Case No.

903

Application, Transcript,
Small Exhibits, Etc.

DRAFT OF PROPOSED REVISION

OF

NEW MEXICO OIL CONSERVATION COMMISSION RULES ON PROCEDURE, INCORPORATING PROVISIONS FOR HEARINGS BEFORE EXAMINERS

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N-RULES ON PROCEDURE

RULE 1201. NECESSITY FOR HEARINGS.

Except as provided in some general rule herein, before any rule, regulation or order, including revocation, changes, renewal or extension thereof shall be made by the Commission, a public hearing before the Commission or a legally appointed Examiner shall be held at such time and place as may be prescribed by the Commission.

RULE 1202. EMERGENCY ORDERS

Notwithstanding any other provision of these rules, in case an emergency is found to exist by the Commission, which, in its judgment, requires the making of a rule, regulation or order without a hearing having first been had or concluded, such emergency rule, regulation or order when made by the Commission shall have the same validity as if a hearing with respect to the same had been held before the Commission after due notice. Such emergency rule, regulation or order shall remain in force no longer than 15 days from its effective date, and in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective.

RULE 1203. METHOD OF INITIATING A HEARING

The Commission upon its own motion, the Attorney General on behalf of the State and any operator, producer or any other person having a property interest may institute proceedings for a hearing. If the hearing is sought by the Commission it shall be on motion of the Commission and if by any other person it shall be by application. The application in TRIPLICATE shall state (1) the name or general description of the common source or sources of supply affected by the order sought,

unless the same is intended to apply to and affect the entire state, in which event the application shall so state, (2) briefly the general nature of the order, rule or regulation sought, (3) any other matter required by a particular rule or rules, and (4) whether applicant desires a hearing before the Commission or an Examiner, and, if hearing before an Examiner is desired, the time and place applicant prefers the hearing to be held may be stated in the application, and such application shall state a list of the names and addresses of all interested parties insofar as applicant believes.

An application shall be signed by the person seeking the hearing or by his attorney. Unless required by a specific rule, an application need not be verified.

RULE 1204. METHOD OF GIVING LEGAL NOTICE FOR HEARINGS

Notice of each hearing before the Commission and notice of each hearing before an Examiner shall be given by personal service on the person affected or by publication once in a newspaper of general circulation published at Santa Fe, New Mexico, and once in a newspaper of general circulation published in the county or each of the counties, if there be more than one, in which any land, oil or gas or other property which may be affected shall be situated.

RULE 1205. CONTENTS OF NOTICE OF HEARING

Such notice shall be issued in the name of "The State of New Mexico" and shall be signed by two members of the Commission or by the Secretary of the Commission, and the seal of the Commission shall be impressed thereon.

The notice shall specify whether the case is set for hearing before the Commission or before an Examiner and shall state the number and style of the case and the time and place of hearing and shall briefly state the general nature of the order or orders, rule or rules, regulation or regulations to be promulgated or effected. The notice shall also state the name of the petitioner or applicant, if any, and unless the contemplated order, rule or regulation is intended to apply to and affect the entire State it shall specify or generally describe the common source or sources of supply which may be affected by such order, rule or regulations.

RULE 1206. SERVICE OF NOTICE

Personal service of the notice of hearing may be made by any agent of the Commission or by any person over the age of 18 years in the same manner as is provided by law for the service of summons in civil actions in the district courts of this State. Such service shall be complete at the time of such personal service or on the date of publication, as the case may be. Proof of service shall be by the affidavit of the person making personal service or of the publisher of the newspaper in which publication is had. Service of the notice shall be made at least 10 days before the hearing.

RULE 1207. SUPPLEMENTAL NOTICES

(a) Failure to Give or Receive a Supplemental Notice. Failure to give or receive any supplemental notice required by these rules shall not be grounds for any complaint, shall not affect the jurisdiction of the Commission, the right of the Commission or any Examiner to conduct any hearing, or the validity of any order or other action taken pursuant to or as a result of any matter or proceeding.

(b) Mailing List. The Secretary of the Commission shall maintain an official mailing list of the names and addresses of persons who have filed a written request to be included on such list. Any person may at any time file with the Secretary of the Commission a written request to be included on or deleted from the mailing list. A request to be included on such list shall specify the address of the person making the request and such person may specify another address at any time, and from time to time, by written notice filed with the Secretary of the Commission. The Secretary of the Commission may at any time, and from time to time, revise the mailing list by mailing to the persons named thereon an application blank and shall include on the revised mailing list only those persons who return such blank.

(c) Supplemental Notice of Hearings. Not less than 10 days before the date on which any hearing is set, a supplemental notice of such hearing shall be given to each person included on the mailing list of the Commission. The supplemental notice of each hearing shall contain an abbreviated statement of the information

filed with the Commission, at least three days prior to the date set for such hearing, a written objection to such hearing being held before an Examiner. In such event the matter or proceeding shall be placed on the regular docket of the Commission for hearing, and the Secretary of the Commission shall promptly give a supplemental notice of such continuance to the applicant or petitioner and to each person who has entered an appearance in such matter or proceeding.

RULE 1210. CONDUCT OF HEARINGS

Hearings before the Commission or any Examiner shall be conducted without rigid formality. A transcript of testimony shall be taken and preserved as a part of the permanent record of the Commission. Any person testifying in response to a subpoena issued by the Commission and any person seeking to testify in support of an application or motion or in opposition thereto shall be required to do so under oath. However, relevant unsworn comments and observations by any interested party will be designated as such and included in the record. Comments and observations by representatives of operators' committees, the United States Geological Survey, the United States Bureau of Mines, the New Mexico Bureau of Mines and other competent persons are welcomed. Any Examiner legally appointed by the Commission may conduct such hearings as may be referred to such Examiner by the Commission or the Secretary thereof.

RULE 1211. STATUTORY POWERS AS TO WITNESSES, RECORDS, ETC.

The Commission or any member thereof has statutory power to subpoena witnesses and to require the production of books, papers, records, etc. A subpoena will be issued by the Commission for attendance at a hearing upon the written request of any person interested in the subject matter of the hearing. In case of the failure of a person to comply with the subpoena issued by the Commission, an attachment of the person may be issued by the district court of any district in the State, and such court has powers to punish for contempt. Any person found guilty of swearing falsely at any hearing may be punished for contempt.

RULE 1212. RULES OF EVIDENCE

Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of

evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

RULE 1213. EXAMINERS' QUALIFICATIONS AND APPOINTMENT

The Commission shall by ex parte order designate and appoint not more than four individuals to be examiners. Each Examiner so appointed shall be a member of the staff of the Commission, but no Examiner need be a full time employee of the Commission. The Commission may by ex parte order designate and appoint a successor to any person whose status as an Examiner is terminated for any reason. Each individual designated and appointed as an Examiner must have at least six years practical experience as a geologist, petroleum engineer or licensed lawyer, or at least two years of such experience and a college degree in geology, engineering or law.

RULE 1214. REFERRAL OF CASES TO EXAMINERS

Either the Commission or the Secretary thereof may refer any matter or proceeding to any legally designated and appointed Examiner for hearing in accordance with these rules. The examiner appointed to hear any specific case shall be designated by name.

RULE 1215. EXAMINER'S POWER AND AUTHORITY

The Commission may, by ex parte order, limit the powers and duties of the Examiner in any particular case to such issues or to the performance of such acts as the Commission deems expedient; however, subject only to such limitations as may be ordered by the Commission, the Examiner to whom any matter or proceeding is referred under these rules shall have full authority to hold hearings on such matter or proceeding in accordance with and pursuant to these rules. The Examiner shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence, subject to such objections as may be imposed, and shall cause a

complete record of the proceeding to be made and transcribed and shall certify same to the Commission as hereinafter provided.

RULE 1216. HEARINGS WHICH MUST BE HELD BEFORE COMMISSION

Notwithstanding any other provision of these rules, the hearing on any matter or proceeding shall be held before the Commission (1) if the Commission in its discretion desires to hear the matter, or (2) if the application or motion so requests, or (3) if any party who may be affected by the matter or proceeding files with the Commission more than three days prior to the date set for the hearing on the matter or proceeding a written objection to such matter or proceeding being heard before an Examiner, or (4) if the matter or proceeding is for the purpose of amending, removing or adding a statewide rule.

RULE 1217. EXAMINER'S MANNER OF CONDUCTING HEARING, DISQUALIFICATION

No Examiner shall conduct any hearing in any matter or proceeding for which the Examiner has conducted any part of the investigation, nor shall any Examiner perform any prosecuting function. An Examiner conducting a hearing under these rules shall conduct himself as a disinterested umpire. Any Examiner who cannot accord a fair and impartial hearing and consideration to the parties in any matter or proceeding referred to such Examiner, or who is otherwise disqualified to conduct the hearing and consider the matter or proceeding, shall so advise the Secretary of the Commission and shall withdraw from such matter or proceeding.

In the event the applicant or petitioner, or any other party who has entered an appearance in any matter or proceeding, concludes that the Examiner to whom the matter or proceeding has been referred is for any reason disqualified to act therein, the party contending that such disqualification exists shall file with the Commission an affidavit stating that such party believes the Examiner to be disqualified. Such affidavit may be filed at any time prior to three days before the date such matter or proceeding is set for hearing.

In the event any Examiner disqualifies himself in any matter or proceeding referred to such Examiner, or if the Commission deems such Examiner to be

disqualified, or if any party to such matter or proceeding has filed an affidavit of such disqualification as hereinabove authorized, the Commission or the Secretary thereof shall promptly refer the matter or proceeding to another Examiner for hearing, or set such matter or proceeding for hearing before the Commission in accordance with these rules. In such event, the Secretary shall give a supplemental notice of such action to each party who has entered an appearance in such matter or proceeding.

RULE 1218. REPORT AND RECOMMENDATIONS RE EXAMINER'S HEARINGS

Upon the conclusion of any hearing before an Examiner, the Examiner shall promptly consider the proceedings in such hearing, and based upon the record of such hearing the Examiner shall prepare his written report and recommendations for the disposition of the matter or proceeding by the Commission. Such report and recommendations shall either be accompanied by a proposed order or shall be in the form of a proposed order, and shall be submitted to the Commission with the certified record of the hearing.

A supplemental notice consisting of a copy of the proposed order, with such other report and recommendations as the Examiner may submit to the Commission, shall be given to each person who entered an appearance of record at the hearing, and no order in such matter or proceeding shall be entered by the Commission until at least ten days after such supplemental notice has been given.

Any party who would be affected by such proposed order may submit written exceptions, objections and suggestions to such order and to any further report and recommendations of the Examiner, at any time before an order is rendered by the Commission in such matter or proceeding. All such written exceptions, objections and suggestions received by the Commission in connection with any matter or proceeding shall be filed by the Commission as a part of the permanent record of such matter or proceeding.

RULE 1219. DISPOSITION OF CASES HEARD BY EXAMINERS.

After receipt of the report and recommendations of the Examiner, the Commission shall either enter its order disposing of the matter or proceeding, or

refer such matter or proceeding to the Examiner for the taking of additional evidence.

RULE 1220. DE NOVO HEARING BEFORE COMMISSION

When any order has been entered by the Commission pursuant to any hearing held by an Examiner, any party adversely affected by such order shall have the right to have such matter or proceeding heard de novo before the Commission, provided that within 30 days from the date such order is rendered such party files with the Commission a written application for such hearing before the Commission. If such application is filed, the matter or proceeding shall be set for hearing before the Commission at the next regular hearing date following the expiration of fifteen days from the date such application is filed with the Commission. In such hearing before the Commission, the Commission shall be entitled to receive and consider the record of the hearing conducted by the Examiner in such matter or proceeding. Any person affected by the order or decision rendered by the Commission after hearing before the Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1222, and said Rule 1222 together with the law applicable to rehearings and appeals in matters and proceedings before the Commission shall thereafter apply to such matter or proceeding.

RULE 1221. NOTICE OF COMMISSION'S ORDERS

Within 10 days after any order has been rendered by the Commission, a supplemental notice consisting of a copy of such order shall be given to each person who has entered an appearance of record in the matter or proceeding pursuant to which such order is rendered.

RULE 1222. REHEARINGS

Within 20 days after entry of any order or decision of the Commission, any person affected thereby may file with the Commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous. The Commission shall grant or refuse any such application in whole or in part within 10 days after the same is filed and failure to act thereon within such period shall be deemed a refusal

thereof and a final disposition of such application. In the event the rehearing is granted, the Commission may enter such new order or decision after rehearing as may be required under the circumstances.

RULE 1223. CHANGES IN FORMS AND REPORTS

Any changes in the forms and reports or rules relating to such forms and reports shall be made only by order of the Commission issued after due notice and hearing.

June 21, 1955
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RULE 201 Filing Pleadings; Copy Delivered to adverse Party or Parties. When any party to a hearing files any pleading, plea or motion of any character (other than application for hearing) which is not by law or by these rules required to be served upon the adverse party or parties, he shall at the same time either deliver or mail to the adverse party or parties who have entered their appearance therein, or their respective attorneys of record, a copy of such pleading, plea or motion. If there be more than four adverse parties who have entered their appearance in said hearing, four copies of such pleading shall be deposited with the Secretary of the Commission and the party filing them shall inform all adverse parties who have entered their appearance, or their attorneys of record, that such copies have been deposited with the Secretary of the Commission. These copies shall be delivered by the Secretary to the first four applicants entitled thereto.

SENATE BILL NO. 229

Introduced by

F. J. Danglade

AN ACT

RELATING TO THE NEW MEXICO OIL CONSERVATION COMMISSION; GRANTING AUTHORITY TO THE COMMISSION TO APPOINT EXAMINERS TO CONDUCT HEARINGS WITH RESPECT TO MATTERS COMING BEFORE THE COMMISSION AND TO MAKE FINDINGS AND RECOMMENDATIONS WITH RESPECT THERETO.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. In addition to the powers and authority, either express or implied, granted to the Oil Conservation Commission by virtue of the statutes of the State of New Mexico, the Commission is hereby authorized and empowered in prescribing its rules of order or procedure in connection with hearings or other proceedings before the Commission to provide for the appointment of one or more examiners to be members of the staff of the Commission to conduct hearings with respect to matters properly coming before the Commission and to make reports and recommendations to the Commission with respect thereto. Any member of the Commission may serve as an examiner as provided herein. The Commission shall promulgate rules and regulations with regard to hearings to be conducted before examiners and the powers and duties of the examiners in any particular case may be limited by order of the Commission to particular issues or to the performance of particular acts. In the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence subject to such objections as may be imposed, and shall cause a complete record of the proceeding to be made and transcribed and shall certify the same to the Commission for consideration together with the report of the examiner and his recommendations in connection therewith. The Commission shall base its decision rendered in any matter or proceeding heard by an examiner, upon the transcript of testimony and record made by or under the supervision of the examiner in connection with such proceeding, and such decision shall have the same force and effect as if said hearing had been conducted before the members of said Commission; PROVIDED, HOWEVER, no matter or proceeding referred to an examiner shall be heard by such examiner where any party who may be affected by any order entered by the Commission in connection therewith, shall object thereto within three days prior to the time set for hearing, in which case such matter shall be heard at the next regular hearing of the Commission. When any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party adversely affected shall have the right to have said matter heard de novo before the Commission upon application filed with the Commission within 30 days from the time any such decision is rendered.

