption, cause number on the appropriate docket and order number. Every page of the order shall also contain a page number, the applicable subject matter docket listed in OAC 165:5-5-1(a), the docket number assigned to the cause by the Court Clerk, and order type, .e.g.. emergency order, final order, etc.
>
> (2) Appearances.
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> (3) Date and place of all hearings.
>
> (4) Summary of allegations of applicant, and of all other parties of record.
>
> (5) Summary of evidence of applicant, and of all other parties of record.

(6) Findings of fact, containing all ultimate facts found to have been established.

(7) Conclusions of law, containing:

(A) All legal conclusions found to be applicable to the facts; and

(B) The directive of the order stated in concise and mandatory language.

(8) Signature of the Secretary certifying as to all Commissioners participating in making the order.

(9) Seal of the Commission.

(10) Date of filing, and effective date where appropriate.

Order No. 596214 does not comply with the Commission rule stated above. The date and place of all hearings is not complete. Paragraph 1 only described the date and place of the hearing on the merits. Paragraph 3 describes the hearing on Ganer's Motion to Intervene on December 12, 2011 and the appellate hearing on January 6, 2012 and the Report of the Appellate Referee filed on February 21, 2012. Paragraph 3 then describes the denial of the Motion to Intervene by Order No. 594728. Order No. 596214 fails to include the hearing on the application for emergency order heard on August 16, 2011 and the resulting emergency Order No. 588898 on September 6, 2011.

Order No. 596214 fails to include (1) the Motion to Vacate Order and Notice filed April 10, 2012; (2) the Motion to Retain and Hearing En Banc filed April 23, 2012 and (3) the Motion to Clarify filed May 16, 2012.

Order No. 596214 fails to include a summary of the allegations made by Ganer in its Motion to Intervene and supplement to the Motion to Intervene and Reopen. Order No. 596214 fails to include a summary of evidence provided by Flint and the evidence provided by Ganer. The record includes the transcripts of the hearings conducted on August 16, 2011, September 12, 2011, December 12, 2011 and January 6, 2012. The reason there is no summary of evidence for the hearing on the merits is evident when the transcript of the hearing on the merits held September 12, 2011 is examined. No evidence was presented.

Evidence is needed to support any order of the Commission. In *Cameron v. Corporation Commission*, 414 P.2d 266 (Okl. 1966) , the Court states:

And in *Chenoweth v. Pan American Petroleum Corporation*, Okl., 382 P.2d 743, we said:

> "The determination whether there is 'substantial evidence' to support an order made by Corporation Commission does not require that the evidence be weighed, but only that the evidence tending to support the order be considered to determine whether it implies a quality of proof which induces the conviction that the order was proper or furnishes a substantial basis of facts from which the issue tendered could be reasonably resolved."

In *Anderson-Prichard Oil Corp. v. Corporation Commission*, 241 P.2d 363 (Okl. 1951), the Court states:

> "Substantial evidence" is defined in the *Pannell* case, supra, as follows:
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> > ...substantial evidence means something more than a 'scintilla of evidence', and means evidence that possesses something of substance and of relevant consequence and such that carries with it fitness to induce conviction."

-- quoting with approval from *N.L.R.B. v. A. S. Abell Co.*, 4 Cir., 97 F.2d 951, wherein it was said:

> "Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred...."

and from *N.L.R.B. v. Union Pacific Stages*, 9 Cir., 99 F.2d 153, as follows:

> "...It implies a quality of proof which induces conviction and makes an impression on reason."

The record in the Flint cause clearly shows that there is no evidence to support any order and Order No. 596214 is void.

Mr. Gore in his brief cites *Harry R. Carlile v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okl. 1986) and *Mullins v. Ward*, 712 P.2d 55 (Okl. 1985) as supportive of his position. *Carlile* states:

> A collateral attack may not be launched on a Cooperation Commission order that is facially

> invulnerable. The district court's power to inquire into the validity of Commission orders is legally limited to ascertaining, from an inspection of the face of the proceedings, if the Commission had jurisdiction to issue the order. A Commission order is deemed facially invalid only when the face of the record reveals the absence of at least one of these three requisite elements of agency jurisdiction...(1) jurisdiction over the parties, (2) jurisdiction over the subject matter, or (3) jurisdictional power to issue the specific order in question. (footnotes omitted)

Mullins states essentially the same. In order to determine if an order is facially void, you look at the record. *Fent v. Oklahoma Natural Gas Company*, 898 P.2d 126 (Okl. 1994), in footnote 4, identifies the record as follows:

> ...The meaning, legal effect and validity of a nisi prius adjudication cannot be assessed solely from the four corners of a journal entry that memorializes the terminal ruling (or some other disposition) in the case. That assessment...must be made upon review of the entire judgment roll (or record proper), which consists of...the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court....12 O.S. 1991 § 32.1.

Carlile was a case that challenged the spacing jurisdiction of the Commission that was based solely upon notice by publication. In the Flint cause the only notice given was notice by publication. The same argument and logic as applied in *Carlile* applies to the Flint cause.

Carlile supra clearly delineated the distinction between rule making actions and adjudication actions by the Commission in footnote 11:

> ...[L]egislative facts were distinguished from adjudicative facts..."facts to which the law is to be applied in the process of adjudication are called adjudicative facts; these are facts about the parties' and must be ascertained from formal proof, as distinguished from 'legislative facts' which are general and may be judicially noticed from legislative source materials for the purpose of determining the meaning, effect, content or validity of enactments.

The facts upon which Order No. 596214 must be based must be facts ascertained from formal proof. Sally Shipley has admitted that there was no evidence submitted in the Flint cause because none was needed in an unprotested case. *Carlile* shows that statement to be wrong. Let's examine the record, the transcript of the hearing on the merits conducted on September 12, 2011. On the hearing on the merits, we find no witnesses and no exhibits and only statements by William Huffman as attorney for applicant Flint. Reference is made to the hearing on the emergency application and the alleged testimony presented at that hearing. Apparently Mr. Huffman was attempting to incorporate the testimony presented at the hearing on the Emergency Application. Let's look at the transcript of the hearing conducted on August 16, 2011 for the Emergency Application. Again, at the hearing on the Emergency Application, no witnesses and no exhibits and only statements by Mr. Huffman. Mr. Huffman did state that notice was given to Commission staff and everyone was in agreement concerning the requested emergency order. Without adjudicative facts to support Order No. 596214, this order is void.

The notice given in the Flint cause is also facially deficient. In the Flint cause, there was no actual notice mailed or served on any third party. The only notice was notice by publication. Certainly, Ganer was not noticed. Zero notice was given as to the number of wells to be drill, the depth of the wells to be drilled, the time frame that the exemption would last, and the efforts made to protect oil and gas zones and treatable water. The notice stated that Flint would abide by all rules set by the Commission in order to be environmentally safe. The notice failed to state that the Commission might rule that the proposed operations would not be subject to the Commission jurisdiction. *Carlile*, supra, in paragraph 9 and footnote 19, states:

> Three distinct legal issues and consequences are implicated in a proceeding to establish spacing units: (1) an area of the common source of supply must be determined and its boundaries identified; (2) royalties within the established unit stand pooled as a result of the unit's formation; and (3) a restriction on the freedom to drill must be imposed. Because spacing clearly calls for a factual finding and affects the proprietary incidents of the mineral estate of every owner sought to be brought within the new unit, a quest for the formation of a drilling and spacing unit calls for adjudication rather than rulemaking.
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> * * *
>
> A spacing order creates the unit, pools royalty interests within the unit, directs that only one well be drilled in the unit within a specific location and

> prohibits the drilling of a well at another location or operating a well drilled in violation of the spacing order....

The legal issues and consequences in the spacing case such as *Carlile* are not the same as in the Flint cause. However, the wells to be drilled at the Flint site will penetrate state waters and potentially oil and gas bearing reservoirs. The owners of the mineral estate are entitled to notice that a company will be penetrating the oil and gas zones that a party will be drilling wells without filing of an intent. Owners in the water bearing zones are entitled to notice that a party will be drilling wells without filing of an intent. Nothing is said about how Flint would protect the state waters. Just as was necessary to have factual findings and evidence of the parties to be affected by the order in the *Carlile* case, the same is true for the Flint cause. *Carlile* states as follows:

> [Footnote 25/HN10] When a proceeding is likely to affect constitutionally protected property interests, notice to interested parties must be "reasonably calculated, under all circumstances" to apprise them of the pendency of the action and afford them an opportunity timely to interpose their objections....Notice is a fundamental element of due process as well as a jurisdictional requirement.
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> [Footnotes 25 and 26/HN11] Our due process clause in art. 2, § 7 Okl. Const., has a definitional sweep that is coextensive with its federal counterpart...requires that legal process affecting property conform to the measure of fairness which accords with the minimum standards of due process.
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> * * *
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> Rule 16, Rules for District Courts, 12 O.S. 1981, h. 2, App., provides the procedural measures that must be followed before a judgment may be taken against a defendant served solely by publication. A trial tribunal must conduct an inquiry to determine whether the plaintiff made a diligent search of all reasonably available sources when a default judgment is sought. After hearing the evidence, if the judge finds that the plaintiff did in fact exercise due diligence in conducting a meaningful search, a standard recitation to that effect is to be included in the journal entry of judgment...The statutory counterpart of Rule 16 is found at 12 O.S. Supp. 1984 tit. 12, § 2004 (C)(3)(e).

* * *

> [paragraph 13/HN12] Publication notice is not reasonably calculated to provide actual knowledge of instituted proceedings. It is hence inadequate as a method to inform those who could be notified by more effective means such as personal service or mailed notice. Mail service is an inexpensive and far more efficient mechanism to enhance the reliability of notice than either publication or posting. When a party's name and address are reasonably ascertainable from sources available at hand, communication by mail or other means certain to insure actual notice is deemed to be a constitutional prerequisite in every proceeding which affects either a person's liberty or property interests.
>
> [paragraph 14/HN13] Because resort to publication service is constitutionally permissible only when all other means of giving notice are unavailable,...the face of an administrative proceeding must affirmatively show a diligent but unsuccessful effort to reach the affected party by better process. In short, courts may not presume publication service alone to be constitutionally valid when the judgment roll or record of an administrative proceeding fails to show that the means of imparting better notice were diligently pursued but proved unavailable.

Notice by publication in the Flint cause did not provide for due process and Order No. 596214 is void. The relief granted was not the same as the relief granted and described in the notice and notice to all necessary parties was not properly given. Notice solely by publication was not sufficient.

Mr. Gore in his brief states that Ganer was a party to the Flint cause. That is not true. Ganer attempted on several motions to intervene in the Flint cause but intervention was never allowed. Ganer was never a party to the Flint cause. Only when the intervention is granted does the intervener become a party-litigant. *Teleco, Inc. v. Corporation Commission*, 649 P.2d 772 (Okl. 1982). If a party is denied intervention, he is a non-party of the litigation. The *City of Oklahoma City v. The Oklahoma City Urban Renewal Authority*, 988 P.2d 901 (Okl. 1999).

Mr. Gore in his brief cites *State v. Corporation Commission*, 590 P.2d 674 (Okl. 1979), stating that evidentiary support for Order No. 596214 is a quasi-jurisdictional fact in which there is no right to inquire in a collateral attack.

State involved the showing of a change of condition to modify a prior order. The Court considered the existence or nonexistence of a change of condition as a quasi-jurisdictional fact. In this case, there is no jurisdiction in the Flint cause over Ganer and no due process notice for the judgment rendered and no due notice based solely upon publication.

The application of Order No. 596214 to the issues in the Ganer cause would be giving the order a retroactive effect. The actions in the Ganer cause have all taken place. The Order in the Flint cause was prospective in nature and it was addressing future actions. *Carlile* in paragraph 22 states:

> The objective of giving a new rule purely prospective application is to protect the public's reasonable expectations of reliance on prior judicial decisions....

Order No. 596214 should not be applied retroactively to the Catoosa site. Parties, such as Ganer, have a reasonable expectation that proper permitting, plugging and operations would be conducted under the Commission rules.

The Commission cannot waive any rule or grant an exception to any rule until satisfactory evidence is provide that the purpose of the rule is not being compromised. In the case of the waiver or exception to filing an intent, if a waiver or exception is given to the filing of the intent, how can the Commission protect state waters, prevent waste and protect correlative rights. The Commission witnesses testified that without the intent, the Commission has no knowledge a well is being drilled. Without knowing a well is being drilled, the Commission cannot protect state waters, prevent waste and protect correlative rights. The application in the Flint cause only concerned the requirement for an intent under OCC-OAC 165:10-3-1. The granting of relief for exemption for all of the Commission rules and regulations is beyond the relief requested.

