

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF AN AMENDED APPLICATION)	
BY 8 NORTH LLC FOR AN ORDER ESTABLISHING)	
A 2,720-ACRE DRILLING AND SPACING UNIT FOR)	CAUSE NO. 407
SECTIONS 13, 14, 23, AND 24, TOWNSHIP 2 NORTH,)	
RANGE 69 WEST, 6 TH P.M. AND SECTION)	DOCKET NO. 171000695
18 TOWNSHIP 2 NORTH, RANGE 68 WEST, 6 TH)	
P.M., FOR HORIZONTAL WELL DEVELOPMENT OF)	TYPE: SPACING
THE CODELL AND NIOBRARA FORMATIONS,)	
WATTENBERG FIELD, BOULDER AND WELD)	
COUNTIES, COLORADO)	

**BOULDER COUNTY’S EXCEPTION TO HEARING OFFICER ORDER STRIKING
SECOND PROTEST BY BOULDER COUNTY**

The Board of County Commissioners of Boulder County, Colorado (“the County”), by its undersigned counsel, submits this Exception to Hearing Officer Order Striking Second Protest by Boulder County. On April 11, 2018, Hearing Officer Rouse issued an Order Striking Second Protest Filed by Boulder County (“Order”), dismissing the County’s March 30, 2018 protest and intervention in the above-captioned matter (“Second Protest”). Pursuant to Section 34-60-106(6), and 24-4-105(14)(b)(III), C.R.S., the County requests reconsideration by the full Colorado Oil and Gas Conservation Commission of the Order and the County’s request for leave to file the Second Protest.

PROCEDURAL HISTORY

1. On September 19, 2017, applicant 8 North, LLC (“8 North”) filed an amended application in the above docket, requesting establishment of a 2,720-acre spacing unit, together with authorization of a single well (the “Application”).
2. On October 16, 2017, the County and the City of Longmont filed a timely Protest and Intervention seeking to participate in the Application proceedings as a party.
 - a. Upon 8 North’s motion, on January 2, 2018, the Hearing Officer dismissed the County’s portion of the October protest for lack of adequate legal and factual basis to support the request to participate in the Application proceedings.
 - b. The County did not file an exception to the order of dismissal of the original protest. At the time, the County had not yet completed its due diligence regarding its leases in the area, as further described in paragraph 5 below.

3. By order of January 4, 2018, the Hearing Officer also dismissed the County's protest to the companion application for additional wells in the same unit, Docket No. 171200774 (the "Additional Density Application").
 - a. The County filed an exception to the dismissal, requesting full Commission review of the Hearing Officer's rulings.
 - b. Before the requested hearing, the County and 8 North reached an agreement allowing the County to file an amended protest to the Additional Density Application without objection by 8 North. Per the agreement and Hearing Officer direction, that amended protest was filed on March 20, 2018.
 - c. The Additional Density Application is scheduled to be heard by the Commission, with the County and the City of Longmont as protestants, at its July 30-31, 2018 meeting.
4. The Application was originally scheduled for the Commission's October 30, 2017 meeting and the Notice of Hearing for the Application set an October 16, 2017 deadline for protests. The hearing was subsequently continued to the April 30-May 1, 2018 meeting.
5. In March, the County was able to complete due diligence in the Application Lands including: collection of the oil and gas leases in the Application Lands applicable to the County's fee lands; review of those leases; necessary consultation with outside experts on those leases; and legal review with the Board of County Commissioners on the results of that work. On that basis, on March 30, 2018, the County filed the Second Protest to the Application, raising a new legal issue based on applicable lease language. A copy of the Second Protest is attached as Exhibit A.
6. On April 4, 2018, by email, 8 North objected to the filing of the Second Protest as untimely. Hearing Officer Rouse notified the parties that he would consider 8 North's e-mailed objection at the prehearing conference the following day. As a result, Hearing Officer Rouse indicated a willingness to consider striking the County's Second Protest without a formally filed written motion and upon only one day's notice to the County. Hearing Officer Rouse never required 8 North to file a formal written motion, nor did he request any written arguments from any party.
7. On April 5, 2018, a pre-hearing conference was held on the Application and the Additional Density Application. At that conference, the Hearing Officer continued the

hearing on the two applications to the July 30-31, 2018 meeting. Also at that conference, the parties presented argument on the timeliness of the Second Protest.