June 1, 1955

Dear Bill:

In yesterday's mail I circulated to the other Committee members a draft of a revision of the procedural rules integrating proposed rules for the Examiner System of Hearing.

A copy of the letter of transmittal and a copy of the proposed revision is attached for your information.

As indicated by the transmittal letter, this draft is intended merely as a jumping off place for the Committee. I thought it would be helpful in getting things started. I assume you will give Bill Kitts any suggestions or ideas you may have on the subject; however, I would appreciate hearing from you directly if you have time.

Sincerely,

TC:MK

Case 703

The Ohio Oil Co.

Legal Department

W. Hume Everett
Thomas K. McElroy
J. O. Terrell Couch
Attorneys

P. O. Box 3128
Houston, Texas

August 1, 1955

Re: New Mexico Oil Conservation Commission
Rules on Procedure

Mr. W. B. Macey
New Mexico Oil Conservation Commission
P. O. Box 871
Santa Fe, New Mexico

Dear Sir:

For your information I enclose a copy of my letter dated August 1, 1955, to Mr. Willard F. Kitts, containing my comments and observations concerning the suggestions and objections which have been made regarding the proposed revision of the Rules of Procedure.

Because of Mr. E. H. Foster's letter dated July 25, I felt it appropriate to furnish to him a copy of my comments and observations pertaining to his objections to Rules 1217 and 1220. I have, therefore, sent to him a copy of that portion of the enclosed letter which relates to his objections.

Very truly yours,

J. O. Terrell Couch

TC:MK
Enc.1

The Ohio Oil Co.

Legal Department

W. Hume Everett
Thomas K. McElroy
J. O. Terrell Couch
Attorneys

August 1, 1955

P. O. Box 3128
Houston, Texas

Mr. Willard F. Kitts
P. O. Box 664
Santa Fe, New Mexico

Dear Sir:

My comments and observations on the suggestions and objections made by the designated parties to the proposed revision of the Commission's Rules on Procedure are set out below. The suggestions and objections are discussed in the order in which they were presented to the Commission at the July 14 hearing.

MAGNOLIA PETROLEUM COMPANY: (Mr. Ross Madole)

Proposed new rule: I have no objection to inserting a new rule such as that suggested by Mr. Madole requiring copies of pleadings to be furnished to or made available to adverse parties who have entered their appearance of record in a particular hearing. However, it seems to me that the rule proposed by Mr. Madole should be redrafted so that only such adverse parties as have stated their addresses in the record of the hearing will be entitled to have a copy of the pleadings furnished to or made available to them. The mailing of a copy of the pleading or of the notice referred to in the rule, addressed to the adverse party at the address stated by such party in the record of the hearing should be specified as sufficient compliance with the rule. That part of the rule which requires four copies of a pleading to be deposited with the Secretary should specify that such four copies must be extra copies for the adverse parties in addition to the copies required for the Commission's own use. Consideration should be given to changing the proposed rule to refer to "any party to a matter or proceeding set for hearing before the Commission or an Examiner" rather than "any party to a hearing." The statute and present rules use the term "application for rehearing", rather than motion for rehearing. Perhaps, therefore, the proposed new rule should refer to "any written pleading, motion or application of any character filed in any such matter or proceeding, except the initial application for hearing."

Rule 1221: Magnolia's suggestion that Rule 1221 be changed to require the Commission to mail a copy of each order to each party who has entered an appearance of record would, in my opinion, place too great a burden on the Commission. If Magnolia's suggestion is followed, the validity of an order might be

dependent upon the fact question of whether the Commission mailed copies of the order as required by such rule. Of course, there is at present not even a statement in the Rules that the Commission should mail copies of its orders to the parties. Rule 1221, as proposed by the Committee, provides for copy of the order to be mailed to each party; however, it is true that the Rules as proposed by the Committee do not specify any penalty for failure to mail such copy, and by express provisions of those Rules, the validity of the order would be unaffected by the failure of the Commission to mail a copy of an order to a party, or the failure of a party to receive a copy of the order. As I recall, it was the consensus of opinion of the Committee members present at the June 14 Committee meeting that a willful failure or refusal to mail a copy of an order to a party within the specified 10-day period would likely be grounds for equitable relief. I doubt that the Commission should extend an opportunity to attack the Commission's orders on the alleged ground that a copy of the order was not mailed to such party.

Magnolia objects to the use of the term "supplemental notice" in Rule 1221 proposed by the Committee. I take the blame for using that term, and agree that a copy of an order is not literally a "supplemental notice." The term was used as an expedient method of invoking the new supplemental notice procedure set up in Rule 1207. The term "supplemental notice" was used in the same manner and for the same purpose in the second paragraph of Rule 1218 proposed by the Committee. Any improvement of language is invited. However, if the term is discarded in Rule 1221, I think it should also be discarded in Rule 1218.

Rule 1219: I agree with the substance of Magnolia's suggestion. However, I suggest Magnolia's proposed language be changed to avoid the possibility of a contention that the rule would require the Commission to dispose of a case immediately upon the expiration of the 10-day period. Following the substance of Magnolia's suggestion, I believe the proposed Rule 1219 could be improved by changing the beginning part to read:

> "After the expiration of 10 days from the date the supplemental notice required by Rule 1218 has been given, the Commission shall either enter its order disposing of the matter or proceeding, or * * *."

SHELL OIL COMPANY: (Mr. Ed Nestor)

Rule 1216: Although Shell suggests that items (2) and (3) be eliminated from the rule proposed by the Committee, those items are in substance required by S.B. 229. As to Shell's other suggestion concerning this rule, I believe it is preferable for the Commission to have the right to call a hearing and have it held before an Examiner if the Commission desires to do so, unless an affected party objects or unless the purpose of the hearing is to amend, remove or add a statewide rule; therefore, I am of the opinion that Shell's proposal to the contrary should not be accepted.

Rule 1217: It seems to me that the answer to Shell's question concerning this rule is that if the disqualification of the Examiner is discovered by a party later than three days before the hearing, such party may obtain relief in one of the following ways: (1) the Examiner may disqualify himself at the request of such party; (2) the Commission may declare the Examiner to be disqualified; or (3) the party may proceed with the hearing either with or without protest and thereafter obtain a de novo hearing before the Commission as authorized by S.B. 229.

Rule 1220: The de novo hearing provided for in the rule is, of course, statutory, and Shell's suggestion to eliminate it must, therefore, be disregarded.

Rule 1203: Shell's objection to item (4) is answered by Rule 1201 which empowers the Commission to prescribe the time and place of hearing; whereas, item (4) in Rule 1203 merely authorizes an applicant to state a preference as to the time and place of hearing. The Commission, while having the benefit of the stated preference, is certainly not obligated to comply with the applicant's wishes on the subject.

EL PASO NATURAL GAS COMPANY: (Mr. Ben Howell)

Rule 1215: Mr. Howell questions whether the language used in the rule empowers the Examiner to rule on and to exclude evidence offered at a hearing. I am inclined to think that the power "to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing" does include the power to rule on and exclude evidence. In any event, the language is verbatim from the statute, and it is probable that in most, if not all, hearings the Examiners will prefer not to exclude evidence, but will admit it subject to objection. Under the circumstances, I do not feel it necessary to change the rule proposed by the Committee, although I have no objection to a change such as has been suggested by Mr. Howell.

HUMBLE OIL & REFINING COMPANY: (Mr. Clarence Hinkle)

Rule 1213: The proviso which Humble recommends be added to this rule is appropriate and I concur that the rule should be amended to specifically recognize that the qualifications of an Examiner stated in the rule shall not prevent any member of the Commission from serving as an Examiner as authorized by S.B. 229.

PHILLIPS PETROLEUM COMPANY: (Mr. E. E. Foster)

Rule 1217: Mr. Foster's two objections to this rule are, in my opinion, without merit.

In order to afford added confidence in the Examiner system, it seems logical to me to provide some method whereby a party who believes an Examiner to be disqualified may avoid a hearing before that Examiner without precluding the holding of the hearing before another Examiner. Although I did not initially favor giving a party the power to disqualify an Examiner as a matter of right merely by filing an affidavit, I understand that the identical procedure is provided for disqualifying judges in the courts of the State of New Mexico. Certainly, the procedure is just as acceptable as a means for disqualifying an Examiner appointed by this Commission. I have no fear that a party "will run the whole string out" [Tr. 9, Case 903, July 14, 1955 Hearing], as Mr. Foster puts it, by filing successive affidavits of disqualification, for I do not anticipate that a party will execute an affidavit that he "believes the Examiner to be disqualified" unless the party actually does believe that to be the case; further, I am sure that the Commission would prevent any such dilatory tactics by setting the matter for a hearing before the Commission as authorized in the last paragraph of Rule 1217.

The first sentence of the rule certainly does not result in "disqualifying a man because he happened to be well informed about the matter on which he was going to conduct the hearing." [Tr. 9, supra.] That sentence reads:

> "No Examiner shall conduct any hearing in any matter or proceeding for which the Examiner has conducted any part of the investigation, nor shall any Examiner perform any prosecuting function."

The sentence quoted merely applies to the Examiner what I understand to be the present attitude of the Commission, assuring that the person conducting a hearing shall be and remain nonpartisan. I think it is of great importance in building and maintaining confidence in the administrative system that the parties be assured of impartiality of the hearing officer. If Mr. Foster's objection is to the draftsmanship rather than the purpose of the above quoted provision, perhaps he will offer a proposed redraft of the sentence at the request of the Committee or the Commission.

Rule 1220: I am of the opinion that Mr. Foster's objections to this rule are without merit.

Although I have read carefully my copy of Mr. Foster's detailed letter of July 25, 1955 to Mr. W. B. Macey, I confess I am still unable to see the "very serious question as to whether or not an order made by this Commission upon a de novo hearing is subject to a judicial review within the provisions of §69-223 of the Statutes." [Tr. 10, supra.] The pertinent part of the statute referred to reads as follows:

> "65-3-22. Rehearings - Appeals. - (a) within twenty (20) days after entry of any order or decision of the commission, any person affected thereby may file with the commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous."

Any such question, "serious" or otherwise, dissolves in the face of the broad and plain language of that statute, which was the law of this State when S.B. 229 was passed by the last Legislature, and which remains the law of this State. An order or decision of the Commission, whether entered at the conclusion of a hearing initially called and held before the Commission, or at the conclusion of a de novo hearing held pursuant to S.B. 229, is nevertheless "any order or decision of the Commission." There is no statute which states that the plain words of §65-3-22 do not mean what they say.

If Mr. Foster's reasoning is followed, it would be necessary to conclude that the losing party in a hearing before an Examiner, having the right under S.B. 229 to a de novo hearing, could, if successful in the de novo hearing, thereby preclude the opposing party from obtaining judicial review. Certainly, the Legislature did not intend that the party who loses in a hearing before an Examiner shall have the power by his voluntary action to control the successful party's right to judicial review in the event the decision should be reversed by the Commission.

There is no statute which states that when an order or decision is entered on the basis of a hearing before an Examiner a party must elect whether to apply for a de novo hearing as authorized by S.B. 229, or a rehearing as authorized by the statute quoted above. Senate Bill 229 guarantees the right to a de novo hearing. It does not repeal the statute quoted above. The two statutes fit together. Supposed conflicts may be argued only on the basis of implications. Mr. Foster implies that since S.B. 229 does not include any provisions for a rehearing and appeal to the courts, the Legislature must have intended that there be no such right of rehearing and appeal after a de novo hearing pursuant to S.B. 229, yet he would apparently recognize a right to rehearing and appeal from an order based on a hearing before an Examiner under S.B. 229. Is it not more logical to realize that a provision included in S.B. 229, authorizing rehearing and appeal to the courts from an order of the Commission, would have merely been an unnecessary repetition of rights already granted in §65-3-22?

It seems to me probable that if a party attempted to appeal to the district court from an order entered on the basis of a hearing before an Examiner, without having sought the de novo hearing guaranteed by S.B. 229, such party would be met with the assertion that he had failed to exhaust his administrative remedy. However, if such party applied for the de novo hearing, he would, in Mr. Foster's judgment, lose his right to judicial review. We do not have the benefit of Mr. Foster's comments on this particular point, but I should think all would agree that we should not attribute to the Legislature an intention to create such a dilemma, especially when the dilemma does arise

not from the language of the statutes but could only arise by means of implications drawn from the failure of the Legislature to reaffirm in S.B. 229 a right of judicial review already on the statute books.

I agree with Mr. Foster that the Commission cannot by rule extend the statutory right of judicial review. No member of this Committee has ever recommended that the Commission attempt to do so. We have recommended a rule which states what we considered to be, and what I still consider to be, the clear and logical effect and operation of S.B. 229 and §65-3-22.

Mr. Foster has ably demonstrated to us, both in his letter of July 25 and by his statements in the record of Case 903, various ingenious lines of argument which might be advanced to limit and restrict by implication the provisions of S.B. 229 and §65-3-22. If initially it was not essential for the Commission to adopt a rule expressing its understanding of those two statutes, it is my firm conviction that the Commission should under the existing circumstances adopt such a rule. To fail to do so would be to subscribe to or surrender to the lines of argument presented. That would truly result in "confusion" and "misunderstanding". When the Commission makes its position clear by the adoption of a rule on this subject, since admittedly the rule cannot deprive anyone of a statutory right, Mr. Foster and any other person may proceed to assert such rights as they have under the statute without regard to any rule which is contrary to the statute.

I favor the retention of Rule 1221 as recommended by the Committee in its initial report. I am forwarding to Mr. Foster a copy of my comments on his objections.

MR. ROSS MALONE:

Rules 1204 and 1209: It seems to me that the objection of Mr. Malone can be met by adding to the sentence which is Rule 1204 the following phrase:

> "provided, however, that when legal notice of a hearing has been given once as provided by law and by this rule, such hearing may be continued as authorized in Rule 1209 by the person presiding at such hearing, and in such event no further notice of such hearing shall be required under this Rule 1204."

I discussed with Mr. Malone the conflict which he believes may exist between Rules 1204 and 1209, and requested him to furnish to the Committee any specific suggestions or wording that he may have. I have just received his letter of July 28, 1955, a copy of which has been directed to each of the other members of the Committee and to Mr. John W. Gurley. Although I have not had time to analyze the letter, I feel sure no additional comment from me will be required.

MR. W. D. GIRAND, JR.:

Rule 1202: The 15-day period for emergency orders is, of course, statutory, and Mr. Girand's suggestion that the period be extended to 30 days cannot be followed.

Rule 1207: It is my opinion that if the rule is changed as suggested by Mr. Girand, the validity of the Commission's orders would be unnecessarily rendered vulnerable to attack on the grounds that the Commission had failed to give the supplemental notice provided for.