As noted by the ALJ in footnote 4 on page 9 of the ALJ Report, Ganer is alleging violations of numerous sections of the Commission rules not mentioned in the Flint application/order.

10) There is no definition in the Commission rules for what is a test well and no evidence was taken in the Flint cause as to what kind of wells were going to be drilled. We have testimony in this case about the moving of the equipment from the Catoosa site to the Flint site and the Commission is trying to boot strap this testimony into the Flint cause. The evidence in this case cannot be used as support for the Flint cause. Without any evidence as to what was going to be drilled at the Flint site in the Flint cause, it is impossible to apply Order No. 596214 to the Catoosa site.

11) The extent of Order No. 596214 in Cause CD 201103909T is clearly expressed by the ALJ in the Flint transcript of the December 12, 2011 hearing, page 20 thru page 22 (Exhibit A). The ALJ on page 22 states: "I don't see that

this applies to anything in Rogers County. The only thing that I see that this application applies to would be the Southeast Quarter of Section 8 in Pawnee County." Order No. 596214 is limited to the SE/4 of Section 8-20N-7E, Pawnee County, Oklahoma. Ganer's Motion to Intervene was denied because Ganer owned no interest in the area covered by the application.

Connie Moore, attorney for the Commission, on page 21, states: "I would agree with Mr. Goodwin that if that was your intent to apply it to the whole state, then you would have to go through the rulemaking process, which is not what's happening here. I don't think this would necessarily apply to anyplace else."

The ALJ in paragraph 40 on page 30 of the ALJ Report states his conclusion and attempts to modify the provisions of Order No. 596214. The ALJ makes no ruling on the validity of Order No. 596214 or its application to this case at hand. The conclusion of the ALJ is that the Commission does not have jurisdiction over test hole facilities at the Catoosa site or at the PCTS and does not have jurisdiction over the plugging of the test holes. The ALJ concludes that the ODEQ has jurisdiction over the test facilities and the plugging of wells at the facility. Based upon his conclusion, the ALJ apparently modifies Order No. 596214 by saying that the GTI's agreement to plug the test wells in accordance with Commission rules and regulations (part of Order No. 596214) is subject to oversight and regulation by the ODEQ not the Commission. The attempt to modify Order No. 596214 is in error and not part of any requested relief before the Commission.

The ALJ in paragraph 41 on page 30 of the ALJ Report states his conclusion and recommendation that GTI's Motion to Dismiss be granted because the Commission does not have jurisdiction over operations and facilities that test drilling equipment and are not being used or operated to explore, drill, develop, produce or process oil and gas and that jurisdiction lies with the ODEQ.

The conclusions made by the ALJ in paragraphs 40 and 41 of the ALJ Report are not part of the issue presented by the Motion to Dismiss filed on May 10, 2012. In the entire Report, the ALJ fails to make any distinction between the Motion to Dismiss filed on May 10, 2012 and the Supplement to Motion to Dismiss filed on May 17, 2012. By failing to make the distinction between the two motions, the ALJ has erroneously made a decision that exceeds the relief requested in the Motion to Dismiss being argued by the parties.

12) The Supplemental Motion to Dismiss filed by GTI raised additional jurisdiction grounds and required evidence and testimony. As shown in the record, the Motion to Dismiss to be addressed by the ALJ was limited to the Flint cause and the order issued in that cause. The ALJ in his Report has

undertaken an examination to the Commission jurisdiction under the statutes and claims made by GTI in its Supplement Motion to Dismiss prior to the completion of the case by Ganer. Ganer has at least three experts, Jerry Black, hydrologist, Walt Hendrickson, geologist, and Joel Friedman, petroleum engineer, and Mark Ganer, the manager of the property for Ganer to present as witnesses with exhibits.

13) The ALJ begins his Recommendations and Conclusions of Law on page 21, paragraph 21. Because the ALJ has addressed the issues raised in the Supplemental Motion to Dismiss, Ganer has to address those arguments even though premature. The respondents and now the ALJ in his Report are fixated on the erroneous conclusion that the Commission's jurisdiction is limited to activities related to the production of oil and gas. There are specific section of the statutes that are directly limited to production of oil and gas, but the Commission jurisdiction is not limited to how oil and gas are produced, but is also concerned with the "conservation of oil and gas." Both 17 O.S. Section 52 and 139 O.S. Section 139 grant to the Commission exclusive jurisdiction for the conservation of oil and gas. Ganer was not through presenting its evidence on those claims.

The view that the Catoosa site and that the drilling of test wells are not subject to the Commission rules and regulations is a new position taken by the Commission. Order No. 290210 dated December 13, 1985 approved amendments to the Commission rules. The Order states:

> "Amendment to Rule 3-204. NOTICE OF INTENT TO DRILL OR COMPLETE. Before any oil, gas, disposal or service well (Underlining added) is drilled, deepened, plugged back or re-entered, the operator shall obtain a Notice of Intent to Drill approved for the well by the Conservation Division."

The same basis language is used on Order No. 117899 dated February 14, 1980.

It is important to remember that the Commission rules have developed over almost 80 years. Order No. 17528 dated January 24, 1945, Section 606 on page 19 states:

> "606. PLUGGING OF SEISMIC, CORE, AND OTHER EXPLORATORY HOLES
>
> Before any hole drilled for seismic, core, or other exploratory purposes which hole penetrates below the fresh water formation is abandoned, it shall be the duty of the owner or driller of same to plug same in such manner as to properly protect all water bearing

> formations; and within ninety (90) days after such plugging, an affidavit shall be filed with the Commission by the owner or driller, setting out the location of the holes drilled or plugged and the method used in protecting the water bearing formations in such plugging."

Even as early as 1945, the Commission recognized the need to properly plug wells that were not drilled to produce oil and gas and to require evidence of the plugging and the location of the wells so plugged. Ganer is the operator and owner of the oil and gas lease under the Facility site and is entitled to know the location of all the wells drilled at the site and that the wells were plugged in accordance with Commission rules and regulations. Completion and filing of the Commission forms provides that information.

A major revision of the Commission rules and regulations took place effective April 1, 1961 under Order No. 44297 dated January 17, 1961. Portions of Order No. 44297 state as follows:

> 203. NOTICE OF INTENTION TO DRILL OR RECOMPLETE
>
> (a) Approval must be obtained from the Oil and Gas Conservation Department prior to the commencement of the drilling of a well for oil or gas or service well. Any operator desiring to drill a well for oil and gas or service well, shall follow the procedure outlined below:
>
> 204. WELL LOG, COMPLETION AND WORK OVER REPORTS
>
> * * *
>
> (c) For the purpose of interpreting this rule, any hole drilled or cored below fresh water and penetrating oil- or gas-bearing formations, in which casing is run at least as low as the approximate depth of the oil or gas-bearing formation, shall be presumed to be a well drilled for oil or gas.

These rules used the term "service well" before there was ever a definition of the term in the Commission rules. The term cannot be dismissed and a determination of what is a service well, prior to the adoption of a definition in 2007, is necessary. The definition adopted in 2007 is very limited as the term is now defined and was added to take into account new technology. Failure to determine what is a "service well" prior to the adoption of the definition in 2007 is error. Failure to determine how the adoption of the definition of "service

well" effected the Commission rules that used the terms is error. Garter asserts that the term "service well" is applicable to the wells drilled by GTI and Amoco now being called "test wells" and that GTI and BP and the Commission are just playing semantics by using the term "test wells". When the Acting Director of the Conservation Division of the Commission was asked what was a "service well" before the definition adopted in 2007, Ron Dunkin stated: "I have no idea."

Prior history shows that a one-time any well that penetrated the fresh water and an oil or gas bearing formation was considered a well drilled for oil and gas. Ron Dunkin testified that the definition of a service well was added to the Commission rules and explained what a service well was under the existing rules using Exhibit YY.

The records show that Amoco filed numerous intents to drill and applied for several permits for surface pits. Testimony from Ron Bray was that until recently, he believed that the Catoosa facilities were exempt for Commission regulation because of a special permit given to Amoco for this site. He had looked for the letter or permit but it could not be located. Mr. Tim Baker, who appears to be the only Commission employee that has any knowledge of the letter or permit, also thought that was the case.

Look at Exhibit Q, e-mails to and from Bill Bowles on behalf of Ganer and Sally Shipley on behalf of the Commission. There can be no doubt that the position of the Commission was that the Commission had jurisdiction.

Look at Exhibit P, letter from the general counsel of GTI. In this letter, the general counsel states: "***, it is GTI's position that the testing activities performed on the site are in full compliance with the Oklahoma law and Commission regulations."

Look at the testimony of Ron Bray, manager of the Facility, since about 1998. He testified at several points in his testimony about the existence of a special dispensation or permit that allowed the site to operate without any filing with the Commission except for a requirement for permitting of pits. Transcript for June 12, pages 82-83. Note here that Ganer had not finished his presentation of witnesses and testimony and exhibits. Since the hearings have abated for the ruling on the Motion to Dismiss, the Commission has provided copies of applications and permits for the pits used by the GTI for its operations. The Commission can take judicial notice of its own records and notice should be taken that GTI has applied for and obtained permits for its pits. In Ron Bray's testimony (Transcript for July 13, 2012, page 101) he stated that he was not aware that the facilities were not subject to the Commission until after Ganer's complaint and within the last year prior to his testimony. Mr. Bray testified on July 13, 2012, page 107 that "we have found pieces of paper that reference the letter, but not the letter."

In paragraph 25 on page 24 of the Report, the ALJ references 27A O.S. Section 1-3-101 and again starts out with the conclusion that only drilling activities done for the purpose of producing oil and gas are regulated by the Commission and that drilling activities that are not done for the purposes of producing oil and gas are regulated by other state agencies. 27A O.S. Section 1-3-101 vests the Commission with exclusive jurisdiction, power and authority over the conservation of oil and gas. The ALJ does not cite any regulations from any other agency, and neither do any of the respondents, that regulate the drilling of test wells.

One of the ways the Commission regulates the conservation of oil and gas in through its rules and regulations concerning pollution and the plugging of wells. Order No. 83168 dated December 29, 1970 adopted the following rules:

> (1) Rule 3-101. Prohibition of Pollution. (a) All operator, contractors, drillers, service companies, pipe pulling and salvaging contractors, or other persons, shall at all times conduct their operations and drill, equip, operate, produce, plug and abandon all wells drilled for oil or gas, service wells or exploratory wells (including seismic, core and stratigraphic holes) in a manner that well prevent pollution and the migration of oil, gas and salt water or other substance from one stratum into another, including any fresh water bearing formation. Pollution of surface or sub-surface fresh water by deleterious substances used in connection with the exploration, drilling, producing, refining, transporting or processing of oil or gas is hereby prohibited, and,
>
> (2) Rule 3-404(g) that required cementing of the productive formations encountered in a well.

These protections have been carried forward in the current rules.

OCC-OAC 165:10-7-2(c)(1) states: "(c) Specific areas of Conservation Division jurisdiction to which Pollution Abatement rules apply: (1) Field operations for geologic and geophysical exploration for oil, gas, and/or brine, including seismic shot holes, stratigraphic test holes or other test wells."

OCC-OAC 165:10-7-5 states that pollution is prohibited and that all operators, contractors, drillers, service companies, pit operators, transporter, pipeline companies, or other persons shall at all times conduct their operations in a manner that will not cause pollution.

OCC-OAC 165:10-11-3(b) states as follows: "Any working interest owner and operator of any oil, gas, disposal, injection , or other service well or any seismic, core or other exploratory hole, whether case or uncased, shall be jointly and severally liable and responsible for the plugging thereof in accordance with this Subchapter."

OCC-OAC 165:10-11-6 (d) requires the plugging of any formation that bears oil or gas. The plugging rules do not state that this applies only to oil and gas wells and was adopted in 1992. Failure to apply the plugging rules of the Commission to the test wells drilled by GTI, Amoco and Flint or any other party will not be a conservation of oil and gas but will result in oil and gas being lost.

This was discussed in the testimony of Ron Dunkin (Transcript for August 15, 2012, pages 48-51. Mr. Dunkin agreed that there is a need to protect common sources of supply and the plugging rules are part of that protection. Mr. Dunkin even states that the rules apply to all wells even test wells. Mr. Dunkin was not aware that many of the wellbore at the Facility were left open and unplugged for long periods of time. Mr. Dunkin stated that Mr. Bray advised that the wells were plugged soon after the operation was completed. Transcript for July 26, 2012, page 25. In reviewing Exhibit Q with Mr. Bray, many wells were shown to have been left opened and unplugged for many years. Even today, there are 19 wells belonging to BP that have not been plugged.