8. The County argued that the Second Protest was timely in at least one of two ways:
 - a. As an independent protest timely filed more than 14 days before the hearing under Rule 509.a(1); or
 - b. As an amendment to the County's initial protest, filed to correct any flaws in the original protest and to raise new legal issues.
9. Moreover, the County argued that 8 North could show no prejudice from the filing of a new or an amended protest five weeks before the scheduled hearing, particularly where the rules authorize the filing of a protest only 14 days before an originally scheduled hearing.
10. Although 8 North did not cite Rule 506.c. as the basis for its purported motion to dismiss in its April 4 e-mail, at the pre-hearing conference the Hearing Officer raised Rule 506.c, which states “[a]ny continuance of a hearing shall not extend the filing deadline for the filing of protests or interventions in accordance with Rule 509, unless the application is amended, *or as otherwise allowed by the Commission.*” (Emphasis added).
11. Under Rule 506.c, the County made an oral request for leave to file the Second Protest on the record of the pre-hearing conference on April 5, and offered to follow the oral request with a written motion for leave if the Hearing Officer preferred. COGCC Recording of April 2, 2018 pre-hearing conference (“Recording” at time stamp 21:29-21:48.) The Hearing Officer made no request for a subsequent written motion at the conference or any time after.
12. On April 11, the Hearing Officer issued the Order, striking the Second Protest as untimely under Rule 506.c. The Hearing Officer stated that the County “ignores the provisions of Commission Rule 506.c” yet made no mention of the County's request for leave to file the Second Protest under that rule or C.R.C.P. 15(a) or both, made at the pre-hearing conference.
13. On April 11, undersigned counsel sent an email to the Hearing Officer and the other parties asking, “Mr. Rouse—do we understand from this order that you are denying the request we made on the record at the pre-hearing conference for leave to file the protest per the last phrase of Rule 506.c, in the event you found such leave necessary?”

14. Having received no response, on April 16, undersigned counsel sent a follow-up email asking, “Mr. Rouse—following up on the below, we are looking at our options with regard to the order striking the county’s protest. The [order] does not mention the county’s request for leave—can you clarify that you are denying the County’s motion for leave to file the protest, made on the record of the PHC on April 5, and the reasons for that denial?” The Hearing Officer did not respond.
15. On April 17, counsel for 8 North sent an email containing lengthy legal argument against the County’s request for leave to file the Second Protest, despite the fact that no briefing on the issue had been requested by the Hearing Officer. In response, undersigned counsel again asked the Hearing Officer for direction whether the request for leave to file the Second Protest had been determined or whether he sought briefing on the issue.
16. As of the date of this Exception, the Hearing Officer has not clarified whether he considered the County’s request for leave to file the Second Protest under Rule 506.c or on what grounds he may have denied that request.

LEGAL STANDARDS

1. Under Section 34-60-106(6), C.R.S., “recommended findings, determinations, or orders of any hearing officer shall not become final until adopted by the commission.”
2. Under Section 24-4-105(14)(a)(II), C.R.S. an exception may be filed seeking agency consideration of an initial determination by a hearing officer within 30 days of the issuance of that order.
3. Under Section 24-4-105(14)(a), C.R.S., “each . . . initial decision [of a hearing officer] *shall* include a statement of findings and conclusions upon *all the material issues* of fact, law or discretion.” (Emphasis added).

ISSUES FOR COMMISSION CONSIDERATION

The County seeks the Commission’s review of the County’s request for leave to file the Second Protest. The County made its request pursuant to the clear language of either C.R.C.P. 15(a) or Rule 506.c, which gives the COGCC discretion to grant leave for a protest filed at a time other than stated in the original Notice of Hearing, or both. Nonetheless, the Hearing Officer either ignored or implicitly denied the request without stating the grounds.

ARGUMENT

- I. The County’s Second Protest was timely.

