

September 18, 2008

OIL AND GAS DOCKET NO. 04-0256605

COMMISSION CALLED HEARING TO AFFORD MICHAEL JOSEPH PAWELEK AN OPPORTUNITY TO SHOW CAUSE WHY HE, AND ANY ORGANIZATION IN WHICH HE HOLDS A POSITION OF OWNERSHIP OR CONTROL, SHOULD NOT BE DEEMED TO BE SUBJECT TO THE RESTRICTIONS OF TEXAS NATURAL RESOURCES CODE §91.114 (a) - (c) AND STATEWIDE RULE 78 (m)(1) BY REASON OF VIOLATIONS OF COMMISSION RULES FOUND TO HAVE BEEN COMMITTED BY IBC PETROLEUM, INC., IN THE FINAL ORDERS SERVED JANUARY 11, 2007 IN OIL & GAS DOCKET NOS. 04-0247766, 04-0247767, 04-0247768 AND 04-0247783.

APPEARANCES:

FOR RESPONDENT MICHAEL JOSEPH PAWELEK:

John Soule
Michael Joseph Pawelek

FOR THE RAILROAD COMMISSION OF TEXAS:

Susan German

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

REQUEST FOR HEARING FILED:	March 5, 2008
NOTICE OF HEARING:	April 23, 2008
DATE CASE HEARD:	June 25, 2008
PFD PREPARED BY:	Mark Helmueller, Hearings Examiner
PFD CIRCULATION DATE:	September 18, 2008
CURRENT STATUS:	Protested

STATEMENT OF THE CASE

Michael Joseph Pawelek has requested that he be found not to be subject to the restrictions of Texas Natural Resources Code §91.114 (a) - (c) and Statewide Rule 78 (m)(1) by reason of violations of Commission Rules found to have been committed by IBC Petroleum, Inc., in the Final Orders served January 11, 2007 in Oil & Gas Docket Nos. 04-0247766, 04-0247767, 04-0247768 and 04-0247783. The examiner recommends the request be denied as Pawelek was admittedly an officer of IBC Petroleum, Inc. ("IBC") during the time period when IBC was found to have violated Commission Rules and he acknowledges receipt of the notice of hearing in the four Enforcement cases. Accordingly, his request is an impermissible collateral attack on the prior Commission Orders.

AUTHORITY

Texas Natural Resources Code Section 91.114(c) provides:

Regardless of whether the person's name appears or is required to appear on the organization report required by Section 91.142, a person holds a position of ownership or control in an organization if:

- (1) the person is:
 - (A) an officer or director of the organization;
 - (B) a general partner of the organization;
 - (C) the owner of a sole proprietorship organization;
 - (D) the owner of at least 25 percent of the beneficial interest in the organization; or
 - (E) a trustee of the organization; or
- (2) the person has been determined by a final judgment or final administrative order to have exerted actual control over the organization.

Statewide Rule 78(a)(8) sets forth the following definition of officers and owners:

Officers and owners--Any persons owning or controlling an organization including officers, directors, general partners, sole proprietors, owners of more than 25% ownership interest, any trustee of an organization, and any person determined by a final judgment or final administrative order to have exercised control over the organization.

SUMMARY OF PRIOR ENFORCEMENT DOCKETS

Official notice was taken of the evidentiary record, Proposals for Decision and Final Orders in Oil & Gas Docket Nos. 04-0247766, 04-0247767, 04-0247768 and 04-0247783: *Enforcement Actions Against IBC Petroleum, Inc. for violations of Statewide Rules, Various State Tracts and Wells in Redfish Bay, Nueces County, Texas*. (Final Orders entered January 11, 2007). The Final Orders in these dockets are currently on appeal in the Travis County District Court.

The administrative record in these dockets shows that Michael Joseph Pawelek was identified on the Commission Form P-5 (Organization Report) filed by IBC on January 21, 2004 as the Vice President. Pawelek was served with the Complaint and Notice of Hearing in each docket and admitted receiving the Complaint and Notice of Hearing. Pawelek did not attend the hearings.

Collectively, the four dockets found five violations of Statewide Rule 3, relating to signs, 12 violations of Statewide Rule 14(b)(2) relating to failure to plug inactive wells; and 8 violations of Statewide Rule 14(b)(3) related to the failure to perform tests of inactive wells over 25 years in age. The total administrative penalty levied against IBC for the violations is \$117,625.00.