Rule 1216: It is my opinion that if the Commission desires to hear any matter or proceeding properly commenced before it, the Commission has the right to do so and cannot be compelled to refer the matter to an Examiner. Therefore, I recommend that Mr. Girand's suggestion on this rule not be followed.

Rule 1217: As I have indicated above, I am of the opinion that the first sentence of this rule will assist in developing confidence in the Examiner system by assuring the parties that they will have the right to have their hearings conducted by an impartial official. I, therefore, oppose deleting the first sentence of this rule.

Mr. Girand's second suggestion concerning this rule is, I believe, satisfactorily taken care of in the last sentence of the second paragraph of the rule, which states that the disqualification affidavit may be filed at any time prior to three days before the date set for hearing, although the Examiner may thereafter disqualify himself or be disqualified by the Commission.

Rule 1218: Although it might be beneficial to all parties to receive a copy of any exceptions, suggestions and objections filed by other parties under Rule 1218 at the conclusion of a hearing before an Examiner, it appears doubtful that such information could be exchanged in time to be of any great benefit, unless action on the Examiner's report is postponed for a greater length of time. If a provision for such exchange of copies is added, the rule should require that such copies be sent only to the adverse parties who had entered an appearance and stated their addresses in the record of the hearing. The rule should specifically state that mailing of such copies to such party at such address will constitute compliance with the provision for furnishing copies and, as in the new rule suggested by Mr. Madole, some provision should be included to cover the case in which there are numerous parties.

Actually, it seems to me that the procedure for exchanging copies might be somewhat cumbersome and might delay the rendition of orders in such cases. Since such exceptions, suggestions and objections as are submitted must be filed as a part of the permanent record of the matter or proceeding, any party who desired to obtain a copy could do so in time to take such action as the party might desire subsequent to the order. I doubt the advisability of following Mr. Girand's proposal regarding Rule 1218.

Rule 1219: The substance of Mr. Girand's suggestion concerning this rule is, in my opinion, beneficial. If the rule proposed by the Committee is changed, I would suggest using the language "for further hearing" instead of the language "for the taking of additional evidence". This would follow the substance of Mr. Girand's suggestion without requiring the Commission to enter a formal order on the subject.

Rule 1220: Mr. Girand's suggestions regarding this rule cannot be followed because of the provisions of S. B. 229.

I regret that other commitments will prevent me from attending the August 17 meeting of the Commission and will also prevent me from meeting with the Committee prior to that date. However, I hope the comments and observations in this letter will be of assistance to the Committee and to the Commission in making the necessary determinations concerning the revision of the Procedural Rules.

Very truly yours,

J. O. Terrell Couch

TC:MK

cc - Hon. John F. Simms
Governor of the State of New Mexico
Santa Fe, New Mexico

Hon. E. S. Walker
Commissioner of Public Lands
Santa Fe, New Mexico

Mr. W. B. Macey
New Mexico Oil Conservation Comm.
P. O. Box 871
Santa Fe, New Mexico

Mr. J. W. Gurley
New Mexico Oil Conservation Comm.
P. O. Box 871
Santa Fe, New Mexico

Mr. Jason W. Kellahin
P. O. Box 597
Santa Fe, New Mexico

Mr. George W. Selinger
Skelly Oil Company
P. O. Box 1650
Tulsa 2, Oklahoma

Mr. Jack M. Campbell
J. P. White Building
Roswell, New Mexico

Mr. John Woodward
Amerada Petroleum Corporation
P. O. Box 2040
Tulsa 1, Oklahoma

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

July 22, 1955

COPY

Mr. Terrell Couch
Ohio Oil Company
P.O. Box 3128
Houston, Texas

Dear Mr. Couch:

I enclose a copy of the July 14th hearing of Case 903 regarding the Rules on Procedure.

We would appreciate it if you would give this transcript your early attention and forward to us your recommendations and, if possible, a rough draft of Section "N" of the Commissions's Statewide Rules and Regulations.

Very truly yours,

Charles M. Reider
District Engineer

CMR:brp
Enclosure

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

July 22, 1955

COPY

Mr. George W. Selinger
Skelly Oil Company
P.O. Box 1650
Tulsa 2, Oklahoma

Dear Mr. Selinger:

I enclose a copy of the July 14th hearing of Case 903 regarding the Rules on Procedure.

We would appreciate it if you would give this transcript your early attention and forward to us your recommendations and, if possible, a rough draft of Section "N" of the Commission's Statewide Rules and Regulations.

Very truly yours,

Charles M. Reider
District Engineer

CMR:brp
Enclosure

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

July 22, 1955

COPY

Mr. John Woodward
Amerada Petroleum Corporation
P.O. Box 2040
Tulsa 1, Oklahoma

Dear Mr. Woodward:

I enclose a copy of the July 14th hearing of Case 903 regarding the Rules on Procedure.

We would appreciate it if you would give this transcript your early attention and forward to us your recommendations and, if possible, a rough draft of Section "N" of the Commission's Statewide Rules and Regulations.

Very truly yours,

Charles M. Reider
District Engineer

CMR:brp
Enclosure

PHILLIPS PETROLEUM COMPANY

AMARILLO, TEXAS

LEGAL DEPARTMENT
RAYBURN L. FOSTER
VICE PRESIDENT
AND GENERAL COUNSEL
HARRY D. TURNER
GENERAL ATTORNEY

AMARILLO DIVISION
E. H. FOSTER
CHIEF ATTORNEY
CLIFFORD J. ROBERTS
C. REX BOYD
JACK RITCHIE
THOMAS M. BLUME
JOE V. PEACOCK
WILLIAM M. COTTON
STAFF ATTORNEYS

July 25, 1955

Re: Proposed Rules of Procedure

Mr. W. B. Macey
New Mexico Oil Conservation Commission
Santa Fe, New Mexico

Dear Sir:

The Commission has submitted a draft of a proposed revision of Rules 1201-1223, inclusive, of the Rules of Procedure of the Commission, incorporating provisions for hearings before examiners.

A revision of the Rules of Procedure is necessitated by the enactment by the 1955 Legislature of New Mexico of Senate Bill 229, Chapter 235, Laws of New Mexico 1955, providing for the appointment of examiners to conduct hearings on matters coming before the Commission.

I wish to comment on Rules 1217 and 1220. I have heretofore stated my objections to Rule 1217. I shall briefly restate them here and then discuss Rule 1220. Rule 1217 is objectionable on principle.

Knowledge of the Facts Should Not Be a Disqualifying Cause.

One of the objectionable features of Rule 1217 is found in this language:

> "No examiner shall conduct any hearing in any matter or proceeding for which the examiner has conducted any part of the investigation, * * *."

Since any member of the Commission may serve as an examiner under the provisions of Senate Bill 229, I see no reason why any member of the Commission, or any other person who may be appointed as an examiner, should be disqualified because of his knowledge of the facts. Proceedings before the Commission are highly technical. Any person who attempts to function without having investigated the facts on any matter to be heard before him cannot, in my opinion, function properly.

Disqualifying an Examiner Should Be a Function of the Commission.

Another objectionable feature of Rule 1217 is found in this language:

> "In the event the applicant or petitioner, or any other party who has entered an appearance in any matter or proceeding, concludes that the examiner to whom the matter or proceeding has been referred is for any reason disqualified to act therein, the party contending that such disqualification exists shall file with the Commission an affidavit stating that such party believes the examiner to be disqualified. Such affidavit may be filed at any time prior to three (3) days before the date such matter or proceeding is set for hearing."

Under the provisions of Senate Bill 229, no person may be forced to have his matter heard before an examiner. Within three days prior to the time set for hearing, one may object to a hearing before the examiner. In this event the matter must then be heard by the Commission. It seems to me the statutory right of objection to a hearing before an examiner should not be further fortified with the right to object for no reason at all to a particular examiner.

Whether an examiner is a qualified person to conduct a hearing should be for the sole determination of the Commission. If he is not qualified for any reason, then he should not, of course, be an examiner. But a determination of the fitness and qualification of an examiner is the sole function of the Commission, in my judgment. To hold otherwise would be to place it within the power of an applicant or petitioner or any party who has entered an appearance in any matter or proceeding to disqualify each examiner to whom the Commission might refer a matter. I do not believe that it was the intention of the Legislature, in administrative proceedings such as are conducted by the Commission under properly delegated authority, that one should have the right to disqualify an examiner to whom a matter has been referred, on the sole ground that he believes the examiner to be disqualified.

I have heretofore stated to the Commission that Rule 1220 is objectionable. I have not stated for the record the basis of my objection. I now wish to discuss at some length Rule 1220.

I wish to discuss the de novo provisions of Senate Bill 229 in connection with Rule 1220. The de novo provisions of the bill are contained in this language:

> "When any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party adversely affected shall have the right to have said matter heard de novo before the Commission upon application filed with the Commission within 30 days from the time any such decision is rendered."

That part of Rule 1220 which I wish to discuss as related to the de novo provisions of Senate Bill 229 is contained in this provision:

> "Any person affected by the order or decision rendered by the Commission after hearing before the Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1222; and said Rule 1222, together with the law applicable to rehearings and appeals in matters and proceedings before the Commission, shall thereafter apply to such matter or proceedings."

Senate Bill 229 Contains no Provision for a Judicial Review of any Order or Decision of the Commission.

Senate Bill 229 contains neither an express nor an implied provision for a judicial review of any order or decision of the Commission. The bill does contain an express provision which gives to a party adversely affected by a decision rendered by the Commission on a matter referred to an examiner the right to an administrative review on application for a de novo hearing made within thirty days from the time of the rendition of the decision. But this is not a provision for a judicial review.

Senate Bill 229 Contains no Provision for Rehearing.

The only provision for an administrative review of an order or decision of the Commission provided by Senate Bill 229 is that of a de novo hearing upon a matter referred to an examiner. If an administrative review of an order or decision of the Commission upon a matter heard by the Commission is desired it must be sought under the provisions of Section 69-223(a),(b), by the filing of a petition for rehearing. It is important, I think, to take note of the

difference in the provisions of Senate Bill 229 providing for administrative review of an order or decision of the Commission on a matter referred to an examiner and the provisions of Section 69-223(a) providing for an administrative review of an order or decision of the Commission on matters heard by the Commission. If a party to a proceedings before the Commission upon a matter referred to an examiner wishes or desires an administrative review of an order or decision of the Commission, he must proceed by way of an application for a de novo hearing. If he wishes or desires an administrative review of an order or decision of a matter heard by the Commission, he must proceed by way of an application for rehearing.

Application for a De Novo Hearing Cannot be Considered an Application for a Rehearing.

While the results to be obtained on a de novo hearing under the provisions of Senate Bill 229 and the results to be obtained on an application for rehearing under the provisions of Section 69-223(a) may coincidentally be the same, an application for a de novo hearing, though filed within twenty days of the entry of an order or decision of the Commission, cannot be considered an application for rehearing. The two applications are different. They are different in nature and as to content.

The Administrative Review Provided for Under Senate Bill 229 Exists as a Matter of Right.

A de novo hearing upon any matter referred to an examiner exists as a matter of right. The Commission must grant a de novo hearing. It has no discretion in the matter. The fact that an administrative review of an order or decision of the Commission by de novo hearing is expressly granted as a matter of right negatives the assumption that the Legislature had in mind extending the right of judicial review to such proceedings.

Scope of Administrative Review on De Novo Hearing is not Limited.

On a de novo hearing the Commission must again go into all the evidence and render its decision anew. There is no statutory limitation on the scope of an administrative review afforded by a de novo hearing. It is important to notice that this is not true of the scope of an administrative review afforded by an application for rehearing.

Scope of Administrative Review on an Application for Rehearing is Limited.

By statute the scope of an administrative review on an application for rehearing is limited. The applicant must set forth the respect in which an order or decision of the Commission is believed to be erroneous. On a rehearing he is limited to those matters raised in the application. And, regardless of what he raises, the Commission is under no statutory duty to grant a rehearing. In fact, the Commission may refuse to hear the application at all, either through the expedient of an order denying the application in whole or in part or through the expedient of letting the ten-day statutory period within which it must act expire, thus refusing a rehearing.

An Administrative Review of an Administrative Decision and a Judicial Review of an Administrative Decision are not the Same.

It requires no citation of authority to demonstrate that an administrative review of an administrative decision is not a judicial review of an administrative decision. An administrative review of an administrative decision may be had before any administrative agency to which such administrative function has been delegated. All that has been done under the de novo provisions of Senate Bill 229 is to delegate to the Oil Conservation Commission the power and authority of administrative review of its orders and decisions on matters referred to an examiner. The Commission had the power of administrative review of its orders and decisions on matters not referred to an examiner under the provisions of Section 69-223(a) by way of an application for a rehearing. No right of judicial review of the administrative review of the Commission on a matter referred to an examiner is expressly contained in Senate Bill 229.

An administrative review of an order or decision of the Commission made upon a hearing de novo, or made upon a rehearing, is not the same as a judicial review of an order or decision of the Commission. Upon an administrative review, the Commission may either affirm, modify, or vacate its previous order in whole or in part. It may, if it sees fit to do so, enter an entirely new order or any order which it thinks it should have entered in the first instance. On a judicial review of an order or a decision of the Commission, the Court may determine only whether the order or decision of the Commission was proper or improper. It may not substitute its judgment for that of the Commission. The Legislature appears to have had in mind the distinction between a judicial review on a trial de novo before a court and an administrative review by the Commission of its order or decision on a hearing de novo. In Senate Bill 229 no provision is made for a judicial review of an order or decision of the Commission made and entered on a de novo hearing. By implication, it appears

that no judicial review of the de novo order or decision was contemplated by the Legislature. If it had been the will of the Legislature that such an order or decision should be the subject of judicial review, all it had to do was to say so. This it did not do.

Only Provision for Judicial Review is Contained in Section 69-223(a),(b).

The material provisions of Section 69-223(a),(b), New Mexico Statutes 1941, are as follows:

> "(a) Within twenty (20) days after entry of any order or decision of the commission, any person affected thereby may file with the commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous. The commission shall grant or refuse any such application in whole or in part within ten (10) days after the same is filed and failure to act thereon within such period shall be deemed a refusal thereof and a final disposition of such application. In the event the rehearing is granted, the commission may enter such new order or decision after rehearing as may be required under the circumstances.
>
> "(b) Any party to such rehearing proceeding, dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision, by filing a petition for the review of the action of the commission within twenty (20) days after the entry of the order following rehearing or after the refusal of rehearing as the case may be."

Judicial review of an administrative decision does not exist as a matter of right. Appeals to the court from decisions of an administrative agency may be granted or withheld at the will of the Legislature. No citation of authority is needed to sustain this statement.

An Order or Decision of the Commission Disposing of an Application for Rehearing is not "Any Order or Decision of the Commission" Within the Meaning of Section 69-223(a) of the Statute.