The ALJ states in paragraph 61 on page 27 that Ganer did not present any evidence that demonstrated any effect from the test holes and from the disposal of drilling materials on Ganer's well or the common sources of supply. (Note the paragraph is misnumbered as paragraph 61.) Ganer was not through with its case and has evidence to present on this question. However, the existence or non-existence of damages is not involved in the Commission jurisdiction. The Commission cannot grant damages. The rules and regulations are designed to prevent damages, pollution, drainage, and protect correlative rights. Nevertheless Ganer has shown failure to properly plug wells will result in migration of fluids between formations and result in waste. The ALJ makes the statement that no oil or gas was produced at the Facility. That is not a correct statement. Testimony from Mr. Bray was that he did not produce any oil or gas and no oil or gas was sold. Mr. Bray can only testify about what took place from 1998 to present. He knows nothing about what took place prior to 1998. The information available to the Commission was limited to the information given to it by GTI and BP. Ron Dunkin testified (Transcript of August 15, 2012, page 53) that neither he nor anyone at the Commission attempted to obtain any records other than the ones gave them. Nothing is known about what was done at the facility prior to 1998 other than the filing of numerous intents.

Exhibit F is the agreement between the surface owner, Angela Sue Williams and Amoco and later assigned to GTI. Ron Bray testified (Transcript of July 12, 2012, pages 25-31) concerning Exhibit F. Exhibit F provides that Amoco conduct experimental drilling, production, and geophysical activities, including, but not limited to, the drilling of wells, fracturing experiments in such wells, drilling procedures and testing of rock bits and testing seismograph and other geophysical or production equipment and techniques. Mr. Bray acknowledged that the agreement stated that Amoco and GTI had the right to produce, but stated he did not produce. He did not know what was done by Amoco prior to his coming to the Facility.

The use of the phrase "oil, gas or service well" in the Commission rules prior to the adoption of a definition in 2007 clearly shows that a service well is not a well being drilled for production of oil or gas. What is the difference between a test well and a service well? The Commission rules use other names for wells such as core well or stratigraphic test well. Ganer asserts that the term service well was used to include all wells that were no classified as an oil well or a gas well. The fact that a well is drill for test purposes and not with the intent to produce oil or gas does not exclude the well from the jurisdiction of the Commission. What happens to the filing of intents if all one has to do in order to avoid the filing of an intent to drill is to claim his intent was only to drill a test well. The test then becomes one of determining the intent of the operator and no protection for surface or subsurface waters and conservation of oil and gas.

The Commission has acknowledged for years that there are wells being drilled that are not intended to produce oil or gas and has always protected the fresh or treatable water and common sources of supply of oil or gas. From the Commission rules a common term for a test well is exploratory well.

The wells drilled at the Facility were drilled from a main drilling rig using a pivot system and 10 to 13 wells were drilled from each surface location. See the statements made in the ODEQ permit, Exhibit B, to the Ganer's Response to Motion to Dismiss. Exhibit L to Ganer's Response to Motion to Dismiss shows how several wells are drilled from the same location. Several of the wells intersected with each other and none of the wells were actually produced according to the companies. Vertical wells, directions wells and horizontal wells were drilled. One of the activities was the testing of perforating tools and numerous wells were perforated.

In *Union Texas Petroleum Corporation, et al v. Oklahoma Corporation Commission*, 909 P.2d 131 (Ok.Civ.App 1955) , the Court states:

> The Corporation Commission is a tribunal of limited jurisdiction and has only such jurisdiction and authority as is expressly or by necessary implication

> conferred upon it by the Constitution and statutes. *Merritt v. Corporation Commission*, 438 P.2d 495 (Okla. 1968). If our Constitution and statutes do not confer jurisdiction upon the Commission either expressly or by necessary implication, the Commission's order is void. *Merritt*, at 497. The Commission has the jurisdiction, power and authority to make and enforce rules, regulations and orders governing and regulating the handling, storage and disposal of salt water for the purpose of preventing pollution of surface and subsurface waters of this state. 52 O.S. 1991, § 139; *Merritt*, at 498. In a provision of the Oklahoma Controlled Industrial Waste Disposal Act, 63 O.S. 1991, § 1-2001 et seq., the Corporation Commission is granted the exclusive jurisdiction, power and authority and indeed the duty to make and enforce rules, regulations and orders governing and regulating the handling, hauling, storage and disposition of salt water, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing and processing of oil and gas. 63 O.S. 1991, § 1-2005(A) (2). This Section further provides the Commission shall promulgate such rules and regulations as are "reasonable and necessary for the purpose of preventing the pollution of the surface and subsurface waters in the state." (Footnotes omitted)

The Commission is charged with protection of pollution of subsurface waters and there is no exclusion for "test wells" and there is no restriction that the well has to be one drilled to produce oil or gas.

In *State of Oklahoma, ex rel. Pollution Control Coordinating Board, v. Oklahoma Corporation Commission*, 660 P.2d 1042 (Okl. 1983), the Court states:

> After the appeal was lodged by the PCCB, the Commission filed a motion to dismiss, alleging that the amendment of 63 O.S. Supp. 1978 § 2756 [recodified as 63 O.S. 1981 § 1-2005(A) (2)] unequivocably vests the Corporation Commission with exclusive [at 1043] jurisdiction and that the appeal should be dismissed because it is moot. The Commission also argues that despite statutory evolution, the Corporation Commission has been vested with exclusive jurisdiction over all oil and as matters since 1917,

> when 17 O.S. 1981 §52 was codified. This statute is the touchstone for the rationale that exclusive jurisdiction is vested in the Corporation Commission. It provides that all authority concerning the drilling and operating of oil and gas well is exclusively conferred on the Commission. This statute has not been amended or repealed since 1917; however, other statutes have been enacted which define specific areas of jurisdiction.
>
> [footnote 1] It is provided by 63 O.S. Supp. 1978 § 2756, now 63 O.S. 1981 § 1-2005(A) (2) in pertinent part:
>
> ..."The Corporation Commission shall promulgate such rules and regulations as are reasonable and necessary for the purpose of preventing the pollution of the surface and subsurface waters in the state...."
>
> [footnote 2] Title 17 0. S. 1981 § 52 states:
>
> "All authority and duties now conferred upon the Corporation Commission or other departments of the state government in reference to the conservation of oil and gas and the drilling and operating oil and gas wells and the construction and regulation of oil and gas pipelines, are hereby conferred exclusively upon the Corporation Commission."
>
> * * *
>
> [paragraph 3] In 1955, 52 O.S. Supp. 1955 § 139 was adopted, vesting the Commission with prevention of pollution of surface and subsurface waters. Although § 139 was amended in 1965, the Commission is still charged with this duty. At the same time that § 139 was enacted, the Legislature also enacted 52 O.S. 5upp. 1955 § 140 which gave the Commission the right, after hearing, to prohibit the storage of deleterious substances in earthen ponds if pollution is occurring or likely to occur. The subsequent 1965 amendment did not alter this right. (Footnotes omitted)

GTI, in its supplement motion, argues that the only applicable statures are 52 O.S. Section 97 and 17 O.S. Section 52. The above case holds that all the statutes are to be considered. For decades, the owners of the Facility used earthen storage ponds for deleterious substances that were obtained by filing

applications with the Commission. The above *Pollution Control* case states in footnote 4:

> Earthen storage ponds are regulated by 52 O.S. 1981 § 140: "The Commission shall not, by a general rule, regulation, or order, prohibit the storage in earthen ponds of the deleterious substances described in Section 1 of this act, but shall by general rule, regulation, or order prescribe standards, conditions, or limitations for the use of such ponds, and shall by rule, regulation, or order prohibit the storage of such substances in earthen ponds in areas, fields, or instances found to be required to prevent pollution."

The *Pollution Control* case further states:

> [paragraph 6] The exclusive jurisdiction of the Corporation Commission has continuously been reaffirmed by the Legislature. In 1974, the enactment of the Oklahoma Wildlife Conservation Code, specifically 29 O.S. Supp. 1974 § 7-401(c), mandated that a pollution violation caused by petroleum drilling, production, transmission, or storage was to be reported to the Corporation Commission. The Commission was given the express power to order corrective action.
>
> [footnote 10] The portion of the Wildlife Conservation Code, 29 O.S, 1981 § 7-401(C) which deals with pollution caused by deleterious, noxious, or toxic substances provide in pertinent part:
>
> "....the party responsible for the control of any salt water, crude oil or other deleterious substances causing a violation of this section and resulting from drilling, production, transmission, storage or other operation of the petroleum industry shall be reported to the Oklahoma Corporation Commission and if corrective action is not taken immediately then criminal proceedings shall be had as herein provided. The Corporation Commission is also given the express power to order whatever corrective action is necessary to abate the pollution and is given the authority to enforce the order by any action against the lease or well. Such action shall be reported by the Wildlife Department to the appropriate agency."

> [paragraph 7] It is readily apparent that the Commission has exclusive statutory authority in the area of conservation of oil and gas and the drilling and operation of oil and gas wells. Title 63 O.S. Supp. 1976 § 2756 [HN12] provided that any substance resulting from or used in conjunction with oil and gas exploration, development or production shall continue to be regulated by the Corporation Commission. The statute, as amended in 1978, vests the Commission with exclusive jurisdiction, power and authority governing the disposition of deleterious substances incidental to petroleum production and to promulgate rules and regulations to prevent pollution of the surface and subsurface waters in the state. This statute, and all prior analogous statutes are merely cumulative and predicated on the foundation laid in 1917 by 17 0. S. 1981 § 52 reposing all authority concerning petroleum production in the Corporation Commission.

In *Meinders v. Johnson*, 134 P.3d 858 (Ok.Civ.App 2006) , the Court makes a detailed analysis of the jurisdiction at the Commission and states:

> V. JURISDICTION
>
> A. Jurisdiction of the Corporation Commission
>
> [paragraph 19] The Corporation Commission is a tribunal of limited jurisdiction and has only such authority as is expressly or by necessary implication conferred upon it by the Constitution and statutes of this state. Okla. Const., art. IX, § 18; *Merritt v. Corporation Commission*, 1968 OK 19, 438 P.2d 495. Consequently, the Corporation Commission has no jurisdiction to award damages or determine private disputes between an industry within its regulatory authority and an individual outside the limited powers granted by the Oklahoma constitution and statutes. See, *Samson Resources Co. v. Corporation Commission*, 1985 OK 31, P15, 702 P.2d 19, 23; *McDaniel v. Moyer*, 1983 OK 39, P15, 662 P.2d 309, 313; *Lear Petroleum Corp. v. Seneca Oil Co.*, 1979 OK 15, P13, 590 P.2d 670, 672; *Chicago R.I. & P. Ry. Co v. State*, 1932 OK 467, P0(4), 12 P.2d 494. See also, *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 1984 OK 52, PP20-23, 687 P.2d 1049, 1053-1054. [***18]

B. Statutory "Exclusive Jurisdiction" of the Corporation Commission -- 17 0. S. § 52, 27A 0. S. § 1-3-101, and 52 0. S, § 139

1. Historical Antecedents

[*P20] By Laws 1917, c. 207, p. 385, now codified at 17 O.S. §' 51, et seq., the Legislature empowered and authorized the Corporation Commission to create an oil and gas department under its jurisdiction and supervision. 17 O.S. § 51. The Legislature further directed that "all authority and duties now conferred upon the Corporation Commission or other departments of the state government in reference to the conservation of oil and gas and the drilling and operating of oil and gas wells and the construction and regulation of oil and gas pipelines are hereby conferred exclusively upon the Corporation Commission. . . ," and authorized the Corporation Commission to "prescribe rules and regulations for the plugging of all abandoned oil and gas wells." 17 0. S. §§ 52, 53. In 1981, the Legislature directed the Corporation Commission to prescribe and promulgate [***19] rules to require the operator or leaseholder to remove surface trash, debris, operating equipment, and storage structures; to fill pits; and to grade disturbed land, upon abandonment of a well. 17 O.S. §'53.1, 53.2.

[*P21] In 1955, the Oklahoma Legislature enacted § 139. As enacted, § 139 provided:

The Corporation Commission...is...vested with jurisdiction, power and authority, and it shall be its duty, to make and enforce such rules, regulations and orders governing and regulating the handling, storage and disposition of saltwater, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing, refining and processing of oil and gas within the State of Oklahoma or operation of oil or gas wells in this state as are reasonable and necessary for the purpose of preventing the pollution of the surface and subsurface waters in the state, and to otherwise carry out the purpose of this act....