Additionally, Findings of Fact and Conclusions of Law in each docket identified the time period during which the violation of each respective Statewide Rule occurred. This information is summarized in the four tables included below:

Oil & Gas Docket No. 04-0247766

Lease ID	Well	Violation	Time Period of Violation
012788	1	3 (missing sign)	5/22/06 to 9/21/06
076517	6	3 (missing sign)	5/22/06 to 9/21/06
012788	1	14(b)(2) failure to plug	2/1/05 to 10/18/06
043367	3	14(b)(2) failure to plug	2/1/05 to 10/18/06
076517	6	14(b)(2) failure to plug	10/4/04 to 9/21/06
012788	1	14(b)(3) failure to test	5/1/05 to 10/18/06
043367	3	14(b)(3) failure to test	5/1/05 to 10/18/06

Oil & Gas Docket No. 04-0247767

Lease ID	Well	Violation	Time Period of Violation
077615	4	3 (improper sign)	5/22/06 to present
08690	2	14(b)(2) failure to plug	2/19/04 to present
12740	4	14(b)(2) failure to plug	1/31/05 to present
08690	2	14(b)(3) failure to test	5/1/03 to present
12740	4	14(b)(3) failure to test	5/1/05 to present

Oil & Gas Docket No. 04-0247768

Lease ID	Well	Violation	Time Period of Violation
054371	1	14(b)(2) failure to plug	2/1/05 to 10/18/06
11552	1	14(b)(2) failure to plug	2/1/05 to 10/18/06
074631	1	14(b)(2) failure to plug	2/19/04 to 10/18/06
054371	1	14(b)(3) failure to test	5/1/03 to 10/18/06

Oil & Gas Docket No. 04-0247783

Lease ID	Well	Violation	Time Period of Violation
087886	1	3 (incorrect sign)	5/22/06 to present
127065	2	3 (incorrect sign)	5/22/06 to 10/18/06
087886	1	14(b)(2) failure to plug	2/19/04 to present
127065	2	14(b)(2) failure to plug	2/1/05 to 10/18/06
143219	3	14(b)(2) failure to plug	2/1/05 to 10/18/06
087886	1	14(b)(3) failure to test	5/1/03 to present
143219	3	14(b)(3) failure to test	5/1/05 to 10/18/06

Each of the Final Orders adopted a Finding of Fact identifying Pawelek as a person in a position of ownership or control of IBC at the time the violations in the docket were committed. Additionally, a Conclusion of Law was adopted by the Final Order in each docket that as an officer of IBC, Pawelek was subject to the restrictions of Texas Natural Resources Code §91.114(a)(2).

PAWELEK’S POSITION AND ARGUMENT

Pawelek was employed by IBC beginning in July 2000 as the Vice President of Exploration. At that time Lee Roy Billington was the Vice President of Operations for IBC. Pawelek was not listed on the P-5 for IBC and his work was limited to evaluation of the prospects for IBC’s properties. He was a salaried employee and owned no interest in IBC.

In May 2002, Billington left IBC and Pawelek was asked to serve as operations manager. With an accountant hired by IBC, Pawelek began an immediate investigation into the production reports and Commission filings during Billington’s tenure. He found improper production allocation to inactive wells and false H-15 tests which were never actually run. He began fixing the problems, but IBC’s principal investors would not fund all of the necessary tests and operations. Additionally, several wells could not be tested due to shallow water access issues.

After Pawelek was unable to procure the funds from IBC to bring the wells into compliance, he was given authority to put together a sale of a portion of IBC’s working interest in the properties. An agreement was entered into in April 2003 with Cinco Natural Resources (“Cinco”). In the first few months some new wells were drilled. However, IBC stopped payments under the cooperative development agreement shortly thereafter.

Pawelek agreed to be listed on IBC's P-5 as an officer of the company in January 2004. In early 2004 after the collapse of the cooperative development agreement, Cinco and IBC began discussing a sale of all of IBC's working interests. In August 2004, the properties were sold. Pawelek remained with IBC to facilitate the transfer to Cinco. At the time of the sale, IBC and Cinco failed to provide for the recently enacted financial security requirements related to bay and offshore wells. Pawelek admitted that this was an oversight at the time the deal was put together.

Due to complications related to required financial security to be posted, Pawelek became uncomfortable with his continuing designation as an officer with IBC. Pawelek therefore tendered a formal letter of resignation on January 17, 2005. IBC never filed an amended P-5 to remove him as an officer. Pawelek attempted to have himself removed as an officer, but due to the pending Enforcement matters, a P-5 removing him as an officer could not be accepted by the Commission.