The statutory time for filing an application for rehearing begins to run with the entry of "any order or decision of the Commission." About this, there can be no controversy. This is the express provision of Section 69-223(a). Under Subsection (a) of the statute a motion for a rehearing must be filed within twenty days of the date of the entry of "any order or decision of the Commission." The Commission shall grant or refuse the application in whole or in part within ten days after the same is filed. If it fails to act thereon within the ten-day period this constitutes a refusal and a final disposition of the application. If a rehearing is granted the Commission may enter such new order or decision after rehearing as may be required under the circumstances. The granting or refusing of the application in whole or in part, or the entry of a new order or decision after rehearing, cannot on any theory be said to be "any order or decision of the Commission" within the meaning of Subsection (a) of the statute. To so construe the statute would be to permit the filing of successive applications for rehearings. This would render the statute unworkable.

Under Subsection (b) a party to a rehearing proceeding, dissatisfied with the disposition of the application for rehearing, may appeal to the district court by filing a petition for review within twenty days after the entry of the order following the rehearing, or after the refusal of rehearing as the case may be.

Any Order or Decision of the Commission, Within the Meaning of Section 69-223(a), Includes Only the First Order or Decision of the Commission.

While judicial review by appeal, provided for by Section 69-223(b), is from the disposition of the application for rehearing which may consist in the granting or refusing of such application in whole or in part, or the entry of a new order or decision after rehearing, notice must be taken of the fact that the appeal is initiated, and can only be initiated, by the filing of an application within twenty days from the entry of any order or decision of the Commission. It is therefore clear that the term "any order or decision of the Commission" as used in Section 69-223(a) can refer to, and does refer only to, the first and original order or decision of the Commission. The term "any" was not intended to be used in the sense that an applicant could select which of several orders or decisions that might be entered by the Commission on which he might file an application for rehearing. Rather the term "any" was used to describe the entry of an order on the subject matter of the hearing from which one dissatisfied with the disposition of a motion for rehearing might have a judicial review of that order

by way of an appeal to a district court provided he followed the statutory mandate of filing his application for a rehearing within the twenty-day statutory period from the date of the entry of the order. This is made clear by the statutory provision that the appeal is from the entry of the order following rehearing or following the refusal of rehearing. The initial step in perfecting the appeal from the entry of the order following rehearing or the refusal of rehearing is the mandatory and jurisdictional requirement that an application for rehearing be filed, not within twenty days from the entry or failure of the entry of an order disposing of the application for rehearing or the entry of a new order or decision after a rehearing or the entry of an order on a hearing de novo, but within twenty days of the date of the entry of any order or decision of the Commission.

A Judicial Review of a De Novo Hearing Cannot be had.

The time element involved in the exercise of the right to a de novo hearing on a matter referred to an examiner and the exercise of the right of judicial review of the disposition of an application for a rehearing on a matter heard before the Commission is such that a judicial review of the disposition of a matter on a de novo hearing cannot be had. The practical effect of establishing a thirty-day period from the time of the rendition of a decision by the Commission on a matter referred to an examiner within which the right to a de novo hearing may be exercised, while retaining the mandatory and jurisdictional statutory period from the date of the entry of an order or decision on a matter heard before the Commission for the filing of an application for a rehearing is a strong, if not a conclusive, indication that the Legislature had no intention of extending the right of judicial review to a de novo order or decision of the Commission.

It must be assumed that the secretary will, in the future as in the past, promptly and expeditiously, in compliance with Section 69-206 of the 1941 Statutes, enter all rules, regulations, and orders in a book kept for that purpose by the Commission. It is not assumed that the secretary will withhold the entry of any order, rule, regulation, or decision of the Commission from entry until after the expiration of thirty days from the rendition of a rule, order, or regulation of the Commission. It is to be assumed that the Commission will make no distinction as to the time of the entry of any order, rule, regulation, or decision of the Commission on matters heard by the Commission itself and matters referred by the Commission to an examiner.

A simple example will illustrate what I am attempting to say. "A" applies for an unorthodox well location. The matter is referred to an examiner. An order or decision of the Commission is rendered and properly entered, denying "A" any relief. "A" now has his choice of an administrative review of this decision.

He may have a de novo hearing without the right of judicial review upon an application filed within thirty days from the date of the rendition of the decision. He may have an administrative review of this decision by way of a rehearing with the right of judicial review upon an application for a rehearing filed within twenty days of the entry of the order. It is evident that "A" cannot pursue his right of a de novo hearing and, at the same time, pursue his right of judicial review. At least, the legislative intent that he may do so is not sufficiently clear to justify the Commission in its endeavor to extend the right of judicial review by rule to an order or decision of the Commission on a de novo hearing.

The Right of Judicial Review Cannot be Extended by a Rule of the Commission.

There can be no objection to stating a statutory provision as a rule. This has been done with respect to a rehearing in Rule 1222. But this has not been done in the statement of Rule 1220. In stating Rule 1220 the Commission seeks by administrative action to extend the right of judicial review to decisions of the Commission made after a de novo hearing authorized by Senate Bill 229. Neither Senate Bill 229 nor any other statutory provision authorizes the Commission to do this. It is fundamental that the Commission has only such power and authority as is expressly or by necessary implication delegated to it. The Legislature has not delegated to the Commission the power or authority to extend the right of judicial review to its orders or decisions.

Bottomed on the provisions of Senate Bill 229, Rule 1220 appears to be in direct conflict with the provisions of Section 69-223 of the statute which provide the procedural steps to be followed in order to obtain a judicial review of an order or decision of the Commission. It follows that any attempt to grant the right to apply for a rehearing other than in accordance with the provisions of Section 69-223 of the statute can result only in confusion, misunderstanding, a probable miscarriage of justice, and injury to those attempting to comply with the rule.

It is not clear why the Commission should give to the de novo provisions of Senate Bill 229 a construction which places Rule 1220 in conflict with Section 69-223 of the statute, when such action is neither necessary nor required in order to perpetuate the right of a hearing de novo under the provisions of Senate Bill 229 and the right of judicial review under Section 69-223 of the statute. The only explanation offerable is, the Commission must have considered the provisions of Senate Bill 229 as in conflict with the provisions of Section 69-223, and that it was charged with the duty and authorized by law to resolve this conflict by the promulgation of the rule.

Nothing could be farther from the truth. The two provisions of the statute are not in conflict. And, if they were, statutory authority to resolve such a conflict

is not one of the powers delegated to the Commission in the administration of the conservation laws of the State of New Mexico.

The Existence of the Right of Judicial Review is For Individual Determination.

It is sound thinking, I believe, to suggest to the Commission that it should not attempt to prejudge or determine by rule the existence of the right of judicial review of its orders or decisions. The existence or nonexistence of the right of judicial review of an order or decision of the Commission is a matter for individual determination.

Very truly yours,

E. H. Foster

EHF:fe

cc: The Honorable John F. Simms
Governor of New Mexico
Santa Fe, New Mexico

The Honorable E. S. Walker
Commissioner of Public Lands
Santa Fe, New Mexico

Mr. W. F. Kitts
P. O. Box 664
Santa Fe, New Mexico

Mr. J. W. Gurley
Oil Conservation Commission
Santa Fe, New Mexico

Mr. Jason W. Kellahin
Attorney at Law
P. O. Box 597
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Mr. J. O. Terrell Couch
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Mr. Harry D. Turner
Staff Attorneys

The Ohio Oil Co.

Legal Department

W. Hume Everett
Thomas K. McElroy
J. O. Terrell Couch
Attorneys

August 1, 1955

P. O. Box 3128
Houston, Texas

Re: New Mexico Oil Conservation Commission
Rules on Procedure

Mr. Willard F. Kitts
P. O. Box 664
Santa Fe, New Mexico

Dear Sir:

I enclose my letter dated August 1, 1955, addressed to you, containing my comments and observations concerning the suggestions and objections which have been made regarding the proposed revision of the Rules of Procedure.

Because of Mr. E. H. Foster's letter dated July 25, I felt it appropriate to furnish to him a copy of my comments and observations pertaining to his objections to Rules 1217 and 1220. I have, therefore, sent to him a copy of that portion of the enclosed letter which relates to his objections.

Very truly yours,

J. O. Terrell Couch

TC:MK
Enc.

cc (w/enc.) - Mr. J. W. Gurley
P. O. Box 871
Santa Fe, New Mexico

Mr. Jason W. Kellahin
P. O. Box 597
Santa Fe, New Mexico

Mr. George W. Selinger
Skelly Oil Company
P. O. Box 1650
Tulsa 2, Oklahoma

Mr. Jack M. Campbell
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Mr. John Woodward
Amerada Petroleum Corporation
P. O. Box 2040
Tulsa 1, Oklahoma

The Ohio Oil Co.

Legal Department

W. Hume Everett
Thomas K. McElroy
J. O. Terrell Couch
Attorneys

August 1, 19[illegible]

P. O. Box 3128
Houston, Texas

Mr. Willard F. Kitts
P. O. Box 664
Santa Fe, New Mexico

Dear Sir:

My comments and observations on the suggestions and objections made by the designated parties to the proposed revision of the Commission's Rules on Procedure are set out below. The suggestions and objections are discussed in the order in which they were presented to the Commission at the July 14 hearing.

MAGNOLIA PETROLEUM COMPANY: (Mr. Ross Madole)

Proposed new rule: I have no objection to inserting a new rule such as that suggested by Mr. Madole requiring copies of pleadings to be furnished to or made available to adverse parties who have entered their appearance of record in a particular hearing. However, it seems to me that the rule proposed by Mr. Madole should be redrafted so that only such adverse parties as have stated their addresses in the record of the hearing will be entitled to have a copy of the pleadings furnished to or made available to them. The mailing of a copy of the pleading or of the notice referred to in the rule, addressed to the adverse party at the address stated by such party in the record of the hearing should be specified as sufficient compliance with the rule. That part of the rule which requires four copies of a pleading to be deposited with the Secretary should specify that such four copies must be extra copies for the adverse parties in addition to the copies required for the Commission's own use. Consideration should be given to changing the proposed rule to refer to "any party to a matter or proceeding set for hearing before the Commission or an Examiner" rather than "any party to a hearing." The statute and present rules use the term "application for rehearing", rather than motion for rehearing. Perhaps, therefore, the proposed new rule should refer to "any written pleading, motion or application of any character filed in any such matter or proceeding, except the initial application for hearing."

Rule 1221: Magnolia's suggestion that Rule 1221 be changed to require the Commission to mail a copy of each order to each party who has entered an appearance of record would, in my opinion, place too great a burden on the Commission. If Magnolia's suggestion is followed, the validity of an order might be

dependent upon the fact question of whether the Commission mailed copies of the order as required by such rule. Of course, there is at present not even a statement in the Rules that the Commission should mail copies of its orders to the parties. Rule 1221, as proposed by the Committee, provides for copy of the order to be mailed to each party; however, it is true that the Rules as proposed by the Committee do not specify any penalty for failure to mail such copy, and by express provisions of those Rules, the validity of the order would be unaffected by the failure of the Commission to mail a copy of an order to a party, or the failure of a party to receive a copy of the order. As I recall, it was the consensus of opinion of the Committee members present at the June 14 Committee meeting that a willful failure or refusal to mail a copy of an order to a party within the specified 10-day period would likely be grounds for equitable relief. I doubt that the Commission should extend an opportunity to attack the Commission's orders on the alleged ground that a copy of the order was not mailed to such party.

Magnolia objects to the use of the term "supplemental notice" in Rule 1221 proposed by the Committee. I take the blame for using that term, and agree that a copy of an order is not literally a "supplemental notice." The term was used as an expedient method of invoking the new supplemental notice procedure set up in Rule 1207. The term "supplemental notice" was used in the same manner and for the same purpose in the second paragraph of Rule 1218 proposed by the Committee. Any improvement of language is invited. However, if the term is discarded in Rule 1221, I think it should also be discarded in Rule 1218.

Rule 1219: I agree with the substance of Magnolia's suggestion. However, I suggest Magnolia's proposed language be changed to avoid the possibility of a contention that the rule would require the Commission to dispose of a case immediately upon the expiration of the 10-day period. Following the substance of Magnolia's suggestion, I believe the proposed Rule 1219 could be improved by changing the beginning part to read:

> "After the expiration of 10 days from the date the supplemental notice required by Rule 1218 has been given, the Commission shall either enter its order disposing of the matter or proceeding, or * * *."

SHELL OIL COMPANY: (Mr. Ed Nestor)

Rule 1216: Although Shell suggests that items (2) and (3) be eliminated from the rule proposed by the Committee, those items are in substance required by S.B. 229. As to Shell's other suggestion concerning this rule, I believe it is preferable for the Commission to have the right to call a hearing and have it held before an Examiner if the Commission desires to do so, unless an affected party objects or unless the purpose of the hearing is to amend, remove or add a statewide rule; therefore, I am of the opinion that Shell's proposal to the contrary should not be accepted.

Rule 1217: It seems to me that the answer to Shell's question concerning this rule is that if the disqualification of the Examiner is discovered by a party later than three days before the hearing, such party may obtain relief in one of the following ways: (1) the Examiner may disqualify himself at the request of such party; (2) the Commission may declare the Examiner to be disqualified; or (3) the party may proceed with the hearing either with or without protest and thereafter obtain a de novo hearing before the Commission as authorized by S.B. 229.

Rule 1220: The de novo hearing provided for in the rule is, of course, statutory, and Shell's suggestion to eliminate it must, therefore, be disregarded.

Rule 1203: Shell's objection to item (4) is answered by Rule 1201 which empowers the Commission to prescribe the time and place of hearing; whereas, item (4) in Rule 1203 merely authorizes an applicant to state a preference as to the time and place of hearing. The Commission, while having the benefit of the stated preference, is certainly not obligated to comply with the applicant's wishes on the subject.

EL PASO NATURAL GAS COMPANY: (Mr. Ben Howell)

Rule 1215: Mr. Howell questions whether the language used in the rule empowers the Examiner to rule on and to exclude evidence offered at a hearing. I am inclined to think that the power "to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing" does include the power to rule on and exclude evidence. In any event, the language is verbatim from the statute, and it is probable that in most, if not all, hearings the Examiners will prefer not to exclude evidence, but will admit it subject to objection. Under the circumstances, I do not feel it necessary to change the rule proposed by the Committee, although I have no objection to a change such as has been suggested by Mr. Howell.

HUMBLE OIL & REFINING COMPANY: (Mr. Clarence Hinkle)

Rule 1213: The proviso which Humble recommends be added to this rule is appropriate and I concur that the rule should be amended to specifically recognize that the qualifications of an Examiner stated in the rule shall not prevent any member of the Commission from serving as an Examiner as authorized by S.B. 229.

PHILLIPS PETROLEUM COMPANY: (Mr. S. H. Foster)

Rule 1217: Mr. Foster's two objections to this rule are, in my opinion, without merit.