52 O.S. 1961 § 139. In 1991, the Legislature designated the quoted language as section A, made minor linguistic changes, and added [***20] section B, granting the Corporation Commission power to take "whatever necessary action, without notice and hearing, including the expenditure of monies from the Corporation Commission revolving fund," "for the purpose of immediately responding to emergency situations having potentially critical environmental impact and resulting from activities within its jurisdiction." 52 O.S. 1991 § 139.

[*P22] In 1992, the Legislature enacted the Oklahoma Environmental Quality Act, 27A O.S. Supp. 1992 §§ 1, et seq. (OEQA). The OEQA assigned "jurisdictional areas of environmental responsibilities" between the Departments of Agriculture, Environmental Quality, Labor, Mines, Public Safety, Wildlife Conservation, Civil Emergency Management, the Oklahoma Water Resources Board, the Conservation Commission, and the Corporation Commission. 27A O.S. § 6.

2. Amendments of 1993

[*P23] In 1993, the Legislature substantially rewrote the OEQA. In the OEQA, the Legislature [**866] renumbered and amended the previous sections, and brought into the OEQA the provisions of the Oklahoma Controlled Industrial Waste Management Act, 63 O.S. §§ 1-2001 [***21] , et seq., as a part of the Oklahoma Environmental Code, 27A 0. S. Supp. 1993 § 2-1-101, et seq. In Article III of the OEQA, 27A U.S. § 1-3-101, the Legislature redefined the "jurisdictional areas of environmental responsibilities" of state agencies previously set out in § 6, and [HN9] in § 1-3-103(E), assigned to the Corporation Commission "exclusive jurisdiction" to regulate and control fourteen specific areas of mineral conservation, exploration, drilling, development, production, processing, transportation, and storage, including "spills of deleterious substances associated with facilities and activities specified," and extending the "exclusive jurisdiction, power and authority of the Corporation Commission...to the construction, operation, maintenance, site remediation, closure and abandonment of the facilities and activities described." 27A O.S. § 1-3-103(E)(1), (2).

[*P24] In the same session, the Legislature also amended 17 O.S. § 52 and 52 O.S. § 139. In 52 O.S. § 139 as amended, [***22] the Legislature granted the Corporation Commission "exclusive jurisdiction, power and authority" in the previously delineated areas. 52 O.S. 5upp. 1993 § 139(A). (Emphasis added.) In both 17 U.S. § 52(A) and 52 0.5. § 139(B), employing virtually identical language to 27A O.S. § 1-3-101 of the OEQA, the Legislature granted the Corporation Commission "exclusive jurisdiction, power and authority" to regulate and control eleven specific areas of mineral conservation, exploration, drilling, development, production, processing, transportation, and storage, including "spills of deleterious substances associated with facilities and activities specified," and extending the "exclusive jurisdiction, power and authority of the Corporation Commission...to the construction, operation, maintenance, site remediation, closure and abandonment of the facilities and activities described."...17 O.S. 5upp. 1993 § 52(A)(1), (2); 52 O.S. Supp. 1993 § 139(B) (1), (2). (Emphasis added.) In both 17 O.S. § 52(A)(3) [***23] ,(6),(7) and (8), and 52 O.S. §139(B) (3), (6), (7), and (8), again employing almost identical language to the OEQA, the Legislature assigned to the Department of Environment Quality "sole jurisdiction over . . . point source discharges of pollutants" from facilities within its regulatory authority.

3. Application of the "Exclusive Jurisdiction" Provisions of 17 O.S. § 52, 27A O.S. § 1-3-101, and 52 O.S. § 139

[*P25] The Oklahoma Supreme Court has recognized that [HN10] 27A O.S. § 1-3-101 "assigns jurisdictional areas of responsibility to the state's environmental agencies," and particularly, between the Corporation Commission, the Oklahoma Department of Environmental Quality, and the Department of Agriculture. *Messer-Bowers Co., Inc. v. State ex rel. Oklahoma Water Resources Bd*, 2000 OK 54, P18, 8 P.3d 877, 882. The Oklahoma Supreme Court has also recognized that 17 O.S. § 52, read together with 52 O.S. § 139 and predecessor provisions to the OEQA, 27A O.S. § 2-6-101, et seq., [***24] 11 and 27A US. 2-7-101, et seq., 12 assign the jurisdictional areas

of authority as between the Corporation Commission, the Oklahoma Water Resources Board, and/or, what was then known as the *Pollution Control Coordinating Board. Matador Pipelines, Inc. v. Oklahoma Water Resources Bd.*, 1987 OK 65, 742 P.2d 15; *State ex rel. Pollution Control Coordinating Bd. v. Oklahoma Corp. Com'n*, 1983 OK 3, 660 P.2d 1042.

11 82 0. S. 1981, §§ 9261, et seq., renumbered as 27A 0. S. § 2-6-101, et seq., by Laws 1993, c. 145, § 359, eff. July 1, 1993. 12 63 O.S. Supp. 1982 §' 1-2001, et seq., renumbered as 27A, § 2-7-101, et seq., by Laws 1993, c. 145, § 359, eff. July 1, 1993.

[*P26] [HN11] As between the Corporation Commission and any other state agency with responsibility for maintaining environmental quality, it is thus clear that "only the Corporation Commission is given 'exclusive' environmental [***25] jurisdiction in the area of oil and gas," including the "exclusive jurisdiction, power and authority governing the disposition of deleterious substances incidental to petroleum production and to promulgate rules and regulations to prevent pollution of [* * 867] the surface and subsurface waters in the state." *Messer-Bowers Co., Inc.*, 2000 OK 54, P18, 8 P.3d at 882; *State ex rel. Pollution Control Coordinating Bd.*, 1983 OK 3, P7, 660 P.2d at 1044. See also, *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 93 7-938 (10th Cir. (Okl.) 2001).

C. Jurisdiction of the District Courts -- Nuisance Damages

[*P27] Clearly, and in keeping with the limited jurisdiction of the Corporation Commission, the Oklahoma Supreme Court has recognized that [I-IN 12] the district courts of this state possess the authority to determine private rights' disputes arising from mineral production. *Tenneco Oil Co.*, 1984 OK 52, PP20-23, 687 P.2d at 1053-54. Indeed, there seems little doubt that only the district courts of this state possess jurisdiction to award nuisance or negligence damages for pollution and cleanup. *Union Texas Petroleum Corp. v. Jackson*, 1995 OK CIV APP 63, 909 P.2d 131; [***26] *Tenneco Oil Co. v. Allen*, 1973 OK 129, 515 P.2d 1391; *Sheridan Oil Co. v. Wall*, 1940 OK

> 225, 187 Okla. 398, 103 P.2d 507. See also, *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373 (10th Cir. (Old.) 1989); *Greyhound Leasing & Financial Corporation v. Joiner City Unit*, 444 F.2d 439 (10th Cir. (Oki.) 1971). And, it appears that a party may pursue a damages claim in district court concurrently with a remediation action before the Corporation Commission. *Schneberger v. Apache Corp.*, 1994 OK 117, 890 P.2d 847; *Union Texas Petroleum Corp.*, 1995 OK CIV APP 63, P19, 909 P.2d at 139. Further, a successor operator may be held liable for maintaining a pollution-related nuisance created by a predecessor. *Union Texas Petroleum Corp.*, 1995 OK CIV APP 63, P26, 909 P.2d at 141.

The Office of the Attorney General of the State of Oklahoma, in Opinion No. 86-59, 1987 Okla. AG Lexis 57, states as follows:

> Title 63 O.S. 1981, § 1-2005 provides that any substance resulting from or used in conjunction with oil and gas exploration development or production shall continue to be regulated by the Commission. In PCCB v. OCC the court found that this statute (formerly 63 O.S. Supp. 1976, § 2756), vests the Commission with exclusive jurisdiction and authority governing the disposition of deleterious substances [*3] incidental to petroleum production and the power to promulgate rules and regulations to prevent pollution of the surface and subsurface waters of the state.
>
> In addition, 17 O.S. Supp. 1986, § 53.1 directs the Commission to prescribe rules and regulations requiring the removal of all surface trash and debris, defined as "all discarded material directly connected with the drilling or producing of or exploration for hydrocarbons including, but not limited to, garbage, rubbish, junk or scrap," from oil and gas well sites.
>
> It is well established that public agencies possess that authority which is expressly granted by statute, and, in addition thereto, such authority as is necessary to carry out express authority and such authority that is fairly implied therefrom. *Marley v. Cannon*, 618 P.2d 401 (Ok!. 1980). The legislative mandate set forth in Section 139 above, clearly contemplates that the Commission has authority to require the removal or

> containment of soil contaminated by oil, saltwater or other deleterious substances produced from, or obtained in connection with oil and gas drilling as may be reasonable and necessary for the purpose of preventing the pollution of the surface [*4] and subsurface waters of the State, or to otherwise carry out the purpose of the Act.
>
> Further, although none of these statutes deal specifically with the contamination of soil by oil and gas, "[t]he legislature will not be presumed to have intended an absurd result, and a statute should be given a sensible construction, bearing in mind the evils intended to be avoided or the remedy afforded." *AMF Tubescope Company v. Hatchel*, 547 P.2d 374, 379 (Okl. 1976). The evil to be avoided by the foregoing statutes is the pollution by oil and gas operations of surface and subsurface waters in Oklahoma. To construe these statutes as not covering instances where oil, saltwater or other deleterious substances have become mixed with soil thereby contaminating it, would be an absurd result. It is, therefore, the official opinion of the Attorney General that pursuant to 52 O.S. 1981, § 139, the Oklahoma Corporation Commission has the jurisdiction and power to require removal or containment of soil contaminated by oil, saltwater or other deleterious substances produced from or obtained in connection with oil and gas drilling to prevent the pollution of surface and subsurface [*5] waters of the state.

Most of the cases deal with pollution of surface and subsurface of the waters of the State, but the authority of the Commission also extends to the conservation of oil and gas. 52 O.S. § 139.B.1.a. requires that the Commission promulgate and enforce rules, and issue and enforce orders governing and regulating the conservation of oil and gas.

Waste is defined for oil is defined in 52 O.S. § 86.2. A combined definition of waste in the Commission rules as follows:

> "Waste" means:
>
> (A) As applied to the production of oil, in addition to its ordinary meaning, "shall include economic waste, underground waste, including water encroachment in the oil or gas bearing strata; the use of reservoir

> energy for oil producing purposes by means or methods that unreasonably interfere with obtaining from the common source of supply the largest ultimate recovery of oil; surface waste and waste incident to the production of oil in excess of transportation or marketing facilities or reasonable market demands." [52 O.S.A., 86.2]
>
> (B) As applied to gas, in addition to its ordinary meaning, shall include economic waste; "the inefficient or wasteful utilization of gas in the operation of oil wells drilled to and producing from a common source of supply; the inefficient or wasteful utilization of gas in the operation of gas wells drilled to and producing from a common source of supply; the production of gas in such quantities or in such manner as unreasonably to reduce reservoir pressure or unreasonably to diminish the quantity of oil or gas that might be recovered from a common source of supply; the escape, directly or indirectly, of gas from oil wells producing from a common source of supply into the open air in excess of the amount necessary in the efficient drilling, completion or operation thereof, waste incident to the production of natural gas in excess of transportation and marketing facilities or reasonable market demand; the escape, blowing, or releasing, directly or indirectly, into the open air, of gas from well productive of gas only, drilled into any common source of supply, save only such as is necessary in the efficient drilling and completion thereof; and the unnecessary depletion or inefficient utilization of gas energy contained in a common source of supply." [52 O.S.A. §86.3]
>
> (C) The use of gas for the manufacture of carbon black or similar products predominately carbon, except as specifically authorized by the Commission, shall constitute waste.
>
> (D) The flaring of tail gas at gasoline, pressure maintenance, or recycling plants where a market is available.

GTI and Amoco/BP have operated the Facility without any regard for waste being caused to the oil and gas reservoirs. They have drilled hundreds of wells, many of which are unknown. Wellbores have been left open and

uncased and not plugged in the time periods required by Commission rules and regulations. Limited records are available about the drilling and plugging of wells. The Commission has allowed the unfettered drilling at the Catoosa site by companies that own no oil and gas lease and have no right to explore. Little or no testing of surface or subsurface waters has been done. For whatever reason, the Commission has abandoned its purpose and failed to protect the very interests that the Commission is designed to protect.