Pawelek admitted receiving the Notice of Hearing and Complaint in each of the Enforcement cases. He claims he was told it was not necessary for him to participate in the Enforcement cases by his attorney. Pawelek was told that all of the Enforcement issues would be taken care of through the transfer of wells from IBC to Cinco. Pawelek's attorney appeared in the Enforcement Dockets on behalf of Cinco as an intervenor. No appearance was made on behalf of Pawelek.

Pawelek also asserts that he did not believe the consequences of any Enforcement actions against IBC would have any impact on him personally. He also urges that the language in the notice of hearing in the Enforcement Dockets did not fully apprise him of the potential consequences under Texas Natural Resources Code Section 91.114(c).

Pawelek contends that the prohibition in Texas Natural Resources Code Section 91.114(c) requires a presumption of control. Pawelek argues that the statutory presumption of control can be rebutted by contrary evidence. While admitting he was an officer and was identified on IBC's P-5 Pawelek claims that he never actually exercised a position of control in IBC. Pawelek urges that his role was limited to fixing the problems which arose during Billington's tenure as operations manager. He worked diligently in trying to correct the problems until funding was cut off by IBC's principal investors. He then put together a cooperative development agreement between IBC and Cinco and ultimately created the package to sell all of IBC's interests. He claims he did everything possible to try to rectify the issues but that ultimately the decisions were made by IBC's investors.

Pawelek believes if he had simply resigned from the company, the state would have been forced to plug IBC's wells. He contends his actions left the situation in better shape than the problems he inherited. He argues he should not be tainted as a result of his good faith efforts when he could have just as easily walked away and left the problems to be resolved by the Commission.

EXAMINER'S OPINION

It is uncontested that Pawelek was an officer in IBC from approximately July 2000 until he resigned in January 2005. Additionally, he was listed as an officer on IBC's P-5 in January 2004. As seen in the tables summarizing the violations, each Enforcement Docket has at least one violation which occurred during Pawelek's admitted tenure as an officer of the company.

As to Pawelek's argument that he never exercised control over the company, the time for raising such an argument would have been at the hearings in the Enforcement Dockets against IBC. As an officer in the company, Pawelek acknowledges receiving notice but did not attend the hearings on the advice of his attorney. His attorney, who appeared on behalf of an intervenor, did not enter an appearance for Pawelek. Accordingly, no one contested Pawelek's status as an officer or challenged the Final Orders on his behalf.

Pawelek acknowledges receipt of the Notices of Hearing and Complaints, but claims the language was not sufficient to inform him of the potential consequences to him personally. However, he was sufficiently aware of the severity of the issues presented to immediately contact counsel. His attorney may have given him a false sense of security regarding the consequences of the Enforcement Dockets. This fact does not excuse the failure to appear at the hearing or otherwise operate as a ground under which the Commission can reopen the underlying Enforcement Dockets to consider evidence regarding Pawelek's admitted role as an officer at IBC.

Additionally under *Combs v. State*, 526 S.W.2d 648 (Tex.App. - Austin 1975, writ *ref'd n.r.e.*) *certiorari denied* 96 S.Ct. 2629, 426 U.S. 922, 49 L.Ed.2d 375, Pawelek cannot belatedly challenge the Commission's actions in the Enforcement dockets, including the findings of fact and conclusions of law identifying him as an officer of IBC. As *Combs* notes, a Commission Final Order and the adopted Findings of Fact may not be collaterally attacked in a subsequent Commission proceeding. In other words, because he received notice of the pending Enforcement actions, but opted not to participate, Pawelek cannot in a separate Commission proceeding question the findings and determinations made by the Commission.

Further, even if the Commission were to allow Pawelek an opportunity to address the issue of his status as an officer of IBC, the argument that he was not in a position of control as an officer in IBC is unlikely to be successful. Texas Natural Resource Code Section 91.114(c) clearly defines officers and directors as persons in ownership or control of an organization. There is no language to suggest that a position as an officer or director in an organization creates a rebuttable presumption of ownership or control. Further, there are no Commission decisions or court cases supporting Pawelek's statutory interpretation.

Finally, even if one accepts the rebuttable presumption argument, Pawelek testified that from May 2002 through August 2004 he was responsible for operations at IBC, and was actively engaged in ensuring IBC's compliance with Commission rules. This admission would undermine any claim that Pawelek was not an officer acting in a position of control at IBC.