In order to afford added confidence in the Examiner system, it seems logical to me to provide some method whereby a party who believes an Examiner to be disqualified may avoid a hearing before that Examiner without precluding the holding of the hearing before another Examiner. Although I did not initially favor giving a party the power to disqualify an Examiner as a matter of right merely by filing an affidavit, I understand that the identical procedure is provided for disqualifying judges in the courts of the State of New Mexico. Certainly, the procedure is just as acceptable as a means for disqualifying an Examiner appointed by this Commission. I have no fear that a party "will run the whole string out" [Tr. 9, Case 903, July 14, 1955 Hearing], as Mr. Foster puts it, by filing successive affidavits of disqualification, for I do not anticipate that a party will execute an affidavit that he "believes the Examiner to be disqualified" unless the party actually does believe that to be the case; further, I am sure that the Commission would prevent any such dilatory tactics by setting the matter for a hearing before the Commission as authorized in the last paragraph of Rule 1217.

The first sentence of the rule certainly does not result in "disqualifying a man because he happened to be well informed about the matter on which he was going to conduct the hearing." [Tr. 9, supra.] That sentence reads:

> "No Examiner shall conduct any hearing in any matter or proceeding for which the Examiner has conducted any part of the investigation, nor shall any Examiner perform any prosecuting function."

The sentence quoted merely applies to the Examiner what I understand to be the present attitude of the Commission, assuring that the person conducting a hearing shall be and remain nonpartisan. I think it is of great importance in building and maintaining confidence in the administrative system that the parties be assured of impartiality of the hearing officer. If Mr. Foster's objection is to the draftsmanship rather than the purpose of the above quoted provision, perhaps he will offer a proposed redraft of the sentence at the request of the Committee or the Commission.

Rule 1220: I am of the opinion that Mr. Foster's objections to this rule are without merit.

Although I have read carefully my copy of Mr. Foster's detailed letter of July 25, 1955 to Mr. W. B. Macey, I confess I am still unable to see the "very serious question as to whether or not an order made by this Commission upon a de novo hearing is subject to a judicial review within the provisions of §69-223 of the Statutes." [Tr. 10, supra.] The pertinent part of the statute referred to reads as follows:

> "65-3-22. Rehearings - Appeals. - (a) Within twenty (20) days after entry of any order or decision of the commission, any person affected thereby may file with the commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous."

Any such question, "serious" or otherwise, dissolves in the face of the broad and plain language of that statute, which was the law of this State when S.B. 229 was passed by the last Legislature, and which remains the law of this State. An order or decision of the Commission, whether entered at the conclusion of a hearing initially called and held before the Commission, or at the conclusion of a de novo hearing held pursuant to S.B. 229, is nevertheless "any order or decision of the Commission." There is no statute which states that the plain words of §65-3-22 do not mean what they say.

If Mr. Foster's reasoning is followed, it would be necessary to conclude that the losing party in a hearing before an Examiner, having the right under S.B. 229 to a de novo hearing, could, if successful in the de novo hearing, thereby preclude the opposing party from obtaining judicial review. Certainly, the Legislature did not intend that the party who loses in a hearing before an Examiner shall have the power by his voluntary action to control the successful party's right to judicial review in the event the decision should be reversed by the Commission.

There is no statute which states that when an order or decision is entered on the basis of a hearing before an Examiner a party must elect whether to apply for a de novo hearing as authorized by S.B. 229, or a rehearing as authorized by the statute quoted above. Senate Bill 229 guarantees the right to a de novo hearing. It does not repeal the statute quoted above. The two statutes fit together. Supposed conflicts may be argued only on the basis of implications. Mr. Foster implies that since S.B. 229 does not include any provisions for a rehearing and appeal to the courts, the Legislature must have intended that there be no such right of rehearing and appeal after a de novo hearing pursuant to S.B. 229, yet he would apparently recognize a right to rehearing and appeal from an order based on a hearing before an Examiner under S.B. 229. Is it not more logical to realize that a provision included in S.B. 229, authorizing rehearing and appeal to the courts from an order of the Commission, would have merely been an unnecessary repetition of rights already granted in §65-3-22?

It seems to me probable that if a party attempted to appeal to the district court from an order entered on the basis of a hearing before an Examiner, without having sought the de novo hearing guaranteed by S.B. 229, such party would be met with the assertion that he had failed to exhaust his administrative remedy. However, if such party applied for the de novo hearing, he would, in Mr. Foster's judgment, lose his right to judicial review. We do not have the benefit of Mr. Foster's comments on this particular point, but I should think all would agree that we should not attribute to the Legislature an intention to create such a dilemma, especially when the dilemma does arise

not from the language of the statutes but could only arise by means of implications drawn from the failure of the Legislature to reaffirm in S.B. 229 a right of judicial review already on the statute books.

I agree with Mr. Foster that the Commission cannot by rule extend the statutory right of judicial review. No member of this Committee has ever recommended that the Commission attempt to do so. We have recommended a rule which states what we considered to be, and what I still consider to be, the clear and logical effect and operation of S.B. 229 and §65-3-22.

Mr. Foster has ably demonstrated to us, both in his letter of July 25 and by his statements in the record of Case 905, various ingenious lines of argument which might be advanced to limit and restrict by implication the provisions of S.B. 229 and §65-3-22. If initially it was not essential for the Commission to adopt a rule expressing its understanding of those two statutes, it is my firm conviction that the Commission should under the existing circumstances adopt such a rule. To fail to do so would be to subscribe to or surrender to the lines of argument presented. That would truly result in "confusion" and "misunderstanding". When the Commission makes its position clear by the adoption of a rule on this subject, since admittedly the rule cannot deprive anyone of a statutory right, Mr. Foster and any other person may proceed to assert such rights as they have under the statute without regard to any rule which is contrary to the statute.

I favor the retention of Rule 1221 as recommended by the Committee in its initial report. I am forwarding to Mr. Foster a copy of my comments on his objections.

MR. ROSS MALONE:

Rules 1204 and 1209: It seems to me that the objection of Mr. Malone can be met by adding to the sentence which is Rule 1204 the following phrase:

> "provided, however, that when legal notice of a hearing has been given once as provided by law and by this rule, such hearing may be continued as authorized in Rule 1209 by the person presiding at such hearing, and in such event no further notice of such hearing shall be required under this Rule 1204."

I discussed with Mr. Malone the conflict which he believes may exist between Rules 1204 and 1209, and requested him to furnish to the Committee any specific suggestions or wording that he may have. I have just received his letter of July 28, 1955, a copy of which has been directed to each of the other members of the Committee and to Mr. John W. Gurley. Although I have not had time to analyze the letter, I feel sure no additional comment from me will be required.

MR. W. D. GIRAND, JR.:

Rule 1202: The 15-day period for emergency orders is, of course, statutory, and Mr. Girand's suggestion that the period be extended to 30 days cannot be followed.

Rule 1207: It is my opinion that if the rule is changed as suggested by Mr. Girand, the validity of the Commission's orders would be unnecessarily rendered vulnerable to attack on the grounds that the Commission had failed to give the supplemental notice provided for.

Rule 1216: It is my opinion that if the Commission desires to hear any matter or proceeding properly commenced before it, the Commission has the right to do so and cannot be compelled to refer the matter to an Examiner. Therefore, I recommend that Mr. Girand's suggestion on this rule not be followed.

Rule 1217: As I have indicated above, I am of the opinion that the first sentence of this rule will assist in developing confidence in the Examiner system by assuring the parties that they will have the right to have their hearings conducted by an impartial official. I, therefore, oppose deleting the first sentence of this rule.

Mr. Girand's second suggestion concerning this rule is, I believe, satisfactorily taken care of in the last sentence of the second paragraph of the rule, which states that the disqualification affidavit may be filed at any time prior to three days before the date set for hearing, although the Examiner may thereafter disqualify himself or be disqualified by the Commission.

Rule 1218: Although it might be beneficial to all parties to receive a copy of any exceptions, suggestions and objections filed by other parties under Rule 1218 at the conclusion of a hearing before an Examiner, it appears doubtful that such information could be exchanged in time to be of any great benefit, unless action on the Examiner's report is postponed for a greater length of time. If a provision for such exchange of copies is added, the rule should require that such copies be sent only to the adverse parties who had entered an appearance and stated their addresses in the record of the hearing. The rule should specifically state that mailing of such copies to such party at such address will constitute compliance with the provision for furnishing copies and, as in the new rule suggested by Mr. Madole, some provision should be included to cover the case in which there are numerous parties.

Actually, it seems to me that the procedure for exchanging copies might be somewhat cumbersome and might delay the rendition of orders in such cases. Since such exceptions, suggestions and objections as are submitted must be filed as a part of the permanent record of the matter or proceeding, any party who desired to obtain a copy could do so in time to take such action as the party might desire subsequent to the order. I doubt the advisability of following Mr. Girand's proposal regarding Rule 1218.

Rule 1219: The substance of Mr. Girand's suggestion concerning this rule is, in my opinion, beneficial. If the rule proposed by the Committee is changed, I would suggest using the language "for further hearing" instead of the language "for the taking of additional evidence". This would follow the substance of Mr. Girand's suggestion without requiring the Commission to enter a formal order on the subject.

Rule 1220: Mr. Girand's suggestions regarding this rule cannot be followed because of the provisions of S. B. 229.

I regret that other commitments will prevent me from attending the August 17 meeting of the Commission and will also prevent me from meeting with the Committee prior to that date. However, I hope the comments and observations in this letter will be of assistance to the Committee and to the Commission in making the necessary determinations concerning the revision of the Procedural Rules.

Very truly yours,

J. T. Terrell Couch

TC:MK

cc - Hon. John F. Simms
Governor of the State of New Mexico
Santa Fe, New Mexico

Hon. E. S. Walker
Commissioner of Public Lands
Santa Fe, New Mexico

Mr. W. B. Macey
New Mexico Oil Conservation Comm.
P. O. Box 871
Santa Fe, New Mexico

Mr. J. W. Gurley
New Mexico Oil Conservation Comm.
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Mr. George W. Selinger
Skelly Oil Company
P. O. Box 1650
Tulsa 2, Oklahoma

Mr. Jack M. Campbell
J. P. White Building
Roswell, New Mexico

Mr. John Woodward
Amerada Petroleum Corporation
P. O. Box 2040
Tulsa 1, Oklahoma

File under Case 903

The Ohio Oil Co.

Legal Department

W. Hume Everett
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P. O. Box 3128
Houston, Texas

May 31, 1955

Re: Proposed Rules for Examiner System under Senate Bill 229

Mr. Willard F. Kitts
P. O. Box 664
Santa Fe, New Mexico

Mr. Jason W. Kellahin
P. O. Box 597
Santa Fe, New Mexico

Mr. George W. Selinger
Skelly Oil Company
P. O. Box 1650
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Mr. John Woodward
Amerada Petroleum Corporation
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Tulsa 1, Oklahoma

Mr. Jack M. Campbell
J. P. White Building
Roswell, New Mexico

Gentlemen:

I enclose in duplicate, for your consideration, a draft of a revision of the Rules on Procedure embodying proposed rules covering the Examiner System. After giving the matter some thought, it appeared to me that it would be preferable to have the rules applying to the Examiner System integrated with the other procedural rules of the Commission rather than to have a separate set of rules applying to the Examiner System only.

I wish to emphasize that I intend the enclosed draft merely as a starting place for our Committee. I wish to give further thought to several of the problems and questions involved, and after having done so I may desire to recommend substantial changes in the draft.

If the Committee feels that a revision of the present Rules of Procedure is the proper approach, it would perhaps be advisable for the Commission to advertise the matter for the June 28 hearing in language sufficiently broad to include such a revision.

I will appreciate hearing from each of you when you have had the opportunity to consider the enclosure, as I am sure it will expedite our meeting on June 14 if we can each have the benefit of the ideas and suggestions of the others prior to that date.

Very truly yours,

J. O. Terrell Couch

TC:MK
Enc.2

TC:MX 5/27/55

DRAFT OF PROPOSED REVISION
of
NEW MEXICO OIL CONSERVATION COMMISSION
RULES ON PROCEDURE, INCORPORATING PROVISIONS FOR HEARINGS BEFORE EXAMINERS

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N-RULES ON PROCEDURE

RULE 1201. NECESSITY FOR HEARINGS

Except as provided in some general rule herein, before any rule, regulation or order, including revocation, changes, renewal or extension thereof shall be made by the Commission, a public hearing before the Commission or a legally appointed Examiner shall be held at such time and place as may be prescribed by the Commission.

RULE 1202. EMERGENCY ORDERS

Notwithstanding any other provision of these rules, in case an emergency is found to exist by the Commission, which, in its judgment, requires the making of a rule, regulation or order without a hearing having first been had or concluded, such emergency rule, regulation or order when made by the Commission shall have the same validity as if a hearing with respect to the same had been held before the Commission after due notice. Such emergency rule, regulation or order shall remain in force no longer than 15 days from its effective date, and in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective.

RULE 1203. METHOD OF INITIATING A HEARING

The Commission upon its own motion and the Attorney General on behalf of the State and any operator, producer or any other person having a property interest may institute proceedings for a hearing. If the hearing is sought by the Commission it shall be on motion of the Commission and if by any other person it shall be by application. The application in TRIPLICATE shall state (1) the name or general description of the common source or sources of supply affected by the order sought, unless the same is intended to apply to and affect the entire state, in which event the application shall so state,

(2) briefly the general nature of the order, rule or regulation sought, (3) any other matter required by a particular rule or rules, and (4) whether applicant desires a hearing before the Commission or an Examiner, and, if hearing before an Examiner is desired, the time and place applicant prefers the hearing to be held may be stated in the application.

An application shall be signed by the person seeking the hearing or by his attorney. Unless required by a specific rule, an application need not be verified.

RULE 1204. METHOD OF GIVING LEGAL NOTICE FOR HEARINGS

Notice of each hearing before the Commission and notice of each hearing before an Examiner shall be given by personal service on the person affected or by publication once in a newspaper of general circulation published at Santa Fe, New Mexico, and once in a newspaper of general circulation published in the county or each of the counties, if there be more than one, in which any land, oil or gas or other property which may be affected shall be situated.

RULE 1205. CONTENTS OF NOTICE OF HEARING

Such notice shall be issued in the name of "The State of New Mexico" and shall be signed by two members of the Commission or by the Secretary of the Commission and the seal of the Commission shall be impressed thereon.

The notice shall specify whether the case is set for hearing before the Commission or before an Examiner and shall state the number and style of the case and the time and place of hearing and shall briefly state the general nature of the order or orders, rule or rules, regulation or regulations to be promulgated or effected. The notice shall also state the name of the petitioner or applicant if any and unless the contemplated order, rule or regulation is intended to apply to and affect the entire State it shall specify or generally describe the common source or sources of supply which may be affected by such order, rule or regulation.

RULE 1206. SERVICE OF NOTICE

Personal service of the notice of hearing may be made by any agent of the Commission or by any person over the age of 18 years in the same manner as

is provided by law for the service of summons in civil actions in the district courts of this State. Such service shall be complete at the time of such personal service or on the date of publication, as the case may be. Proof of service shall be by the affidavit of the person making personal service or of the publisher of the newspaper in which publication is had. Service of the notice shall be made at least 10 days before the hearing.