In keeping with the AG opinion, to construe the statutes and rules and regulations to exclude "test wells" from Commission jurisdiction would be an absurd result. GTI Motion to Dismiss based upon the Flint cause should be denied. The ALJ exceeded the scope of the Motion to Dismiss that was presented and Ganer has not finished with its evidence and the case should be reset for hearing and taking of additional testimony prior to any determination or ruling on the Supplement Motion to Dismiss.

14) While no one could find the Facility permit, a similar site is being operated by Hughes in Okfuskee County and a copy of that permit or letter was admitted as Exhibit XX. No other document related to the Hughes facility has be provided. Ganer attempted to obtain documents from Hughes, but its motion for discover was denied. The denial of the discovery motion was in error. Ganer has filed an open records request with the Commission concerning the Hughes permit and no other documentation has been provided. The data, files and information from Hughes is necessary to look at what was done is a similar situation. Ron Bray testified that the Hughes facility was the same as the Catoosa facility. There is no question that a permit or something similar to a permit was given to Amoco for the Catoosa site. The Hughes permit should be considered as to what the permit to Amoco would have been and this required plugging wells in accordance with Commission rules and regulations. The wells at the Catoosa site have not been plugged in accordance with the Commission rules and regulations.

15) The ALJ failed to discuss Exhibit M, an article form Gas Tips. Ron Bray testified that the wells drilled at the Facility were drilled as close as possible to actual wells drilled in the field. Without the test facilities, the testing would have to be done in the field. As stated in Exhibit M, testing, evaluating and calibrating tools in a realistic environment are vital in exploration and production. Exhibit M further states "GTI Catoosa is no longer just a drilling research site. The facility is used extensively for formation evaluation tools, downhole data acquisition and completion tools testing. It is an excellent location for testing new geophysical methods and techniques." While there may not be any actual production of oil and gas at the Catoosa site, there can be no argument that the drilling activities are related to and benefit the production of oil and gas.

The ALJ failed to consider the Mission statement made by GTI on its website, Exhibit N. "The GTI Geophysical and Drilling Technology Testing and Evaluation Facility (formerly he Amoco Catoosa Site) is commercially available for customer-directed R&D related to drilling, formation evaluation, geophysical, completion and any other oilfield or environmental research.

The lease agreement with the surface owner, Exhibit F, states that Amoco would be conducting geophysical activities.

16) 17 O.S. 52, 52 O.S. 139, and 27A O.S. 1-3-101 all contain the following language: "the Corporation Commission is hereby vested with exclusive jurisdiction, power and authority * * * governing and regulating: * * * b. field operations for geologic and geophysical exploration * * *"

There can be no doubt that the operations at the Catoosa site as represented by GTI are subject to the Commission jurisdiction.

17) The ALJ in paragraph 40 states that since the Commission does not have jurisdiction over test holes and facilities, it does not have jurisdiction over the plugging of test holes. That is not what the current rules state. The ALJ is making a determination that the plugging rules and presumably the pollution rules of the Commission do not apply to test wells. The orders that created the current rules and past rules of the Commission all state that the rules are within the Commission jurisdiction. OAC 165:10-1-1 states: "The rules of this Chapter were promulgated in furtherance of the public policy and statutory laws of the State of Oklahoma to prevent waste of oil and gas, to assure the greatest ultimate recovery from the State's reservoirs, to protect the correlative rights of all interest owners, and to prevent pollution."

The Commission has already determined that its orders and rules are valid when enacted. There has to be a presumption by the Commission that its orders are valid. A change of mind by Commission staff is not sufficient justification to ignore existing rules of the Commission. Neither the Commission nor its staff can make a determination that the without notice and hearing to change or modify its rules. In this case the Commission staff has taken an active stance to the position that the Commission does not have jurisdiction over test wells or facilities.

18) An example of how the facility was used to assist the oil and gas industry is revealed by Mr. Bray in his testimony in the Transcript for July 13, 2012, page 7-8. Two wells (RW wells) were drilled in the SW/c of the property and high angle wells were drilled from the Ronda wells to the RW wells. The technology developed in that drilling was used to stop the blowout that occurred in the Gulf. Mr. Bray acknowledged that this was an example of how the operations at the Catoosa site were essential to the oil and gas industry.

19) The Report of the ALJ indicates that the Commission determined that there were no problems with potential oil and gas formations in the GTI wells. Mr. Wayne Wright in his testimony for July 25, page 153 was asked if he or anyone from the Commission ever made any investigation on whether or not there were any oil and gas bearing formations in the wells drilled by GTI or Amoco and Mr. Wright answered "Not that I'm aware of, no."

20) Mr. Bray in his testimony on July 13, 2012, page 95 was asked about the number of wells that might have been drilled before he came on the Catoosa site. It was estimated that 100 to maybe 200 wells were drilled by Amoco before Mr. Bray came to the Catoosa site. Mr. Bray stated they never conducted any bottom-hole pressure tests.

The Commission has made statement thought Sally Shipley that test and studies were done by the Commission, but the Commission has not presented any witnesses to describe what test or studies were done, except for the one sample taken by John Woodson. Mr. Woodson also took pictures but did not write any report.

21) Ganer has filed motions for discovery from GTI, BP, Baker Hughes and the Commission and the motions have been denied. Denial of the motions for discovery is error. There is information that is relevant and material to the issues in the case that may be discoverable. It is error to dismiss the application prior to effective discovery by Ganer. The discovery to Baker Hughes is relevant to jurisdictional issues in this case as it is a similar operation. The Commission has not file on the case and Baker Hughes and indicated that it has records and documents related to it exemption permit. Ron Bray testified as a witness about the operations of the site, but because no discovery of documents or records from GTI or BP/Amoco, Ganer has not been able to inspect documents and records that may or may not be relevant to or adverse to Mr. Bray's testimony. The Catoosa site was a research facility and as such, the gathering of information and maintaining of that information should be most important and thus available for discovery. Nothing is known about the operations conducted by Amoco/BP and the records and evidence to be obtained by discovery is necessary for any understanding of what was done by Amoco at the site. Discovery to the Commission is important in determining what and when the Commission exercised jurisdiction over the site and for the determination of what a "service well' is or was under the Commission rules.

22) The Commission has jurisdiction over underground storage and secondary recovery projects. The rules dealing with Underground storage can be found in OAC 165:10-3-5. Those rules cover any well drilled or bored or to be drilled or bored within the boundaries of an underground storage facility. Application of the ruling by the ALJ would exempt any test well or facilities from Commission jurisdiction for a well drilled through an underground

storage site. Those rules have very specific procedures that have to be followed by an operator that drills through the storage site.

In addition, the Commission has jurisdiction over secondary or unitized common sources of supply and has a specific rule on how wells that penetrate the unitized common sources of supply have to be plugged in OAC 165: 10-3-4(n).

The application of the recommendation of the AU would exempt test wells that penetrate underground storage sites or enhanced recovery operations. The damage that could be caused by such a test well should be obvious. Ganer has expert testimony about the damages that could result from failure to follow Commission rules for wells drilled through underground storage, enhanced recovery operations and just normal well such as drilled by Ganer on his leases. The ODEQ has not been a party to this action and it may or may not agree to the recommendation of the ALJ.

23) The only permit obtained from the ODEQ by GTI was a permit marked as Exhibit EEE. This is an air quality permit for the rigs and equipment used at the site. Exhibit EEE contained copies of Permit No. 2001-011-0 and a Memorandum dated February 9, 2004 from or to GTI. In the Memorandum, GTI describes its activities at the site as experimental fracturing and testing of rock bits for other companies. Also included is a copy of Permit No. 88-109-0 dated March 10, 1989 to Amoco. Other that this information and the ex parte communication from Sarah Penn at the ODEQ little is known about what action has been taken at the ODEQ. There is no substantial evidence about what the ODEQ is or is not doing.

24) Wherefore, the Motion to Dismiss filed May 10, 2012 should be denied and the case set for further hearings and the taking of evidence.

THE ALJ FOUND:

1) The Commission is a tribunal of limited jurisdiction charged with overseeing the conservation of oil and gas. See *New Dominion, LLC v. Parks Family Company, LLC,* 216 P.3d 292 (Okl.Civ.App 2008); *Burmah Oil & Gas Co. v. Corporation Comm'n,* 541 P.2d 834 (Okl. 1975); and *Kingwood Oil Co. v. Hall-Jones Oil Corp., 396 P.2d 510 (Okl. 1964).* The Commission's jurisdiction and authority is limited to what is expressly or by necessary implication conferred upon it by the Constitution and statutes. See *Merritt v. Corporation Commission,* 438 P.2d 495 (Okl. 1968).

2) The Commission has exclusive jurisdiction over the production of oil and gas and related activities, and the rules of the Commission focus upon the prevention of waste, the protection of correlative rights and the protection of human health and the environment. As shown in 17 O.S. Section 52 A (1), the

Commission's jurisdiction is limited to activities related to the production of oil and gas:

> Except as otherwise provided by this section, the Corporation Commission is hereby vested with exclusive jurisdiction, power and authority with reference to: a. the conservation of oil and gas, b. field operations for geologic and geophysical exploration for oil, gas and brine, including seismic survey wells, stratigraphic test wells and core test wells, c. the exploration, drilling, development, producing or processing for oil and gas on the lease site, d. the exploration, drilling, development, production and operation of wells used in connection with the recovery, injection or disposal of mineral brines...

3) See 17 O.S. Section 52 which states:

> A. 1. Except as otherwise provided by this section, the Corporation Commission is hereby **vested with exclusive jurisdiction, power and authority** with reference to: **a. the conservation of oil and gas, b. field operations for geologic and geophysical exploration for oil, gas and brine, including seismic survey wells, stratigraphic test wells and core test wells, c. the exploration, drilling, development, producing or processing for oil and gas on the lease site, d. the exploration, drilling, development, production and operation of wells used in connection with the recovery, injection or disposal of mineral brines,** e. reclaiming facilities only for the processing of salt water, crude oil, natural gas condensate and tank bottoms or basic sediment from crude oil tanks, pipelines, pits and equipment associated with the exploration, drilling, development, producing or transportation of oil or gas, f. injection wells known as Class II wells under the federal Underground Injection Control Program, and any aspect of any CO_2 sequestration facility, including any associated CO_2 injection well, over which the Commission is given jurisdiction pursuant to the Oklahoma Carbon Capture and Geologic Sequestration Act. Any substance that the United States Environmental Protection Agency allows to be injected into a Class II well may continue to be so injected, g. tank farms for storage of crude oil and petroleum

> products which are located outside the boundaries of refineries, petrochemical manufacturing plants, natural gas liquid extraction plants, or other facilities which are subject to the jurisdiction of the Department of Environmental Quality with regard to point source discharges, h. the construction and operation of pipelines and associated rights-of-way, equipment, facilities or buildings used in the transportation of oil, gas, petroleum, petroleum products, anhydrous ammonia or mineral brine, or in the treatment of oil, gas or mineral brine during the course of transportation but not including line pipes in any: (1) natural gas liquids extraction plant, (2) refinery, (3) reclaiming facility other than for those specified within subparagraph e of this subsection, (4) mineral brine processing plant, and (5) petrochemical manufacturing plant, i. the handling, transportation, storage and disposition of saltwater, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing and operating of oil and gas wells, at: (1) any facility or activity specifically listed in paragraphs 1 and 2 of this subsection as being subject to the jurisdiction of the Commission, and (2) other oil and gas extraction facilities and activities, j. spills of deleterious substances associated with facilities and activities specified in paragraph 1 of this subsection or associated with other oil and gas extraction facilities and activities, and k. subsurface storage of oil, natural gas and liquefied petroleum gas in geologic strata. **(emphasis added)**

4) 52 O.S. Section 139 emphasizes that the Commission's jurisdiction, power and authority are found in the realm of the "the drilling, development, producing, and operating of oil and gas wells and brine wells" and that the Commission shall "promulgate and enforce rules, and issue and enforce orders, governing and regulating: a. the conservation of oil and gas; b. field operations for geologic and geophysical exploration for oil, gas and brine, including seismic survey wells, stratigraphic test wells and core test wells; c. the exploration, drilling, development, producing or processing for oil and gas on the lease site; d. the exploration, drilling, development, production and operation of wells used in connection with the recovery, injection or disposal of mineral brines." Here the words "development" and "exploration" refer to activities that are directly related to the production of oil and gas. The drilling of holes and wells for other purposes such as testing equipment, producing

water, exploring for minerals other the hydrocarbons and the disposal of hazardous wastes are not mentioned in the statute.