Accordingly, it is the examiner's recommendation that Pawelek's request not to be subject to the restrictions of Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) by reason of violations of Commission Rules found to have been committed by IBC Petroleum, Inc., in the Final Orders served January 11, 2007 in Oil & Gas Docket Nos. 04-0247766, 04-0247767, 04-0247768 and 04-0247783 be denied.

Based on the record in this docket, the examiner recommends adoption of the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Michael Joseph Pawelek ("Pawelek") was given at least 10 days notice of this proceeding. Pawelek appeared, was represented by counsel, and presented testimony and evidence at the hearing. Susan German, Staff Attorney, Office of General Counsel, Enforcement Section, appeared on behalf of the Commission.
2. Official notice was taken of the evidentiary record, Proposals for Decision and Final Orders in Oil & Gas Docket Nos. 04-0247766, 04-0247767, 04-0247768 and 04-0247783: *Enforcement Actions Against IBC Petroleum, Inc. for violations of Statewide Rules, Various State Tracts and Wells in Redfish Bay, Nueces County, Texas*. (Final Orders entered January 11, 2007). The Final Orders in these dockets are currently on appeal in the Travis County District Court.
 - A. The administrative record in these dockets shows that Michael Joseph Pawelek was identified on the Commission Form P-5 (Organization Report) filed by IBC Petroleum, Inc. ("IBC") on January 21, 2004 as the Vice President.
 - B. Pawelek was served with the Complaint and Notice of Hearing in each docket and admitted receiving the Complaint and Notice of Hearing.
 - C. Pawelek did not attend the hearings.
 - D. Collectively, the four dockets found five violations of Statewide Rule 3, relating to signs, 12 violations of Statewide Rule 14(b)(2) relating to failure to plug inactive wells; and 8 violations of Statewide Rule 14(b)(3) related to the failure to perform tests of inactive wells over 25 years in age. The total administrative penalty levied against IBC for the violations is \$117,625.00.

- E. Each of the Final Orders adopted a Finding of Fact identifying Pawelek as a person in a position of ownership or control of IBC at the time the violations in the docket were committed.
 - F. Each of the Final Orders adopted a Conclusion of Law that the violations committed by IBC constituted acts deemed serious and a hazard to public health and safety.
 - G. A Conclusion of Law was adopted by the Final Order in each docket that as an officer of IBC, Pawelek was subject to the restrictions of Texas Natural Resources Code §91.114(a)(2).
- 3. Pawelek was a Vice President with IBC from his hiring in July 2000 until his resignation on January 17, 2005.
 - 4. While employed as a Vice President, Pawelek was responsible for operations at IBC from May 2002 through August 2004.
 - 5. Violations of Commission rules deemed serious and a hazard to public health and safety were committed by IBC during the time period when Pawelek was a designated officer in the organization responsible for operations.
 - A. In Oil & Gas Docket 04-0247766, findings of fact and conclusions of law determined that IBC violated Statewide Rule 14(b)(2) for Well No. 6, State Tract 397, (RRC Gas Well ID No. 076517), from October 4, 2004 to September 21, 2006.
 - B. In Oil & Gas Docket 04-0247767, findings of fact and conclusions of law determined that IBC violated Statewide Rule 14(b)(2) for Well No. 2, State Tract 416, (RRC Lease ID No. 08690), from February 19, 2004 through the date of the issuance of the proposal for decision.
 - C. In Oil & Gas Docket 04-0247767, findings of fact and conclusions of law determined that IBC violated Statewide Rule 14(b)(3) for Well No. 2, State Tract 416, (RRC Lease ID No. 08690), from May 1, 2003 through the date of the issuance of the proposal for decision.
 - D. In Oil & Gas Docket 04-0247768, findings of fact and conclusions of law determined that IBC violated Statewide Rule 14(b)(2) for Well No. 1, State Tract 395, (RRC Gas Well ID No. 054731), from February 19, 2004 through October 18, 2006.
 - E. In Oil & Gas Docket 04-0247768, findings of fact and conclusions of law determined that IBC violated Statewide Rule 14(b)(3) for Well No. 1, State Tract 395, (RRC Gas Well ID No. 054731), from May 1, 2003 through October 18, 2006.

- F. In Oil & Gas Docket 04-0247783, findings of fact and conclusions of law determined that IBC violated Statewide Rule 14(b)(2) for Well No. 1, State Tract 352, (RRC Gas Well ID No. 087886), from February 19, 2004 through the issuance of the proposal for decision.
- G. In Oil & Gas Docket 04-0247768, findings of fact and conclusions of law determined that IBC violated Statewide Rule 14(b)(3) for Well No. 1, State Tract 352, (RRC Gas Well ID No. 097886), from May 1, 2003 through the issuance of the proposal for decision.