RULE 1207. SUPPLEMENTAL NOTICES

(a) Mailing List. The Secretary of the Commission shall maintain an official mailing list of the names and addresses of persons who have filed a written request to be included on such list. Any person may at any time file with the Secretary of the Commission a written request to be included on or deleted from the mailing list. A request to be included on such list shall specify the address of the person making the request and such person may specify another address at any time and from time to time by written notice filed with the Secretary of the Commission.

(b) Supplemental Notice of Hearings. Not less than 10 days before the date on which any hearing is set, a supplemental notice of such hearing shall be given to each person included on the mailing list of the Commission. The supplemental notice of each hearing shall contain an abbreviated statement of the information required to be included in the legal notice of such hearing. Such supplemental notice may be in the form of a docket or in any other form the Secretary of the Commission deems convenient and it need not be certified or signed. The supplemental notice of one or more hearings set on the same or different date may be included in one list and may be given at the same time, if the Secretary deems it expedient to do so.

(c) Other Supplemental Notices. In addition to supplemental notice of hearings, such other supplemental notices shall be given as may be required by these rules.

(d) Method of Giving Supplemental Notices. A supplemental notice shall be given to any person included on the mailing list above provided for by depositing the notice in the United States mail, with adequate postage affixed, addressed to the person at the address of the person which is shown on the mailing list.

(e) Failure to Give or Receive a Supplemental Notice. Failure to give or receive any supplemental notice required by these rules shall not be grounds for any complaint, shall not affect the jurisdiction of the Commission, the right of the Commission or any Examiner to conduct any hearing, or the validity of any order or other action taken pursuant to or as a result of any matter or proceeding with reference to which such supplemental notice should have been given, unless complainant has no actual knowledge of such matter or proceeding until after the Commission's action in such matter or proceeding has become final, and then only in the event the failure to give or receive such notice is the result of willful misconduct of a member or employee of the Commission. Any and all objections and complaints based on failure to give or receive a supplemental notice shall be waived unless written application for relief supported by affidavit setting forth the pertinent facts is filed with the Commission within six months after the date of the action taken by the Commission pursuant to such notice. If any such application is so filed, the Commission shall proceed with notice and public hearing thereon in accordance with these rules, and if the above facts and injury to applicant are shown the Commission shall on its own motion reopen the matter or proceeding with reference to which such supplemental notice should have been given to applicant.

RULE 1208. PREPARATION OF NOTICES

After a motion or application is filed with the Commission the notice or notices required shall be prepared by the Commission and mailing, service and publication thereof shall be taken care of by the Commission without cost to the applicant.

RULE 1209. CONTINUANCE OF HEARING WITHOUT NEW SERVICE

Any hearing before the Commission or an Examiner held after due notice may be continued by the person presiding at such hearing to a specified time and place without the necessity of notice of the same being again mailed, served or published. In the event of any continuance, a statement thereof shall be made in the record of the hearing which is continued.

Any matter or proceeding set for hearing before an Examiner shall be automatically continued to the next regular hearing of the Commission following

the date set for the hearing before the Examiner if any person who may be affected by any order entered by the Commission in connection with such hearing shall file with the Commission, at least three days prior to the date set for such hearing, a written objection to such hearing being held before an Examiner. In such event the matter or proceeding shall be placed on the regular docket of the Commission and shall be heard as though it had not been set for hearing before an Examiner and the Secretary of the Commission shall promptly give a supplemental notice of such automatic continuance to the applicant or petitioner and to each person who has entered an appearance in such matter or proceeding.

RULE 1210. CONDUCT OF HEARINGS

Hearings before the Commission or any Examiner shall be conducted without rigid formality. A transcript of testimony shall be taken and preserved as a part of the permanent records of the Commission. Any person testifying in response to a subpoena issued by the Commission and any person seeking to testify in support of an application or motion or in opposition thereto shall be required to do so under oath. However, unsworn comments and observations by any interested party will be invited and made a part of the record. Comments and observations by representatives of operators' committees, the United States Geological Survey, the United States Bureau of Mines, the New Mexico Bureau of Mines and other competent persons are welcomed. Two members of the Commission constitute a quorum for the transaction of business for the holding of hearings by the Commission, but one member of the Commission may conduct a hearing for the purpose of receiving testimony only. Any Examiner legally appointed by the Commission may conduct such hearings as may be referred to such Examiner by the Commission or the Secretary thereof.

RULE 1211. STATUTORY POWERS AS TO WITNESSES, RECORDS, ETC.

The Commission or any member thereof has statutory power to subpoena witnesses and to require the production of books, papers, records, etc. A subpoena will be issued by the Commission for attendance at a hearing upon the written request of any person interested in the subject matter of the hearing. In case of the failure of a person to comply with the subpoena issued by the Commission, an attachment of the person may be issued by the district court of

any district in the State, and such court has powers to punish for contempt. Any person found guilty of swearing falsely at any hearing may be punished for contempt.

RULE 1212. RULES OF EVIDENCE

Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made which is not supported by some competent legal evidence.

RULE 1213. EXAMINERS' QUALIFICATIONS AND APPOINTMENT

The Commission shall be ex parte order designate and appoint not more than four individuals to be Examiners. Each Examiner so appointed shall be a member of the staff of the Commission, but no Examiner need be a full time employee of the Commission. The Commission may by ex parte order designate and appoint a successor to any person whose status as an Examiner is terminated for any reason. Each individual designated and appointed as an Examiner must have a college degree in geology, engineering or law and at least two years practical experience as a geologist, petroleum engineer or lawyer.

RULE 1214. REFERRAL OF CASES TO EXAMINERS

Either the Commission or the Secretary thereof may refer any matter or proceeding to any legally designated and appointed Examiner for hearing in accordance with these rules.

RULE 1215. EXAMINER'S POWER AND AUTHORITY

The Commission may, by ex parte order, limit the powers and duties of the Examiner in any particular case to such issues or to the performance of such acts as the Commission deems expedient; however, subject only to such limitations as may be so ordered, the Examiner to whom any matter or proceeding is referred under these rules shall have full authority to hold hearings on such matter or proceeding in accordance with and pursuant to these rules. The Examiner shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct

of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence, subject to such objections as may be imposed, and shall cause a complete record of the proceeding to be made and transcribed and shall certify same to the Commission as hereinafter provided.

RULE 1216. HEARINGS WHICH MUST BE HELD BEFORE COMMISSION

Notwithstanding any other provision of these rules, the hearing on any matter or proceeding shall be held before the Commission (1) if the application or motion so requests, or (2) if any party who may be affected by the matter or proceeding files with the Commission more than three days prior to the date set for the hearing on the matter or proceeding a written objection to such matter or proceeding being heard before an Examiner, or (3) if the matter or proceeding is for the purpose of amending, removing or adding a statewide rule.

RULE 1217. EXAMINER'S MANNER OF CONDUCTING HEARING, DISQUALIFICATION

No Examiner shall conduct any hearing in any matter or proceeding for which the Examiner has conducted any part of the investigation, nor shall any Examiner perform any prosecuting function. An Examiner conducting a hearing under these rules shall conduct himself as a disinterested umpire, with the duty to receive the evidence offered and to assist in developing of the pertinent facts. Any Examiner who cannot accord a fair and impartial hearing and consideration to the parties in any matter or proceeding referred to such Examiner, or who is otherwise disqualified to conduct the hearing and consider the matter or proceeding, shall so advise the Secretary of the Commission and shall withdraw from such matter or proceeding.

In the event the applicant or petitioner, or any other party who has entered an appearance in any matter or proceeding, concludes that the Examiner to whom the matter or proceeding has been referred is for any reason disqualified to act therein, the party contending that such disqualification exists shall file with the Commission an affidavit containing the pertinent facts establishing such disqualification. Such affidavit may be filed at any time before an order is rendered by the Commission on the basis of the proceedings before such Examiner. Upon the filing of such affidavit the Commission shall set the matter of the Examiner's disqualification for hearing before the

Commission and give a supplemental notice of such hearing, five days in advance thereof, to each person who has entered an appearance in the matter or proceeding as to which the disqualification is claimed.

In the event any Examiner disqualifies himself in any matter or proceeding referred to such Examiner, or if such Examiner is found by the Commission to be disqualified upon the complaint of any party to such matter or proceeding, the Commission or the Secretary thereof shall promptly refer the matter or proceeding to another Examiner for hearing, or set such matter or proceeding for hearing before the Commission in accordance with these rules. In such event, the Secretary shall give a supplemental notice of such action to each party who has entered an appearance in such matter or proceeding.

RULE 1218. REPORT AND RECOMMENDATIONS RE EXAMINER'S HEARINGS

Upon the conclusion of any hearing before an Examiner, the Examiner shall promptly consider the proceedings in such hearing, and based upon the record of such hearing the Examiner shall prepare his written recommendations for the disposition of the matter or proceeding by the Commission. Such recommendations shall either be accompanied by a proposed order or shall be in the form of a proposed order, and shall be submitted to the Commission with the certified record of the hearing.

A supplemental notice consisting of a copy of the proposed order, with such other recommendations as the Examiner may submit to the Commission, shall be given to each person who entered an appearance of record at the hearing, and no order in such matter or proceeding shall be entered by the Commission until at least five days after such supplemental notice has been given.

Any party who would be affected by such proposed order may submit written exceptions, objections and suggestions to such order and to any further recommendations of the Examiner, at any time before an order is rendered by the Commission in such matter or proceeding. All such written exceptions, objections and suggestions received by the Commission in connection with any matter or proceeding shall be filed by the Commission as a part of the permanent record of such matter or proceeding.

RULE 1219. DE NOVO HEARING BEFORE COMMISSION

When any order has been entered by the Commission pursuant to any hearing held by an Examiner, any party adversely affected by such order shall have the right to have such matter or proceeding heard de novo before the Commission, provided that within 30 days from the date such order is rendered such party files with the Commission a written application for such hearing before the Commission. If such application is filed, the matter or proceeding shall be set for hearing before the Commission at the next regular hearing date following the expiration of fifteen days from the date such application is filed with the Commission. In such hearing before the Commission, the Commission shall be entitled to receive and consider the record of the hearing conducted by the Examiner in such matter or proceeding. Any person affected by the order or decision rendered by the Commission after hearing before the Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1221, and said Rule 1221 together with the law applicable to rehearings and appeals in matters and proceedings before the Commission shall thereafter apply to such matter or proceeding.

RULE 1220. NOTICE OF COMMISSION'S ORDERS

Within 10 days after any order has been rendered by the Commission, a supplemental notice consisting of a copy of such order shall be given to each person who has entered an appearance of record in the matter or proceeding pursuant to which such order is rendered.

RULE 1221. REHEARINGS

Within 20 days after entry of any order or decision of the Commission, any person affected thereby may file with the Commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous. The Commission shall grant or refuse any such application in whole or in part within 10 days after the same is filed and failure to act thereon within such period shall be deemed a refusal thereof and a final disposition of such application. In the event the rehearing is granted, the Commission may enter such new order or decision after rehearing as may be required under the circumstances.

RULE 1222. CHANGES IN FORMS AND REPORTS

Any changes in the forms and reports or rules relating to such forms and reports shall be made only by order of the Commission issued after due notice and hearing.

COPY

ATWOOD & MALONE
LAWYERS

JEFF D. ATWOOD
ROSS L. MALONE
CHARLES F. MALONE

F. KIRK NEWMAN
RUSSELL D. MANN

ROSWELL PETROLEUM BUILDING
ROSWELL, NEW MEXICO

July 26, 1955

Mr. J. O. Terrell Couch
Legal Department
The Ohio Oil Company
P. O. Box 3128
Houston, Texas

Re: Proposed Amendment of Rules of New Mexico Oil Conservation Commission

Dear Mr. Couch:

I am sorry that I did not have an earlier opportunity to forward my written comments on the proposed rules of procedure prepared by the committee of which you are a member. I appreciated very much the invitation to submit my views, and I am doing so herewith.

At the outset, I would like to express the view that experience under the rules will be the most effective means of determining the changes which should be made. The following additional changes seem to me to merit consideration. As you will note, some of them are merely matters of draftsmanship which you may disregard if you do not feel that they are an improvement.

1. I mentioned at the hearing the apparent conflict between the provisions of Rule 1204 and 1209. Rule 1204 contains the mandatory requirements that "notice of each hearing before the Commission and notice of each hearing before an examiner" shall be given by personal service and publication. Rule 1209 is entitled "Continuance of Hearing Without New Service", and provides that a matter as to which notice has been published for hearing before an examiner shall be placed on the regular docket of the Commission for hearing if an objection is filed by an interested person within three days prior to the proposed hearing. The rule then continues to provide for only a supplemental notice to persons who have appeared in the proceeding as a prerequisite for the Commission hearing. As I read the mandatory and unqualified requirement of Rule No. 1204, no valid hearing could be held before the Commission, whether on continuance under Rule 1209, or otherwise, without personal service and publication. As 1209 is written, it does not contemplate such service. One manner of eliminating the conflict would be

to insert after the words "notice of each hearing before the Commission," in Rule 1204, the following: "except hearings continued by an examiner as provided in Rule 1209".

2. The same apparent conflict exists between Rule 1209 and subparagraph (c) in Rule 1207. The latter provision requires a supplemental notice not less than ten days before the date of a hearing before the Commission, whereas under the provisions of Rule 1209, a matter set before an examiner will be continued to the next regular hearing of the Commission in case of objection without reference to whether time is available for the supplemental notice required by subparagraph (c) of Rule 1207.

3. We discussed individually the attempt of the drafting committee to combine under Rule 1207 "supplemental notices", every type of service or notice which would occur subsequent to the original service and publication. While the objective is a desirable one, it seems to me that it is not appropriate to treat the proposed report and recommendations of the examiner as a "supplemental notice" as is done in Rule 1217. The same observation could be made with reference to treating the Commission's orders as a supplemental notice under Rule 1221.

4. I believe that the phraseology of Rule 1203 would be improved if the words "known to applicant" were inserted in lieu of the words "insofar as applicant believes" appearing in the third line from the end of the rule.

5. At the June Commission hearing you will recall that there was some discussion as to the due process of law aspects of Section 1209 if notice of a hearing before an examiner is published, and the hearing is actually held before the Commission on continuance, with no publication of notice of the Commission hearing as such. I think that this may pose a problem, but that it can be handled as suggested, I believe by John Woodard, by making the published notice include the possibility of continuance for hearing before the Commission as provided by the rules and regulations of the Commission.

6. If, as suggested, by El Paso Natural Gas Company I believe, the examiner is given the express power to exclude testimony or evidence in Rule 1215, I believe that provisions should be made for making a tender of the proof so that it would be in the record when considered by the Commission. The exclusion could then be assigned as error and passed upon by the Commission.

7. With reference to Rule 1217, I am curious as to the "prosecuting function" which is referred to. I do not know of any "prosecution" that would occur before an examiner, and it would seem to me that if it is intended to prohibit the examiner

from participating in the hearing, other than as an umpire, that should be so stated. The last sentence of the first paragraph of Rule 1217 does no harm, but it seems to me that the provisions for disqualification by the parties is perfectly adequate without it. The procedure is patterned after our statute providing for disqualification of District Judges, which puts the burden on the parties to disqualify. It presumes that the judge will be impartial without an express requirement to that effect.