The Hearing Officer found that “Boulder County did submit a timely protest . . . which was subsequently dismissed by the Hearing Officer.” The Hearing Officer dismissed the County’s original protest because he treated the protest as equivalent to a complaint under the Colorado Rules of Civil Procedure subject to C.R.C.P. 12(b) motions. A copy of the order dismissing the original protest is attached as Exhibit B. The rules of civil procedure apply to commission proceedings so long as they do not conflict with commission rules. Rule 519.a. The County disagrees that C.R.C.P. 12(b) and C.R.C.P. 8 apply to COGCC protests because the principles of “claims for relief” and notice pleading standards conflict with the COGCC Rule 509 requirements for protests by local governments. Nonetheless, the Hearing Officer strictly applied the rules of civil procedure to the original protest but did not apply them to the Second Protest. No COGCC rule specifies the process a party must follow to file an additional or amended protest after dismissal of a timely protest, nor does any agency rule address whether a second or amended protest relates back to the date of the filing of the original protest. Thus, because they do not conflict with any agency rule, the applicable Colorado Rules of Civil Procedure apply to the Second Protest just as they did to the first.

Under C.R.C.P. 15(a), “a party may amend his pleading once as a matter of course at *any time* before a responsive pleading is filed.” (Emphasis added). A motion to dismiss, like that filed by 8 North in response to the County’s initial timely protest, is not a “responsive pleading” under 15(a) and, therefore, leave to file the Second Protest was not required. *See Great v. Mulvihill*, 207 P.3d 918, 922 (Colo. App. 2009) (a C.R.C.P. 12(b)(5) motion is not a responsive pleading under C.R.C.P. 15(a)). An amended pleading is deemed timely as it relates back to the date of filing of the original protest under C.R.C.P. 15(c). Under C.R.C.P. 15(a) and (c), the County’s protest was timely filed because no leave was required and the filing related back to the original filing date.

II. The Hearing Officer erred by requiring a “motion for leave” to file a second protest and then failing to address the County’s request for leave.

Even if leave was required to file the Second Protest, under C.R.C.P. 15(a) “it shall be freely given,” which can occur even after the original pleading has been dismissed. *Davis v. Paolino*, 21 P.3d 870, 873 (Colo. App. 2001) (“A trial court should allow amendment under these circumstances even following its grant of a motion to dismiss.”). The Hearing Officer noted at the pre-hearing conference that the County had not requested leave to file the Second Protest under either C.R.C.P. 15(a) or Rule 506.c. However, even though the County did not believe a request for leave was necessary or required, it did make an oral request for leave at the April 5 conference. *See* Recording at time stamp 21:29-21:48 (“I’d like to make that request now to the extent it’s necessary and if you’d like us to follow up with a written request we’d be happy to do that.”). The Hearing Officer commented that the protest had already been filed and undersigned counsel responded that the Hearing Officer had discretion whether to now accept it or not based on the request for leave. *Id.* The Hearing Officer did not ask for subsequent written filings and took the matter under advisement. *Id.* at 31:10.

The Order does not explain why the Hearing Officer refused to “freely” grant leave to file the Second Protest under C.R.C.P. 15(a) or to exercise his discretion to authorize the protest “as otherwise allowed by the Commission” under Rule 506.c. In fact, the Order does not mention the County’s request for leave to file the Second Protest. After three follow-up requests for clarification, the County still received no response to its request for leave. Therefore, the Order is incomplete and does not meet the standards for hearing officer decisions set by the Colorado APA. *See* § 24-4-105(14)(a), C.R.S. (hearing officer’s initial decisions must make findings of fact on all material issues “of fact, law or discretion”). Moreover, the County cannot determine what its appeal or other rights may be without a clear statement of a determination on its request for leave and the reasoning supporting that result. For these reasons, the Order cannot be adopted by the Commission as the agency’s final ruling on the matter.