CONCLUSIONS OF LAW

1. Proper notice of hearing was timely issued to the appropriate persons entitled to notice.
2. All things necessary to the Commission attaining jurisdiction have occurred.
3. Findings of Fact and Conclusions of Law adopted by Commission Final Orders entered after an affected person was provided notice by the Commission may not be attacked in a subsequent Commission proceeding under *Combs v. State*, 526 S.W.2d 648 (Tex.App. - Austin 1975, writ *ref'd n.r.e.*) *certiorari denied* 96 S.Ct. 2629, 426 U.S. 922, 49 L.Ed.2d 375.
4. Michael Joseph Pawelek, as an officer IBC Petroleum, Inc., is subject to the restrictions set forth in Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) based on findings of fact and conclusions of law adopted by Commission Final Order entered in Oil & Gas Docket 04-0247766 which determined that IBC violated Statewide Rule 14(b)(2) for Well No. 6, State Tract 397, (RRC Gas Well ID No. 076517), from October 4, 2004 to September 21, 2006.
5. Michael Joseph Pawelek, as an officer IBC Petroleum, Inc., is subject to the restrictions set forth in Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) based on findings of fact and conclusions of law adopted by Commission Final Order entered in Oil & Gas Docket 04-0247767, findings of fact and conclusions of law which determined that IBC violated Statewide Rule 14(b)(2) for Well No. 2, State Tract 416, (RRC Lease ID No. 08690), from February 19, 2004 through the date the proposal for decision was issued.
6. Michael Joseph Pawelek, as an officer IBC Petroleum, Inc., is subject to the restrictions set forth in Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) based on findings of fact and conclusions of law adopted by Commission Final Order entered in Oil & Gas Docket 04-0247767, findings of fact and conclusions of law which determined that IBC violated Statewide Rule 14(b)(3) for Well No. 2, State Tract 416, (RRC Lease ID No. 08690), from May 1, 2003 through the date the proposal for decision was issued.

7. Michael Joseph Pawelek, as an officer IBC Petroleum, Inc., is subject to the restrictions set forth in Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) based on findings of fact and conclusions of law adopted by Commission Final Order entered in Oil & Gas Docket 04-0247768, findings of fact and conclusions of law which determined that IBC violated Statewide Rule 14(b)(2) for Well No. 1, State Tract 395, (RRC Gas Well ID No. 054731), from February 19, 2004 through October 18, 2006.
8. Michael Joseph Pawelek, as an officer IBC Petroleum, Inc., is subject to the restrictions set forth in Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) based on findings of fact and conclusions of law adopted by Commission Final Order entered in Oil & Gas Docket 04-0247768, findings of fact and conclusions of law which determined that IBC violated Statewide Rule 14(b)(3) for Well No. 1, State Tract 395, (RRC Gas Well ID No. 054731), from May 1, 2003 through October 18, 2006.
9. Michael Joseph Pawelek, as an officer IBC Petroleum, Inc., is subject to the restrictions set forth in Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) based on findings of fact and conclusions of law adopted by Commission Final Order entered in Oil & Gas Docket 04-0247783, findings of fact and conclusions of law which determined that IBC violated Statewide Rule 14(b)(2) for Well No. 1, State Tract 352, (RRC Gas Well ID No. 087886), from February 19, 2004 through the date the proposal for decision was issued.
10. Michael Joseph Pawelek, as an officer IBC Petroleum, Inc., is subject to the restrictions set forth in Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) based on findings of fact and conclusions of law adopted by Commission Final Order entered in Oil & Gas Docket 04-0247768, findings of fact and conclusions of law which determined that IBC violated Statewide Rule 14(b)(3) for Well No. 1, State Tract 352, (RRC Gas Well ID No. 097886), from May 1, 2003 through the date the proposal for decision was issued.

CONCLUSION

The examiner recommends that Pawelek's request not to be subject to the restrictions of Texas Natural Resources Code Section 91.114 (a) - (c) and Statewide Rule 78 (m)(1) by reason of violations of Commission Rules found to have been committed by IBC Petroleum, Inc., in the Final Orders served January 11, 2007 in Oil & Gas Docket Nos. 04-0247766, 04-0247767, 04-0247768 and 04-0247783 be denied.

Respectfully submitted,

Mark J. Helmueller
Hearings Examiner