Of the foregoing suggestions, I consider numbers 1 and 2 to be quite important as they undoubtedly will result in an attack on the jurisdiction of the Commission if the conflicts are not eliminated. The remaining matters fall in the general category of "observations". I have the feeling that the procedure is unduly extended by the filing of the proposed report of the examiner, filing and possibly argument before the Commission of exceptions thereto, entry by the Commission of an order and thereafter a trial de novo by the Commission of the same issues, followed by the possibility of a rehearing. I am confident that only matters in which no controversy is anticipated will be heard before examiners under these circumstances, but perhaps, until the volume of cases becomes much greater, that will be desirable.

May I again express my appreciation of your invitation to file these recommendations. I am sending copies to Messrs. Gurley, Kitts, Kellahin, Sellinger and Woodard, who, I understand, composed the Committee.

With best personal regards, I am,

Sincerely yours,

Ross L. Malone

RLM:bc

cc: Mr. John W. Gurley
Mr. Willard F. Kitts
Mr. Jason Kellahin
Mr. George Sellinger
Mr. John Woodard

SKELLY OIL COMPANY

TULSA 2, OKLAHOMA

PRODUCTION DEPARTMENT
J. S. FREEMAN, VICE PRESIDENT

July 25, 1955

Re: Case 903
Rules on Procedure

Oil Conservation Commission
P. O. Box 871
Santa Fe, New Mexico

Attention: Mr. Charles M. Reider

Gentlemen:

Thank you for your letter of July 22, attaching a copy of the transcript of the hearing held July 14 on the revision of Section "N", Rules on Procedure, governing hearings to be conducted by Trial Examiners.

We are herewith attaching our suggestions and recommendations for revison of Section "N". You will note that we recommend amending Rule 1209, without the necessity of a wholesale change of rules. We have attempted to keep this revision as simple as possible.

We are returning the Transcript of Proceedings.

Yours very truly,

George W. Selinger

GWS:dd

George W. Selinger

CONDUCTING OF HEARINGS
Rule 1209

(a) Hearings before the Commission shall be conducted without rigid formality. A transcript of testimony shall be taken and preserved as a part of the permanent records of the Commission. Any person testifying in response to a subpoena issued by the Commission and any person seeking to testify in support of an application or motion or in opposition thereto, shall be required to do so under oath. However, unsworn comments and observations by any interested party will be united and made a part of the record. Comments and observations by representatives of Operators Committees, the United States Geological Survey, the United States Bureau of Mines, the New Mexico Bureau of Mines and other competent persons are welcomed. Deleted (Two members of the Commission constitute a quorum for the transaction of business and for holdings of hearings, but one member of the Commission may conduct a hearing for the purpose of receiving testimony only.)

Added: (b) The Commission may authorize any one of its members or any member of its staff to conduct hearings on any application that may be properly filed before it. At the time of such filing, applicant may specifically request that the matter be referred to an examiner, and unless such request is objected to by any interested party at least ten (10) days prior to the day selected for hearing, the matter will be automatically referred; provided, however, the Commission may, at its discretion, have the matter heard before it at the next regular statewide hearing of the Commission. Applications eligible for reference must be on file at least fifteen (15) days prior to such regular statewide hearing of the Commission, except in emergency matters as provided for in Rule 1202 herein.

Added: (c) Such examiner shall have the power to regulate all proceedings held before them and perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearings, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence subject to such objections as may be imposed, ruling on such objections, and shall cause a complete record of the proceeding to be made and transcribed and shall certify the same to the Commission for consideration, together with the report of the examiner and his recommendations in connection therewith. It shall be the duty of the examiner to send a copy of his report and recommendations to each of the parties of record involved in the matter, stating that in five (5) days he will file such report with the Commission and further advising that exceptions to such report by any party adversely affected shall be filed with the Commission five (5) days after the date of the intended filing by such examiner. Upon receipt of such exceptions to the examiner's report, the Commission shall set the matter down for (a) de novo hearing or (b) upon unanimous agreement of all parties entering appearances in the case for oral arguments only, within thirty (30) days from the time any such decision is rendered by the examiner.

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C. MELVIN NEAL
W. D. GIRAND, JR.
J. W. NEAL

NEAL & GIRAND
LAWYERS
NEAL BUILDING
HOBBS, NEW MEXICO

TELEPHONES:
3-5171 3-5172
P. O. BOX 1326

July 8, 1955.

Mr. William F. Kitts,
c/o Oil Conservation Commission,
Santa Fe, New Mexico.

Dear Mr. Kitts:

The writer respectfully proposes certain changes in the proposed Rules of Procedure offered by your Committee at the June meeting of the Oil Conservation Commission.

Since Rule 1202 is being amended, I think that the emergency Order should be valid for more than 15 days. I would suggest thirty days.

I suggest the following changes in the Rules enumerated:

1. In Rule 1207, in the first paragraph, sub-number (a), that the words, "give or" in lines one and two be deleted;

2. In Rule 1216, delete after the word, "Commission", on line two before the numeral (1) through the word "or" appearing on line three before the numeral (2) and re-number;

3. In Rule 1217, delete the first sentence. I would also suggest under Rule 1217, that Paragraph 3 be amended so that a time be fixed in which to inaugurate proceedings to disqualify an examiner;

4. In Rule 1216, in the last paragraph thereof, delete the period and insert a comma and add, "and copies of such exceptions, objections and suggestions to such Order be furnished to each person who entered an appearance of record at the hearing".

6. Rule 1219, I suggest that after the word, "or", on Page 8, be added the following: "Order further Hearing", and delete that portion of the Rule appearing on Page 9;

7. I suggest that Rule 1220 be deleted in its entirety. In regard to this Rule, I see no need for it in light of your Rule 1222 for the reason that a trial De Novo before the Commission on a matter which the Commission has referred to an examiner and entered its Order based upon the examiner's report and the record made before the examiner would serve no purpose except to delay the entry of a final Order.

I take this opportunity to compliment you and your Committee on the fine job done in the preparation of the proposed Rules and offer the above only as suggestions.

Respectfully submitted,

NEAL & GIRAND,

BY:

G/bc
cc: Mr. Jason W. Kellahin,
Attorney at Law,
Santa Fe, New Mexico.

Mr. Jack Campbell,
Attorney at Law,
Roswell, New Mexico.

Mr. William B. Macey, Secretary,
Oil Conservation Commission,
Santa Fe, New Mexico.

Mr. Terrell Couch,
c/o Ohio Oil Company,
Houston, Texas.

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

July 22, 1955

COPY

Mr. John Woodward
Amerada Petroleum Corporation
P.O. Box 2040
Tulsa 1, Oklahoma

Dear Mr. Woodward:

I enclose a copy of the July 14th hearing of Case 903 regarding the Rules on Procedure.

We would appreciate it if you would give this transcript your early attention and forward to us your recommendations and, if possible, a rough draft of Section "N" of the Commission's Statewide Rules and Regulations.

Very truly yours,

Charles M. Reider
District Engineer

CMR:brp
Enclosure

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

July 22, 1955

COPY

Mr. Terrell Couch
Ohio Oil Company
P.O. Box 3128
Houston, Texas

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Enclosure

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

July 22, 1955

COPY

Mr. George W. Selinger
Skelly Oil Company
P.O. Box 1650
Tulsa 2, Oklahoma

Dear Mr. Selinger:

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Enclosure

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

July 22, 1955

COPY

Mr. Jack M. Campbell
J. P. White Building
Roswell, New Mexico

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Very truly yours,

Charles M. Reider
District Engineer

CMR:brp
Enclosure

July 25, 1955

Re: Proposed Rules of Procedure

Mr. A. L. Macey
New Mexico Oil Conservation Commission
Santa Fe, New Mexico

Dear Sir:

The Commission has submitted a draft of a proposed revision of Rules 1201-1223, inclusive, of the Rules of Procedure of the Commission, incorporating provisions for hearings before examiners.

A revision of the Rules of Procedure is necessitated by the enactment by the 1955 Legislature of New Mexico of Senate Bill 229, Chapter 235, Laws of New Mexico 1955, providing for the appointment of examiners to conduct hearings on matters coming before the Commission.

I wish to comment on Rules 1217 and 1220. I have heretofore stated my objections to Rule 1217. I shall briefly restate them here and then discuss Rule 1220. Rule 1217 is objectionable on principle.

Knowledge of the Facts Should Not Be a Disqualifying Cause.

One of the objectionable features of Rule 1217 is found in this language:

> "No examiner shall conduct any hearing in any matter or proceeding for which the examiner has conducted any part of the investigation, * * *."

Since any member of the Commission may serve as an examiner under the provisions of Senate Bill 229, I see no reason why any member of the Commission, or any other person who may be appointed as an examiner, should be disqualified because of his knowledge of the facts. Proceedings before the Commission are highly technical. Any person who attempts to function without having investigated the facts on any matter to be heard before him cannot, in my opinion, function properly.

Disqualifying an Examiner should be a Function of the Commission.

Another objectionable feature of Rule 1217 is found in this language:

> "In the event the applicant or petitioner, or any other party who has entered an appearance in any matter or proceeding, concludes that the examiner to whom the matter or proceeding has been referred is for any reason disqualified to act therein, the party contending that such disqualification exists shall file with the Commission an affidavit stating that such party believes the examiner to be disqualified. Such affidavit may be filed at any time prior to three (3) days before the date such matter or proceeding is set for hearing."

Under the provisions of Senate Bill 227, no person may be forced to have his matter heard before an examiner. Within three days prior to the time set for hearing, one may object to a hearing before the examiner. In this event the matter must then be heard by the Commission. It seems to me the statutory right of objection to a hearing before an examiner should not be further fortified with the right to object for no reason at all to a particular examiner.

Whether an examiner is a qualified person to conduct a hearing should be for the sole determination of the Commission. If he is not qualified for any reason, then he should not, of course, be an examiner. But a determination of the fitness and qualification of an examiner is the sole function of the Commission, in my judgment. To hold otherwise would be to place it within the power of an applicant or petitioner or any party who has entered an appearance in any matter or proceeding to disqualify each examiner to whom the Commission might refer a matter. I do not believe that it was the intention of the Legislature, in administrative proceedings such as are conducted by the Commission under properly delegated authority, that one should have the right to disqualify an examiner to whom a matter was been referred, on the sole ground that he believes the examiner to be disqualified.

I have heretofore stated to the Commission that Rule 1220 is objectionable. I have not stated for the record the basis of my objection. I now wish to discuss at some length Rule 1220.

I wish to discuss the de novo provisions of Senate Bill 229 in connection with Rule 1222. The de novo provisions of the bill are contained in this language:

> "When any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party adversely affected shall have the right to have said matter heard de novo before the Commission upon application filed with the Commission within 30 days from the time any such decision is rendered."

That part of Rule 1220 which I wish to discuss as related to the de novo provisions of Senate Bill 229 is contained in this provision:

> "Any person affected by the order or decision rendered by the Commission after hearing before the Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1222; and said Rule 1222, together with the law applicable to rehearings and appeals in matters and proceedings before the Commission, shall thereafter apply to such matter or proceedings."

Senate Bill 229 Contains no Provision for a Judicial Review of any Order or Decision of the Commission.

Senate Bill 229 contains neither an express nor an implied provision for a judicial review of any order or decision of the Commission. The bill does contain an express provision which gives to a party adversely affected by a decision rendered by the Commission on a matter referred to an examiner the right to an administrative review on application for a de novo hearing made within thirty days from the time of the rendition of the decision. But this is not a provision for a judicial review.

Senate Bill 229 Contains no Provision for Rehearing.

The only provision for an administrative review of an order or decision of the Commission provided by Senate Bill 229 is that of a de novo hearing upon a matter referred to an examiner. If an administrative review of an order or decision of the Commission upon a matter heard by the Commission is desired it must be sought under the provisions of Section 69-223(a),(b), by the filing of a petition for rehearing. It is important, I think, to take note of the

difference in the provisions of Senate Bill 229 providing for administrative review of an order or decision of the Commission on a matter referred to an examiner and the provisions of Section 69-223(a) providing for an administrative review of an order or decision of the Commission on matters heard by the Commission. If a party to a proceedings before the Commission upon a matter referred to an examiner wishes or desires an administrative review of an order or decision of the Commission, he must proceed by way of an application for a de novo hearing. If he wishes or desires an administrative review of an order or decision of a matter heard by the Commission, he must proceed by way of an application for rehearing.

Application for a De Novo Hearing Cannot be Considered an Application for a Rehearing.

While the results to be obtained on a de novo hearing under the provisions of Senate Bill 229 and the results to be obtained on an application for rehearing under the provisions of Section 69-223(a) may coincidentally be the same, an application for a de novo hearing, though filed within twenty days of the entry of an order or decision of the Commission, cannot be considered an application for rehearing. The two applications are different. They are different in nature and as to content.

The Administrative Review Provided for Under Senate Bill 229 Exists as a Matter of Right.

A de novo hearing upon any matter referred to an examiner exists as a matter of right. The Commission must grant a de novo hearing. It has no discretion in the matter. The fact that an administrative review of an order or decision of the Commission by de novo hearing is expressly granted as a matter of right negatives the assumption that the legislature had in mind extending the right of judicial review to such proceedings.

Scope of Administrative Review on De Novo Hearing is not Limited.

On a de novo hearing the Commission must again go into all the evidence and render its decision anew. There is no statutory limitation on the scope of an administrative review afforded by a de novo hearing. It is important to notice that this is not true of the scope of an administrative review afforded by an application for rehearing.

Scope of Administrative Review on an Application for Rehearing is Limited.

By statute the scope of an administrative review on an application for rehearing is limited. The applicant must set forth the respect in which an order or decision of the Commission is believed to be erroneous. On a rehearing he is limited to those matters raised in the application. And, regardless of what he raises, the Commission is under no statutory duty to grant a rehearing. In fact, the Commission may refuse to hear the application at all, either through the expedient of an order denying the application in whole or in part or through the expedient of letting the ten-day statutory period within which it must act expire, thus refusing a rehearing.

An Administrative Review of an Administrative Decision and a Judicial Review of an Administrative Decision are not the Same.

It requires no citation of authority to demonstrate that an administrative review of an administrative decision is not a judicial review of an administrative decision. An administrative review of an administrative decision may be had before any administrative agency to which such administrative function has been delegated. All that has been done under the de novo provisions of Senate Bill 229 is to delegate to the Oil Conservation Commission the power and authority of administrative review of its orders and decisions on matters referred to an examiner. The Commission had the power of administrative review of its orders and decisions on matters not referred to an examiner under the provisions of Section 69-223(a) by way of an application for a rehearing. No right of judicial review of the administrative review of the Commission on a matter referred to an examiner is expressly contained in Senate Bill 229.