III. The issues raised in the Second Protest are important for the Commission’s consideration.

The new legal issue raised in the Second Protest references the language of several oil and gas leases to which the County is the successor lessor and, on information and belief, 8 North is the successor lessee. *See* Exhibit A. The Commission does not interpret lease provisions and the County is not asking it to do so. However, the County, as a mineral lessor and a surface owner, should have the right and ability to present relevant evidence to the commission related to the proposed unit size. The leases constitute evidence of the appropriate unit size for the area and show that a larger unit like that proposed in the Application may damage the County’s correlative mineral and surface rights. The Commission may not ultimately agree with the County’s position, but the merits of the County’s argument are irrelevant to whether the County should be permitted to present its position *at all*. For this reason, these issues are appropriately brought to the Commission in the Second Protest before it grants or denies the Application.

Furthermore, the County’s original protest was dismissed because the Hearing Officer found the protest lacking in factual support for its request to intervene in the matter. The Second Protest, while filed especially to raise the newly-confirmed legal issue, also contains additional factual support for the County’s interest in raising issues with public health, safety, and welfare, and the environment and wildlife in its roles as a mineral owner, landowner and land use regulator. *See, e.g.*, Rule 509.a (giving local governments the opportunity to intervene as of right and without fee). The County has important issues to raise relating to protection of people and the environment in addition to the legal issues with the leases.

IV. Fairness requires leave for Boulder County to file the Second Protest.

Under principles of fairness and equity, the County should be given leave to file the Second Protest to the extent that the Commission finds such leave necessary. First, in its objection to the Second Protest and at the pre-hearing conference, 8 North did not show any

cognizable prejudice that it will suffer by the County filing the Second Protest. The Second Protest was filed five weeks before the scheduled hearing, which has now become four months before the hearing as ultimately continued. While 8 North argued at the pre-hearing conference that it had not heard of the lease issue before and had no time to consider it, 8 North will have several months to consider it before the hearing. Furthermore, the language at issue is in 8 North's leases that it presumably reviewed prior to initiating the spacing unit application and, therefore, it should be amply aware of the issue. Finally, although the Second Protest would be the only protest to the Application and therefore pull it off the consent agenda, the Application is one of four closely related dockets that are expected to be heard together in July due to their inter-related factual and legal issues, together with the Commission's special provision, made by motion and amendment at its December 11, 2017, meeting, for public comment on all four dockets. Therefore, 8 North cannot show cognizable prejudice from allowing the County to file the Second Protest.

Secondly, in its public meetings and in several parts of its procedural rules, the Commission refers to the importance of local government participation in its proceedings. The Second Protest, and the County's presentation of evidence at the hearing, will provide important information regarding public health, safety, and welfare and environmental and wildlife impacts in the Application Lands, particularly where the County owns the vast majority of the Application Lands as preserved, public, open space land.

Finally, the County notes that the confusion over the deadline for filing a protest when a hearing is continued demonstrates that the Commission's forms and rules are not as clear as they should be. Rule 506.c should be clarified to indicate that it applies only to an original, and not to an amended, protest. The Notice of Hearing form should clearly reference Rule 506.c with respect to the protest deadline in case a hearing is continued. Rule 509.a(1) should also make reference to Rule 506.c and the effect of a hearing continuance on the deadline stated clearly in that rule. The County should not be prevented from participating because COGCC practices are not clear.

REQUEST FOR RELIEF

For all of the above reasons, the County makes the following request for relief:

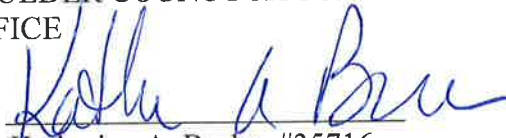
1. That the Commission agree to hold a hearing on the County's request for leave to file the Second Protest;
 - a. the County proposes that 60 minutes would be sufficient for all legal argument, questions and deliberation.
2. That the Commission grant the County leave to file the Second Protest as of the date of its original filing.

Dated this 24th day of April, 2018.

Respectfully submitted,

BOULDER COUNTY ATTORNEY'S
OFFICE

By:



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**ATTORNEYS FOR PROTESTOR
AND INTERVENOR BOULDER
COUNTY**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **BOULDER COUNTY'S EXCEPTION TO HEARING OFFICER ORDER STRIKING SECOND PROTEST BY BOULDER COUNTY** has been mailed or served electronically this 24th day of April, 2018, to the following entities that require notice of such filing and an original and two copies have been sent or filed with the COGCC:

James P. Rouse
Hearing Officer
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