5) See 52 O.S. Section 139 which states:

> A. The Corporation Commission is **vested with exclusive jurisdiction, power and authority**, and it shall be its duty, to make and enforce such rules and orders governing and regulating the handling, storage and disposition of saltwater, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with **the drilling, development, producing, and operating of oil and gas wells and brine wells** within this state as are reasonable and necessary for the purpose of preventing the pollution of the surface and subsurface waters in the state, and to otherwise carry out the purpose of this act. B. 1. Except as otherwise provided by this subsection, the Corporation Commission is hereby **vested with exclusive jurisdiction, power and authority**, and it shall be its duty to promulgate and enforce rules, and issue and enforce orders governing and regulating: a. **the conservation of oil and gas, b. field operations for geologic and geophysical exploration for oil, gas and brine, including seismic survey wells, stratigraphic test wells and core test wells, c. the exploration, drilling, development, producing or processing for oil and gas on the lease site, d. the exploration, drilling, development, production and operation of wells used in connection with the recovery, injection or disposal of mineral brines,** e. reclaiming facilities only for the processing of salt water, crude oil, natural gas condensate and tank bottoms or basic sediment from crude oil tanks, pipelines, pits and equipment associated with the exploration, drilling, development, producing or transportation of oil or gas, f. injection wells known as Class II wells under the federal Underground Injection Control Program, and any aspect of any CO_2 sequestration facility, including any associated CO_2 injection well, over which the Commission is given jurisdiction pursuant to the Oklahoma Carbon Capture and Geologic Sequestration Act. Any substance that the United States Environmental Protection Agency allows to be injected into a Class II well may continue to be so injected, g.

> tank farms for storage of crude oil and petroleum products which are located outside the boundaries of the refineries, petrochemical manufacturing plants, natural gas liquid extraction plants, or other facilities which are subject to the jurisdiction of the Department of Environmental Quality with regard to point source discharges, h. the construction and operation of pipelines and associated rights-of-way, equipment, facilities or buildings used in the transportation of oil, gas, petroleum, petroleum products, anhydrous ammonia or mineral brine, or in the treatment of oil, gas or mineral brine during the course of transportation but not including line pipes associated with processing at or in any: (1) natural gas liquids extraction plant, (2) refinery, (3) reclaiming facility other than for those specified within subparagraph e of this paragraph, (4) mineral brine processing plant, and (5) petrochemical manufacturing plant, i. the handling, transportation, storage and disposition of saltwater, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing and operating of oil and gas wells, at: (1) any facility or activity specifically listed in paragraphs 1 and 2 of this subsection as being subject to the jurisdiction of the Commission, and (2) other oil and gas extraction facilities and activities, j. spills of deleterious substances associated with facilities and activities specified in paragraph 1 of this subsection or associated with other oil and gas extraction facilities and activities, and k. subsurface storage of oil, natural gas and liquefied petroleum gas in geologic strata." **(emphasis added)**

6) Drilling activities that are not done for the purposes of producing oil and gas are regulated by other state agencies such as the ODEQ or the OWRB. 27A O.S. Section 1-3-101 sets forth the jurisdiction and authority of the Commission and the ODEQ. As shown herein:

> The Corporation Commission is hereby vested with exclusive jurisdiction, power and authority, and it shall be its duty to promulgate and enforce rules, and issue and enforce orders governing and regulating: a. the conservation of oil and gas; b. field operations for geologic and geophysical exploration for oil, gas and brine, including seismic survey wells, stratigraphic test

wells and core test wells; c. the exploration, drilling, development, producing or processing for oil and gas on the lease site; d. the exploration, drilling, development, production and operation of wells used in connection with the recovery, injection or disposal of mineral brines...

* * *

The Department of Environmental Quality shall have the following jurisdictional areas of environmental responsibility: 1. All point source discharges of pollutants and storm water to waters of the state which originate from municipal, industrial, commercial, mining, transportation and utilities, construction, trade, real estate and finance, services, public administration, manufacturing and other sources, facilities and activities, except as provided in subsections D and E of this section; 2. All nonpoint source discharges and pollution except as provided in subsections D, E and F of this section....9. Hazardous waste and solid waste, including industrial, commercial and municipal waste; 10. Superfund responsibilities of the state under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and amendments thereto, except the planning requirements of Title III of the Superfund Amendment and Reauthorization Act of 1986....19. Environmental regulation of any entity or activity, and the prevention, control and abatement of any pollution, not subject to the specific statutory authority of another state environmental agency...

7) See 27A O.S. Section 1-3-101 which states:

E. Corporation Commission. 1. The Corporation Commission is hereby **vested with exclusive jurisdiction, power and authority**, and it shall be its duty to promulgate and enforce rules, and issue and enforce orders governing and regulating: a. **the conservation of oil and gas, b. field operations for geologic and geophysical exploration for oil, gas and brine, including seismic survey wells, stratigraphic test wells and core test wells, c. the exploration, drilling, development, producing or processing for oil and gas on the lease site, d. the exploration, drilling, development, production and operation of wells used in connection with the**

recovery, injection or disposal of mineral brines, e. reclaiming facilities only for the processing of salt water, crude oil, natural gas condensate and tank bottoms or basic sediment from crude oil tanks, pipelines, pits and equipment associated with the exploration, drilling, development, producing or transportation of oil or gas, f. underground injection control pursuant to the federal Safe Drinking Water Act and 40 CFR Parts 144 through 148, of: (1) Class II injection wells, (2) Class V injection wells utilized in the remediation of groundwater associated with underground or aboveground storage tanks regulated by the Commission, (3) those wells used for the recovery, injection or disposal of mineral brines as defined in the Oklahoma Brine Development Act, and (4) any aspect of any CO_2 sequestration facility, including any associated CO_2 injection well, over which the Commission is given jurisdiction pursuant to the Oklahoma Carbon Capture and Geologic Sequestration Act. Any substance that the United States Environmental Protection Agency allows to be injected into a Class II well may continue to be so injected, g. tank farms for storage of crude oil and petroleum products which are located outside the boundaries of refineries, petrochemical manufacturing plants, natural gas liquid extraction plants, or other facilities which are subject to the jurisdiction of the Department of Environmental Quality with regard to point source discharges, h. the construction and operation of pipelines and associated rights-of-way, equipment, facilities or buildings used in the transportation of oil, gas, petroleum, petroleum products, anhydrous ammonia or mineral brine, or in the treatment of oil, gas or mineral brine during the course of transportation but not including line pipes in any: (1) natural gas liquids extraction plant, (2) refinery, (3) reclaiming facility other than for those specified within subparagraph e of this subsection, (4) mineral brine processing plant, and (5) petrochemical manufacturing plant, i. the handling, transportation, storage and disposition of saltwater, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing and operating of oil and gas wells, at: (1) any facility or activity specifically listed in paragraphs 1 and 2 of this subsection as

being subject to the jurisdiction of the Commission, and (2) other oil and gas extraction facilities and activities, j. spills of deleterious substances associated with facilities and activities specified in paragraph 1 of this subsection or associated with other oil and gas extraction facilities and activities, k. subsurface storage of oil, natural gas and liquefied petroleum gas in geologic strata, l. groundwater protection for activities subject to the jurisdictional areas of environmental responsibility of the Commission, m. utilization and enforcement of Oklahoma Water Quality Standards and implementation documents, and n. development and promulgation of a Water Quality Standards Implementation Plan pursuant to Section 1-1-202 of this title for its jurisdictional areas of environmental responsibility.

8) See 27A O.S. Section 1-3-101 B. which states:

Department of Environmental Quality. The Department of Environmental Quality shall have the following **jurisdictional areas of environmental responsibility**: 1. **All point source discharges of pollutants and storm water to waters of the state which originate from municipal, industrial, commercial, mining, transportation and utilities, construction, trade, real estate and finance, services, public administration, manufacturing and other sources, facilities and activities, except as provided in subsections D and E of this section; 2. All nonpoint source discharges and pollution except as provided in subsections D, E and F of this section;** 3. Technical lead agency for point source, nonpoint source and storm water pollution control programs funded under Section 106 of the federal Clean Water Act, for areas within the Department's jurisdiction as provided in this subsection; 4. Surface water and groundwater quality and protection and water quality certifications; 5. Waterworks and wastewater works operator certification; 6. Public and private water supplies; 7. Underground injection control pursuant to the federal Safe Drinking Water Act and 40 CFR Parts 144 through 148, except for: a. Class II injection wells, b. Class V injection wells utilized in the remediation of groundwater associated with underground or aboveground storage tanks regulated by the Corporation Commission, c. those wells used for the recovery, injection or disposal of mineral brines as defined in the Oklahoma Brine Development Act regulated by the Commission, and d. any aspect of any CO_2 sequestration facility, including any associated CO_2 injection well, over which the Commission is given jurisdiction pursuant to the Oklahoma Carbon Capture and Geologic Sequestration Act; 8. Notwithstanding any other provision in this section or other environmental jurisdiction statute, sole and exclusive jurisdiction for air quality under the federal Clean Air Act and applicable state law, except for indoor air quality and asbestos as regulated for

worker safety by the federal Occupational Safety and Health Act and by Chapter 11 of Title 40 of the Oklahoma Statutes; 9. **Hazardous waste and solid waste, including industrial, commercial and municipal waste; 10. Superfund responsibilities of the state under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and amendments thereto, except the planning requirements of Title III of the Superfund Amendment and Reauthorization Act of 1986;** 11. Radioactive waste and all regulatory activities for the use of atomic energy and sources of radiation except for electronic products used for diagnosis by diagnostic x-ray facilities and electronic products used for bomb detection by public safety bomb squads within law enforcement agencies of this state or within law enforcement agencies of any political subdivision of this state; 12. Water, waste, and wastewater treatment systems including, but not limited to, septic tanks or other public or private waste disposal systems; 13. Emergency response as specified by law; 14. Environmental laboratory services and laboratory certification; 15. Hazardous substances other than branding, package and labeling requirements; 16. Freshwater wellhead protection; 17. Groundwater protection for activities subject to the jurisdictional areas of environmental responsibility of the Department; 18. Utilization and enforcement of Oklahoma Water Quality Standards and implementation documents; 19. **Environmental regulation of any entity or activity, and the prevention, control and abatement of any pollution, not subject to the specific statutory authority of another state environmental agency;** 20. Development and maintenance of a computerized information system relating to water quality pursuant to Section 1-4-107 of this title; and 21. Development and promulgation of a Water Quality Standards Implementation Plan pursuant to Section 1-1-202 of this title for its jurisdictional area of environmental responsibility." (**emphasis added**)

9) The statute emphasizes that the jurisdiction of the Commission is limited to those areas that are expressly set forth in the language of the statute and that all other potential areas of regulation that aren't expressly stated fall under the jurisdiction of the ODEQ (unless regulated by OWRB, the Department of Mines or the Department of Agriculture). This division of jurisdiction is also found in 52 O.S. Section 139 B (7) which states:

> Department of Environmental Quality shall have sole environmental jurisdiction for point and nonpoint source discharges of pollutants and storm water to waters of the state from....other facilities, activities and sources not subject to the jurisdiction of the Corporation Commission or Department of Agriculture as specified by this section.

10) See 52 O.S. Section 139 B 7 which states:

> The Department of Environmental Quality shall have sole environmental jurisdiction for point and nonpoint source discharges of pollutants and storm water to waters of the state from: a. refineries, petrochemical manufacturing plants and natural gas liquid extraction plants, b. manufacturing of oil and gas related equipment and products, c. bulk terminals, aboveground and underground storage tanks not subject to the jurisdiction of the Commission pursuant to this subsection, and d. **other facilities, activities and sources not subject to the jurisdiction of the Corporation Commission** or Department of Agriculture as specified by this section." (**emphasis added**)

11) Here Ganer alleged that the Commission should have jurisdiction over the Facility because Amoco and GTI drilled test holes that penetrated the common sources of supply over which Ganer owned the minerals, and produced drilling waste in the form of cuttings, fluids, mud and chemicals that are typically regulated by the Commission. Ganer further alleged that these drilling activities harmed or interfered with the production of hydrocarbons from oil and gas wells that it operated in the area, thus affecting its correlative rights and producing waste.

12) Ganer presented evidence that the test holes were not drilled in compliance with the rules of the Commission for oil and gas wells. He showed that some of the holes were not properly plugged and records were not kept of all the activities at the Facility. He showed that there was insufficient documentation about the drilling fluids used and about the disposal and closure of the pits where drilling fluids and cuttings were stored. He also showed that the drilling of some of the test holes produced cores that showed a presence of oil, indicating that the formations penetrated may have the potential to produce oil and gas.

13) Although the facility was allegedly allowed to operate by the Commission under a somewhat nebulous "blanket permit", the permit wasn't presented in the hearing and no-one could determine the scope and the extent of the activities done at the Facility from the 1980s to around 1997 because no records could be found. GTI's Manager, Ron Bray, testified that when the pits containing drilling mud and cuttings were remediated, the work wasn't permitted or supervised by the Commission and there was very little regulation, inspection or follow-up work done at the site by Commission staff.

14) No significant evidence was presented, however, that demonstrated any effect from the test holes and from the disposal of drilling materials upon Ganer's oil and gas wells or upon the common sources of supply in the area.

The Acting Director of the Oil and Gas Division, Ron Dunkin, said that the Commission's staff determined that the drilling of test holes and other related activities didn't impact reservoir pressures in the area or the ability of a mineral owner to produce hydrocarbons in the common sources of supply encountered by the test holes. He acknowledged that some of the cores taken from some of the test holes showed oil but said that a mere showing of oil wasn't proof that the common sources of supply that showed the oil held a commercially productive accumulation of hydrocarbons. No gas or oil was produced at the Facility.

15) Ganer was also unable to show that the activities done at the Facility harmed human health and the environment. Some soil samples were analyzed and found to contain heavy metals and diesel-type hydrocarbons, but the extent of the analysis was limited and the results inconclusive with respect to a determination of the risk of environmental harm. No significant evidence was presented that showed any contamination of the treatable water or the groundwater in the area, although a thorough environmental study of the area could show otherwise.

16) GTI and the Commission's staff both testified that none of the activities that took place at the Facility contaminated the groundwater or had an adverse effect upon the environment. The Deputy General Counsel for the Commission, Sally Shipley, stated for the record that the Commission completed environmental testing at the site and found no pollution related to oil and gas production. She said that the ODEQ assumed jurisdiction over the Facility and opened a file on the site and conducted its own tests of the soil and water, and is currently overseeing the closure of the Facility.

17) Ganer contended that the issue of conveying jurisdiction to the Commission with respect to the Facility was not about what kind of well or hole was drilled but whether or not the well or hole penetrated fresh or treatable water or penetrated any potential common source of supply of oil or gas. Ganer asserted that such holes or wells posed a threat to the environment or to the production of hydrocarbons from producing oil and gas wells in the area. Ganer further alleged that if such activities are not regulated by the Commission, reservoirs could be damaged or oil and gas could be taken without the knowledge of the Commission or the mineral owners, thus adversely affecting their correlative rights and causing waste of the resources.

18) The Manager of Pollution Abatement for the Commission, Tim Baker, testified that the Commission's jurisdiction over a drilling activity depends upon the driller's intent and that the Commission has jurisdiction only over drilling activities, holes and wells and pits that are intended to produce oil and gas or to dispose of substances created during the drilling of oil and gas wells. He said that wells or holes drilled for some other purpose or pits that store deleterious substance from such activities are under the jurisdiction of the

ODEQ or the OWRB and noted that the ODEQ has jurisdiction over Class I, III and V injection wells.

19) Ganer's former counsel, William Bowles, opined that the Commission assumed jurisdiction over the Facility by its regulatory activities over the years that the Facility was in operation. He attended several meetings where the Commission's staff said that the Facility complied with the rules of the Commission and that the holes should be properly plugged in accordance with the rules of the Commission. He noted that GTI put up a surety bond to mitigate risk from its operations at the Facility and that the Commission can use the bond money to plug the wells. He also noted that the Commission's field staff had been on the site to oversee activities related to the closure of the pits, to answer complaints, to make inspections and to take samples for analysis and evaluation. He opined that some government agency must regulate the Facility and related test facilities that only the Commission has the capability to properly regulate such test facilities and even if no oil and gas is produced. He said that the Commission should regulate such facilities to prevent contamination of the groundwater.

20) Mr. Baker responded that one might erroneously conclude from the evidence and from the activities of the Commission's staff that the Commission had assumed jurisdiction over the Facility. He opined, however, that jurisdiction comes from the Oklahoma Constitution and from the statutes and can't be created by the actions of a state agency. He noted that some activities that comply with the Commission's rules are not necessarily under the jurisdiction of the Commission. He said that the Commission engages in public services and investigates complaints that may ultimately be determined during the investigation to be outside the jurisdiction of the Commission.

21) GTI, BP and the Commission's staff all directed the ALJ's attention to Order No. 596214 where the Commission held that the operations of Flint in drilling test holes at the PCTF are not for: the exploration or production of oil and gas; injection, disposal or as a service well; reentry of a plugged well; re-completion of a well; or the deepening of a well; and do not fall within the subject matter jurisdiction of the Commission.

22) Flint is a sister company of Catoosa Test Facility, LLC that acquired all of the assets and equipment from the Facility when it was closed in 2011. Ron Bray testified that the assets and equipment from the Facility were sold to Flint and moved to Pawnee County where the same type of equipment testing continued. He testified that the above-described activities are the same activities which were conducted at the Facility. The Commission issued Order No. 596214 because it is an agency of limited jurisdiction that regulates the exploration and production of oil and gas, and that the drilling of holes to test equipment and develop new well techniques is not the exploration for or the production of oil and gas.

23) GTI argued that the Commission determined by Order No. 596214 that it does not have subject matter jurisdiction over the PCTF that will drill "test holes that are not for the exploration or production of oil and gas, injection, disposal or as a service well, re-entry of a plugged well, re-completion of a well or the deepening of a well" and also doesn't have jurisdiction over the Facility that previously engaged in the same activity. GTI thus asserted that the doctrine of defensive non-mutual collateral estoppel is applicable to this cause, citing *Anco Mfg. & Supply Co., Inc. v. Swank,* 524 P.2d 7 at 13 (Okla. 1974); *US. v. Mendoza,* 464 U.S. 154 at 160 (1984); and *Gonzalez v. Dub Ross Co., Inc.,* 224 P.3d 1283 at 1285 (Okl. Civ. App. 2009).

24) Based upon this doctrine, BP contended that the Commission has already ruled that it doesn't have subject jurisdiction over the drilling of test holes and related activities done at the Facility. BP also argued that Ganer failed to show any evidence that the activities at the Facility were for the "exploration or production of oil and gas, injection, disposal or as a service well, re-entry of a plugged well, re-completion of a well or the deepening of a well" and that no oil or gas was ever produced at the Facility.

25) BP also agreed with the Commission's staff that the Commission cannot assert or assume jurisdiction over the Facility solely by its actions and activities at the Facility. BP argued that the fundamentals of subject matter jurisdiction apply to the Commission in the same manner as to other courts of record. "Subject matter jurisdiction defines the court's authority to hear a given type of case; it represents the extent to which a court can rule on the conduct of persons or the status of things," citing *Carlsbad Technology, Inc. v. HIF Bio, Inc.,* 556 U.S. 635, 639 (2009). BP alleged that no action of any party can confer subject matter jurisdiction upon a court where it does not already exist -- not waiver, not estoppel, not even an agreement between the parties, citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 *(1982); Wilson v. Glenwood Intermountain Properties, Inc.,* 98 F.3d 590, 593 (10th Cir. 1996).

26) In light of the above, the ALJ finds the Commission does not have subject matter jurisdiction over test hole facilities that test equipment for research and development, and that this holding applies to the Facility as well as the PCTF. The ALJ notes that because the Commission doesn't have subject matter jurisdiction over the test holes and related activities at the Facility, it cannot have jurisdiction over the activities related to the plugging of the test holes. The ODEQ has jurisdiction over the activities at the Facility pursuant to Title 27A, Article III, Section 1-3-101 *et seq.* since the Commission does not have jurisdiction and GTI's agreement to plug any test holes must be subject to oversight and regulation by the ODEQ, not by the Commission.

27) After taking into consideration all of the facts, circumstances, evidence, testimony and arguments presented in this cause, it is the recommendation of the ALJ that GTI's Motion to Dismiss be granted. The Commission doesn't have subject matter jurisdiction over operations and facilities that test drilling equipment and are not being used or operated to explore, drill, develop, produce or process oil and gas. Jurisdiction over the Facility lies with the ODEQ.

POSITIONS OF THE PARTIES

GANER

1) **Richard K. Goodwin**, attorney, appearing on behalf of Ganer, stated that the ALJ failed to distinguish between the Motion to Dismiss, filed on May 10th, and a Supplemental Motion, filed on May 17th. The Motion to Dismiss involved only the application of Order No. 596214. The Supplemental Motion supplemented the earlier one with arguments concerning Commission's lack of subject matter jurisdiction. The hearing before the ALJ should have only addressed the proper application of Order No. 596214. However, according to Ganer, the ALJ's report contained an almost exclusive analysis of merits of the Commission's jurisdiction. This suggests that the ALJ improperly deviated from the scope of the hearing and decided an issue that was not actually argued.

2) Ganer takes issue with the *ex parte* communication with the ODEQ that was submitted to the ALJ. Although the communication was considered by the ALJ and seemed to play a role in the final recommendation, it was not admitted into evidence. According to Ganer, this is clear error and should require that the case be remanded.

3) Ganer argues that the testimony of Ron Bray is deficient because it only illuminates the nature of the operations at the test facility from 1988 to the present day. No testimony was presented which described the facility's operations from its inception in 1972 until the time Mr. Bray began his work at the facility in 1988.

4) Ganer argues that Order No. 596214 is invalid for three reasons and consequently should not be relied upon as authority: (1) No evidence or factual finding was presented prior to the issuance of the order; (2) the order exceeded the relief requested by the Applicants; (3) the order violated Ganer's due process rights because they were not allowed to participate in the proceedings.

5) Ganer draws a distinction between a rule and an order. Ganer notes that a rule can be applied on a statewide basis while an order is only applicable to the issues and the parties involved in a particular case.

6) Ganer takes issue with the application of Order No. 596214 to the present case. Ganer notes that the test facility at issue in Order No. 596214 was located in Pawnee County while the Catoosa facility, now at issue, is located in Rodgers County.

7) Ganer notes that an order can be adopted by the Commission as a rule applicable on a statewide basis. In these instances a new case must be filed and adjudicated to transform the specific order into a statewide rule. No such action was taken in regard to Order No. 596214 and thus it should not apply to the present case.

8) Ganer rejects the contention that they are engaged in a collateral attack on Order No. 596214. Ganer instead asserts that they are making a direct attack on the validity of the order and are not attempting to change the order retroactively. On the contrary, Ganer argues that GTI is attempting to retroactively apply Order No. 596214 to the present case. Ganer cites OCC-OAC 165:5-15-1(a) which requires that an order must be supported by a factual finding. No such findings occurred before the issuance of Order No. 596214. Consequently, no conclusion of law could be based upon nonexistent facts and therefore Order No. 596214 is void. In support, Ganer relies on *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okl. 1986); which held that a factual finding must occur before any application is granted by the Commission.

9) Ganer argues that Order No. 596214 cannot be considered a valid rule because it did not meet the publication requirements. A new rule must be published in both Oklahoma and Tulsa County. The publication of Order No. 596214 was done in Pawnee and Oklahoma County but not in Tulsa County making the order fall short of the standard for publication.

10) Ganer notes that the ALJ made no conclusion in his report regarding the validity of Order No. 596214. Ganer argues that the ALJ attempted to modify the order by stating that the GTI agreement to plug and test wells in accordance with Commission rules was not subject to Commission oversight or enforcement. The basis for the ALJ's dismissal of the motion was centered on the jurisdictional arguments that the Commission does not have jurisdiction over operations and facilities that test drilling equipment and are not being used to operate, explore, drill, produce or process oil and gas and jurisdiction lies with the ODEQ. The basis for the dismissal discusses all the statutory authority cited in the Supplemental Brief which is not supposed to be part of this argument.

11) Ganer objects to the ALJ's conclusion that damages were not discussed or demonstrated. Ganer notes that damages need not be shown for the Commission to exercise its jurisdiction.

12) Ganer notes that the Commission has established rules which state that once any well has penetrated treatable water and a common source of supply it is then subject to Commission regulations.

13) Ganer argues that there is no difference between exploratory wells and test wells. Consequently, the Commission rules which apply to exploratory wells should also apply to the test wells at the Catoosa facility.

14) Ganer observes that OCC-OAC 165:10-11-6(d) requires plugging any well that bears oil and gas. This rule would then apply to both test wells and oil and gas wells as they both have the capacity to produce oil and gas.

15) Ganer argues that the Commission's authority is not limited to only oil and gas wells. The Commission has authority over multiple activities such as oil and gas conservation, drilling operations of oil and gas wells, and construction of oil and gas pipelines. The purpose of this authority is to protect treatable water, common sources of supply, and to prevent waste.

16) Ganer argues that the Commission has the exclusive authority over the conservation of oil and gas and the drilling operations of oil and gas wells.

17) Ganer argues that the prevention of waste is not limited in scope to only wells that produce or explore for oil and gas. Ganer notes that waste cannot be addressed in wells which the Commission does not know exist. The filing of an intent to drill form allows the Commission to properly exercise its authority. Without filing this document the Commission would lack the information necessary to exercise its authority to prevent waste or protect against pollution.

18) Ganer concludes by arguing that Commission regulations should apply to test wells because of the new and unproven technology that is employed in their drilling.

GTI

1) **Richard J. Gore**, attorney, appearing on behalf of GTI, argues that the present case represents an impermissible collateral attack on Order No. 596214. GTI notes that collateral attacks are prohibited under 52 O.S. Section 111.

2) GTI argues that the Commission lacks jurisdiction to regulate equipment testing facilities. GTI notes that the operations and the equipment used by the Hallett and Catoosa facilities were virtually identical. Ron Bray who managed both facilities stated that the two are identical for all intents and purposes. The Commission was found to lack subject matter jurisdiction over the Hallett facility in the Order No. 596214 and accordingly the Commission should not have jurisdiction over the Catoosa facility.

3) GTI notes that an order from the Commission can be deemed void if one of three jurisdictional elements is absent. These are jurisdiction over the parties, the subject matter and the power to pronounce a particular decision. GTI argues that Order No. 596214 was not facially invalid because it properly satisfied all three jurisdictional elements. This precludes the order from being subject to a collateral attack by Ganer.

4) GTI rejects Ganer's contention that the Order No. 596214 is invalid because it did not contain evidentiary support. GTI draws a comparison between the facts in *Mullins v. Ward*, 712 P.2d 55 (Okl. 1985); and the present case. In *Mullins* a retroactive despacing order was challenged on the grounds that it lacked evidentiary support. The court held that a claim that a previous order was not supported by sufficient evidence is barred as an impermissible collateral attack.

5) GTI admits that while there are statutes granting the Commission jurisdiction over pollution, this grant of authority is only in the context of exploration for oil and gas.

6) GTI argues that there is no requirement to file an intent to drill form for the Catoosa facility because they are not engaged in the exploration or production of oil and gas. This distinction is very important as GTI asserts that the Commission does not have the authority to regulate operations that are not directly involved in the exploration or production of oil and gas.

7) GTI notes that administrative agencies can create rules on an ad hoc basis, through the legislative rule making process, or by a combination of the two.

BP

1) **Rob F. Robertson**, attorney, appearing on behalf of BP, argued that Order No. 596214 ties directly into the present action both factually and legally.

2) BP notes that although the Commission's jurisdiction is governed in part by Constitutional provisions, generally the Commission's authority over oil and gas matters is provided by statute.

3) BP points to statutory language which addresses the treatment of deleterious substances. BP observes that the Commission has jurisdiction over these substances only when they are produced, obtained, or used in conjunction with the drilling, development, production or operation of an oil and gas well. Otherwise these issues are under the authority of the ODEQ.

4) BP observes that the Catoosa facility was never used for the production of oil and gas but rather was exclusively used as a testing facility. Testimony by the facility manager established that the operations were the same in almost every aspect as the prior operations at the Catoosa/Flint facility. In addition, the manager testified that the facility never intentionally or even inadvertently produced oil and gas from the test wells drilled on site.

5) BP notes that Ganer's attempts to intervene, seek clarification, and vacate Order No. 596214 were rejected by the Commission. In fact the application filed in the present cause was done so only three days after the ALJ denied Ganer's Motion to Intervene.

6) BP points to the language of Order No. 596214 itself which states that the test wells drilled at the facility would not fall within the subject matter jurisdiction of the Commission. The language of Order 596214 plainly states that the Commission is an agency of limited jurisdiction and regulates the exploration and production of oil and gas.

7) BP argues that Order No. 596214 should be binding in this case because of the strong similarities between the facts which determined Order No. 596214 and those of the present case. Even if Order 596214 is not binding as a matter of law it should remain instructive in considering the outcome of the present case.

CORPORATION COMMISSION

1) **Sally Shipley**, Deputy General Counsel, appearing on behalf of the Commission, notes that the Oil and Gas Conservation Division is in agreement with the arguments made by GTI and believes that the Commission does not have jurisdiction over the facility at issue.

RESPONSE OF GANER

1) Ganer directs the courts attention to the testimony of Ron Dunkin who testified that test wells were indeed subject to the Commission's jurisdiction.

2) Ganer argues that there was no need to appeal Order No. 596214 because it was limited in scope to only the Facility and would not be applied on a statewide basis.

3) Ganer argues that there is a critical information gap regarding the operations of the Catoosa facilities from 1972 to 1988 because the testimony of Ron Bray only covered the time period that he was involved personally with the facility beginning in 1988. Because of this lack of information the Commission is unaware of any possible test wells drilled on the facility during this period. Ganer urges the Commission to undertake an investigation of the activities at the facility from 1972 to 1988.

4) Ganer again rejects the assertion that they are engaged in a collateral attack on Order No. 596214. Instead Ganer contends that they are attacking the record, specifically the total lack of factual findings. Ganer points out that because there were no factual findings in the Order No. 596214 it would be impossible to use that order to establish parameters that could be applied to the present case.

5) Ganer observes that the initial shut-in gas pressure from the test wells was approximately 50-90 psi when it should have registered at 300 psi. Ganer speculates that this reduction in pressure was caused by hydrocarbon production.

CONCLUSIONS

The Referee finds that the recommendation of the ALJ to grant the Motion to Dismiss should be affirmed.

1) The Referee finds that the ALJ's recommendation to grant GTI's Motion to Dismiss should be affirmed and is supported by applicable law. The Commission lacks jurisdiction to entertain Ganer's application as the Commission doesn't have subject matter jurisdiction over operations and facilities that test drilling equipment and are not being used or operated to explore, drill, develop, produce or process oil and gas.

2) The testing activities conducted at the Facility by BP's predecessor, Amoco and GTI, were fundamentally identical to the activities currently

conducted by the parties at the Pawnee facility and therefore are governed by Order No. 596214. At the July 12, 2012 hearing on GTI's Motion to Dismiss, Ron Bray, petroleum engineer and site manager who supervised operation of the Facility from approximately 1999 through 2011, testified as follows:

> Mr. Goodwin (counsel for applicant Ganer Oil Company): Q: Okay. Do you know what is different in the Catoosa site as opposed to the site now in Pawnee County?"
>
> Mr. Bray: A: Well, we can work 24 hours in this site we are at now. We couldn't at Catoosa. What else? We can go deeper. We hit basement as (sic) 5000 feet at Hallett. There's 3000 feet there. The new facility's [sic] at Hallett, H-A-L-L-E-T-T, Oklahoma. And we had more area to where we can go laterally further at the new facility than we can the old facility." See Transcript, July 12, 2012, pp. 67-68, lines 19-1.

Thus the test holes drilled at the Facility, as with the Pawnee facility, were drilled only for the purpose of testing equipment used for the exploration and production of oil and gas at sites other than the Facility. There was no testimony or evidence that hydrocarbons were produced at the Facility. Further there was no evidence that there were any oil and gas operators as parties who utilized the testing facility.

3) The Commission has exclusive jurisdiction over the production of oil and gas and related activities and the rules of the Commission focus upon the prevention of waste, the protection of correlative rights and the protection of human health and the environment. 17 O.S. Section 52A(1) states the Commission's jurisdiction is limited to activities related to the production of oil and gas. 52 O.S. Section 139 emphasizes that the Commission's jurisdiction, power and authority are found in the realm of the "drilling, development, producing, and operating of oil and gas wells and brine wells." The drilling of test wells for other purposes such as testing equipment, producing water, exploring for minerals other than hydrocarbons and the disposal of hazardous wastes are not mentioned in the statute. Drilling activities that are not done for the purpose of producing oil and gas are regulated by other state agencies such as Oklahoma Department of Environmental Quality or the Oklahoma Water Resources board. See 27 A O.S. 1-3-101.

4) The testing activities as stated above conducted at the Facility by BP's predecessor were fundamentally identical to the activities currently conducted

by Flint or its affiliate at the Pawnee facility as testified to by Mr. Ron Bray. No evidence was presented to refute the testimony of Mr. Bray; or the extensive evidence offered at the hearing on the Motion to Dismiss; or the publically available Commission documents regarding the activities that previously took place at the Facility. Therefore, Order No. 596214 provides substantial evidence that this cause should be dismissed for lack of subject matter jurisdiction.

5) Neither Ganer nor any other party filed a motion, application, or appeal of Order No. 596214 in the Flint cause within the prescribed 10 or 30 day time periods. See OCC-OAC 165:5-17-1(a); OCC-OAC 165:5-17-2(a); OCC-OAC 165:5-17-5; Oklahoma Supreme Court Rule 1.21. Therefore, Order No. 596214 is a final, non-appealable order of the Corporation Commission.

6) Ganer asserts that Order No. 596214 and the proceeding in the Flint case cannot be applied to Ganer in the present cause and the Facility in Rogers County, Oklahoma. Ganer asserts:

> [(1)] The order in the Flint case cannot be used in the Ganer Case as the order is void on the record or procured by fraud upon the Commissioners; (2) Order No. 569214 exceeds the relief requested and the facts as alleged in the application in the Flint case; (3) application of the order in this case file violates due process."

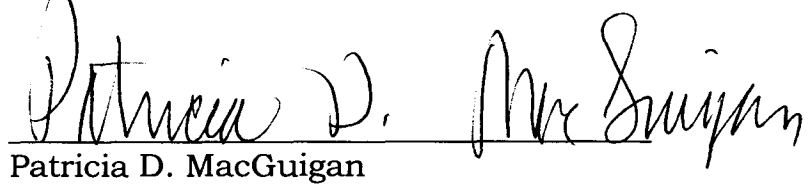
GTI asserts that Order No. 596214 is a final, non-appealable order of the Corporation Commission and the current cause is an improper collateral attack by Ganer upon a final, nonappealable Commission order. See Oklahoma Constitution Article 9, Section 20; 52 O.S. Section 111; *Mullins v. Ward*, 712 P.2d 55 (Okl. 1985). Final orders of the Commission may only be collaterally attacked for reasons of constitutionally inadequate Commission procedure...not for reasons of allegedly insufficient evidentiary support heard by the Commission before issuing its order. *Mullins v. Ward*, supra. The power to change a previous order requires a showing before the Commission of a change in conditions or knowledge of conditions necessitating the repeal, amendment or modification. Failure to make such a showing renders an attempt to modify a prior order subject to the prohibition of collateral attacks set forth by the legislature in 52 O.S. Section 111; *Nilsen v. Ports of Call Oil Company*, 711 P.2d 98 (102 Okl. 1985). The present hearing on the Motion to Dismiss in this cause is an improper procedure forum in which to challenge the facial validity of a final, nonappealable Commission order from a different cause. The argument that Order No. 569214 is somehow defective is moot and irrelevant

to this Commission's determination of the applicability of Order No. 596214 to the present cause. As the court said in *Mullins v. Ward,* supra, at 60:

> The retroactive despacing order is challenged as invalid because there is no evidentiary support for giving it retroactive effect. This argument may not be entertained. It is not directed to the order's facial invalidity—the only basis upon which a district court attack may be sustained. Error that claims an absence of sufficient evidentiary support for a Commission order is barred from district court cognizance as a impermissible collateral attack.

7) Therefore, based upon the above stated evidence, law and authority, the Motion to Dismiss the subject cause should be granted because the Commission would exceed its jurisdiction if it granted the application of Ganer as there is no constitutional or statutory basis for the Commission to have jurisdiction over the Facility. When there is no exploration or production of oil and gas attempted or occurring, the Commission does not have subject matter jurisdiction over a facility engaged in drilling test holes to study and refine drilling technologies that may be used at other locations for commercial exploration or production of hydrocarbons.

RESPECTFULLY SUBMITTED THIS 25th day of April, 2013.



Patricia D. MacGuigan
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Commissioner Anthony
Commissioner Murphy
Jim Hamilton
ALJ David D. Leavitt
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