An administrative review of an order or decision of the Commission made upon a hearing de novo, or made upon a rehearing, is not the same as a judicial review of an order or decision of the Commission. Upon an administrative review, the Commission may either affirm, modify, or vacate its previous order in whole or in part. It may, if it sees fit to do so, enter an entirely new order or any order which it thinks it should have entered in the first instance. On a judicial review of an order or a decision of the Commission, the Court may determine only whether the order or decision of the Commission was proper or improper. It may not substitute its judgment for that of the Commission. The legislature appears to have had in mind the distinction between a judicial review on a trial de novo before a court and an administrative review by the Commission of its order or decision on a hearing de novo. In Senate Bill 229 no provision is made for a judicial review of an order or decision of the Commission made and entered on a de novo hearing. By implication, it appears

that no judicial review of the de novo order or decision was contemplated by the Legislature. If it had been the will of the Legislature that such an order or decision should be the subject of judicial review, all it had to do was to say so. This it did not do.

Only Provision for Judicial Review is Contained in Section 69-223(a),(b).

The material provisions of Section 69-223(a),(b), New Mexico Statutes 1941, are as follows:

> "(a) Within twenty (20) days after entry of any order or decision of the commission, any person affected thereby may file with the commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed to be erroneous. The commission shall grant or refuse any such application in whole or in part within ten (10) days after the same is filed and failure to act thereon within such period shall be deemed a refusal thereof and a final disposition of such application. In the event the rehearing is granted, the commission may enter such new order or decision after rehearing as may be required under the circumstances.
>
> "(b) Any party to such rehearing proceeding, dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision, by filing a petition for the review of the action of the commission within twenty (20) days after the entry of the order following rehearing or after the refusal of rehearing as the case may be."

Judicial review of an administrative decision does not exist as a matter of right. Appeals to the court from decisions of an administrative agency may be granted or withheld at the will of the Legislature. No citation of authority is needed to sustain this statement.

An Order or Decision of the Commission Denying an Application for Rehearing is not "any order or decision of the Commission" within the meaning of Section 69-223(a) of the Statute.

The statutory time for filing an application for rehearing begins to run with the entry of "any order or decision of the Commission." About this, there can be no controversy. This is the express provision of section 69-223(a). Under subsection (a) of the statute a motion for a rehearing must be filed within twenty days of the date of the entry of "any order or decision of the Commission." The Commission shall grant or refuse the application in whole or in part within ten days after the same is filed. If it fails to act thereon within the ten-day period this constitutes a refusal and a final disposition of the application. If a rehearing is granted the Commission may enter such new order or decision after rehearing as may be required under the circumstances. The granting or refusing of the application in whole or in part, or the entry of a new order or decision after rehearing, cannot on any theory be said to be "any order or decision of the Commission" within the meaning of Subsection (a) of the statute. To so construe the statute would be to permit the filing of successive applications for rehearings. This would render the statute unworkable.

Under Subsection (b) a party to a rehearing proceeding, dissatisfied with the disposition of the application for rehearing, may appeal to the district court by filing a petition for review within twenty days after the entry of the order following the rehearing, or after the refusal of rehearing as the case may be.

Any Order or Decision of the Commission, Within the Meaning of Section 69-223 a, Includes Only the First Order or Decision of the Commission.

While judicial review by appeal, provided for by Section 69-223 b), is from the disposition of the application for rehearing which may consist in the granting or refusing of such application in whole or in part, or the entry of a new order or decision after rehearing, notice must be taken of the fact that the appeal is initiated, and can only be initiated, by the filing of an application within twenty days from the entry of any order or decision of the Commission. It is therefore clear that the term "any order or decision of the Commission" as used in Section 69-223(a) can refer to, and does refer only to, the first and original order or decision of the Commission. The term "any" was not intended to be used in the sense that an applicant could select which of several orders or decisions that might be entered by the Commission on which he might file an application for rehearing. Rather the term "any" was used to describe the entry of an order on the subject matter of the hearing from which one dissatisfied with the disposition of a motion for rehearing might have a judicial review of that order

by way of an appeal to a district court provided he followed the statutory mandate of filing his application for a rehearing within the twenty-day statutory period from the date of the entry of the order. This is made clear by the statutory provision that the appeal is from the entry of the order following rehearing or following the refusal of rehearing. The initial step in perfecting the appeal from the entry of the order following rehearing or the refusal of rehearing is the mandatory and jurisdictional requirement that an application for rehearing be filed, not within twenty days from the entry or failure of the entry of an order disposing of the application for rehearing or the entry of a new order or decision after a rehearing or the entry of an order on a hearing de novo, but within twenty days of the date of the entry of any order or decision of the Commission.

A Judicial Review of a De Novo Hearing Cannot be Had.

The time element involved in the exercise of the right to a de novo hearing on a matter referred to an examiner and the exercise of the right of judicial review of the disposition of an application for a rehearing on a matter heard before the Commission is such that a judicial review of the disposition of a matter on a de novo hearing cannot be had. The practical effect of establishing a thirty-day period from the time of the rendition of a decision by the Commission on a matter referred to an examiner within which the right to a de novo hearing may be exercised, while retaining the mandatory and jurisdictional statutory period from the date of the entry of an order or decision on a matter heard before the Commission for the filing of an application for a rehearing is a strong, if not a conclusive, indication that the legislature had no intention of extending the right of judicial review to a de novo order or decision of the Commission.

It must be assumed that the secretary will, in the future as in the past, promptly and expeditiously, in compliance with Section 65-106 of the 1941 Statutes, enter all rules, regulations, and orders in a book kept for that purpose by the Commission. It is not assumed that the secretary will withhold the entry of any order, rule, regulation, or decision of the Commission from entry until after the expiration of thirty days from the rendition of a rule, order, or regulation of the Commission. It is to be assumed that the Commission will make no distinction as to the time of the entry of any order, rule, regulation, or decision of the Commission on matters heard by the Commission itself and matters referred by the Commission to an examiner.

A simple example will illustrate what I am attempting to say. "A" applies for an unorthodox well location. The matter is referred to an examiner. An order or decision of the Commission is rendered and properly entered, denying "A" any relief. "A" now has his choice of an administrative review of this decision.

He may have a de novo hearing without the right of judicial review upon an application filed within thirty days from the date of the rendition of the decision. He may have an administrative review of this decision by way of a rehearing with the right of judicial review upon an application for a rehearing filed within twenty days of the entry of the order. It is evident that "A" cannot pursue his right of a de novo hearing and, at the same time, pursue his right of judicial review. At least, the legislative intent that he may do so is not sufficiently clear to justify the Commission in its endeavor to extend the right of judicial review by rule to an order or decision of the Commission on a de novo hearing.

The Right of Judicial Review Cannot be Extended by a Rule of the Commission.

There can be no objection to stating a statutory provision as a rule. This has been done with respect to a rehearing in Rule 1222. But this has not been done in the statement of Rule 1220. In stating Rule 1220 the Commission seeks by administrative action to extend the right of judicial review to decisions of the Commission made after a de novo hearing authorized by Senate Bill 229. Neither Senate Bill 229 nor any other statutory provision authorizes the Commission to do this. It is fundamental that the Commission has only such power and authority as is expressly or by necessary implication delegated to it. The Legislature has not delegated to the Commission the power or authority to extend the right of judicial review to its orders or decisions.

Bottomed on the provisions of Senate Bill 229, Rule 1220 appears to be in direct conflict with the provisions of Section 69-223 of the statute which provide the procedural steps to be followed in order to obtain a judicial review of an order or decision of the Commission. It follows that any attempt to grant the right to apply for a rehearing other than in accordance with the provisions of Section 69-223 of the statute can result only in confusion, misunderstanding, a probable miscarriage of justice, and injury to those attempting to comply with the rule.

It is not clear why the Commission should give to the de novo provisions of Senate Bill 229 a construction which places Rule 1220 in conflict with Section 69-223 of the statute, when such action is neither necessary nor required in order to perpetuate the right of a hearing de novo under the provisions of Senate Bill 229 and the right of judicial review under Section 69-223 of the statute. The only explanation offerable is, the Commission must have considered the provisions of Senate Bill 229 as in conflict with the provisions of Section 69-223, and that it was charged with the duty and authorized by law to resolve this conflict by the promulgation of the rule.

Nothing could be farther from the truth. The two provisions of the statute are not in conflict. And, if they were, statutory authority to resolve such a conflict

is not one of the powers delegated to the Commission in the administration of the conservation laws of the State of New Mexico.

The Existence of the Right of Judicial Review is for Individual Determination.

It is sound thinking, I believe, to suggest to the Commission that it should not attempt to prejudge or determine by rule the existence of the right of judicial review of its orders or decisions. The existence or nonexistence of the right of judicial review of an order or decision of the Commission is a matter for individual determination.

Very truly yours,

ORIGINAL SIGNED BY
E. S. WALKER

E. S. Walker

ESW:fe

cc: The Honorable John F. Simms
Governor of New Mexico
Santa Fe, New Mexico

The Honorable E. S. Walker
Commissioner of Public Lands
Santa Fe, New Mexico

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P. O. Box 664
Santa Fe, New Mexico

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Oil Conservation Commission
Santa Fe, New Mexico

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Mr. J. D. Terrell Couch
The Ohio Oil Company
Box 3128
Houston, Texas

Mr. Harry D. Turner
Staff Attorneys

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NO. 903
Order No. R-681

IN THE MATTER OF THE APPLICATION
OF THE OIL CONSERVATION COMMISSION
OF NEW MEXICO UPON ITS MOTION FOR
AN ORDER REVISING SECTION "N" - RULES
ON PROCEDURE, OF THE RULES AND
REGULATIONS OF THE COMMISSION.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 o'clock a.m. on May 18, 1955, June 28, 1955 and July 14, 1955 at Santa Fe, New Mexico, before the Oil Conservation Commission, hereinafter referred to as the "Commission."

NOW, on this 15th day of September, 1955, the Commission, a quorum being present, having considered the records and testimony adduced, and having considered further the recommendations of the Committee appointed by the Commission for the purpose of studying this cause, and the recommendations submitted by other interested parties, and being fully advised in the premises,

FINDS:

(1) That due notice of the time and place of hearing and the purpose thereof having been given as required by law, the Commission has jurisdiction of this case and the subject matter thereof.

(2) That the advent of Chapter 235, New Mexico Laws of 1955, authorizing the Commission to implement an Examiner System in connection with hearings and other proceedings before the Commission, has necessitated the promulgation of rules and regulations to govern the appointment and qualifications of such Examiner, and to govern the procedure and conduct of hearings before such Examiner.

(3) That experience has demonstrated to the Commission that certain other sections and provisions of Section N - Rules on Procedure, of its Rules and Regulations, are in need of revision to enable the Commission more efficiently to conduct the business which comes before it.

IT IS THEREFORE ORDERED:

1. That Section N - Rules on Procedure of the Rules and Regulations of the New Mexico Oil Conservation Commission be, and the same is hereby, revised to read as follows:

N - RULES ON PROCEDURE

RULE 1201. NECESSITY FOR HEARINGS.

Except as provided in some general rule herein, before any rule, regulation or order, including revocation, changes, renewal or extension thereof shall be made by the Commission, a public hearing before the Commission or a legally appointed Examiner shall be held at such time and place as may be prescribed by the Commission.

RULE 1202. EMERGENCY ORDERS.

Notwithstanding any other provision of these rules, in case an emergency is found to exist by the Commission, which, in its judgment, requires the making of a rule, regulation or order without a hearing having first been had or concluded, such emergency rule, regulation or order when made by the Commission shall have the same validity as if a hearing with respect to the same had been held before the Commission after due notice. Such emergency rule, regulation or order shall remain in force no longer than 15 days from its effective date, and in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or orderbecomes effective.

RULE 1203. METHOD OF INITIATING A HEARING.

The Commission upon its own motion, the Attorney General on behalf of the State and any operator, producer or any other person having a property interest may institute proceedings for a hearing. If the hearing is sought by the Commission it shall be on motion of the Commission and if by any other person it shall be by application. The application in TRIPLICATE shall state (1) the name or general description of the common source or sources of supply affected by the order sought, unless the same is intended to apply to and affect the entire state, in which event the application shall so state, (2) briefly the general nature of the order, rule or regulation sought, (3) any other matter required by a particular rule or rules, and (4) whether applicant desires a hearing before the Commission or an Examiner, and, if hearing before an Examiner is desired, the time and place applicant prefers the hearing to be held may be stated in the application, and such application shall state a list of the names and addresses of all interested parties known to applicant.

An application shall be signed by the person seeking the hearing or by his attorney. Unless required by a specific rule, an application need not be verified.

RULE 1204. METHOD OF GIVING LEGAL NOTICE FOR HEARINGS.

Notice of each hearing before the Commission, except hearings continued by an Examiner as provided in Rule 1209, and notice of each hearing before an Examiner shall be given by personal service on the person affected or by publication once in a newspaper of general circulation published at Santa Fe, New Mexico, and once in a newspaper of general circulation published in the county or each of the counties, if there be more than one, in which any land, oil or gas or other property which may be affected shall be situated.

RULE 1205. CONTENTS OF NOTICE OF HEARING.

Such notice shall be issued in the name of "The State of New Mexico" and shall be signed by two members of the Commission or by the Secretary of the Commission, and the seal of the Commission shall be impressed thereon.

The notice shall specify whether the case is set for hearing before the Commission or before an Examiner and shall state the number and style of the case and the time and place of hearing and shall briefly state the general nature of the order or orders, rule or rules, regulation or regulations to be promulgated or effected. The notice shall also state the name of the petitioner or applicant, if any, and unless the contemplated order, rule or regulation is intended to apply to and affect the entire State it shall specify or generally describe the common source or sources of supply which may be affected by such order, rule or regulations.

RULE 1206. PERSONAL SERVICE OF NOTICE.

Personal service of the notice of hearing may be made by any agent of the Commission or by any person over the age of 18 years in the same manner as is provided by law for the service of summons in civil actions in the district courts of this State. Such service shall be complete at the time of such personal service or on the date of publication, as the case may be. Proof of service shall be by the affidavit of the person making personal service or of the publisher of the newspaper in which publication is had. Service of the notice shall be made at least 10 days before the hearing.

RULE 1207. PREPARATION OF NOTICES.

After a motion or application is filed with the Commission the notice or notices required shall be prepared by the Commission and, service and publication thereof shall be taken care of by the Commission without cost to the applicant.

RULE 1208. FILING PLEADINGS; COPY DELIVERED TO ADVERSE PARTY OR PARTIES.

When any party to a hearing files any pleading, plea or motion of any character (other than application for hearing) which is not by law or by these rules required to be served upon the adverse party or parties, he shall at the same time either deliver or mail to the adverse party or parties who have entered their appearance therein, or their respective attorneys of record, a copy of such pleading, plea or motion. For the purposes of these rules, an appearance of any interested party shall be made either by letter addressed to the Commission, or in person at any proceeding before the Commission, or before an Examiner, with notice of such appearance to the parties from whom such pleadings, pleas, or motions are desired.

RULE 1209. CONTINUANCE OF HEARING WITHOUT NEW SERVICE.

Any hearing before the Commission or an Examiner held after due notice may be continued by the person presiding at such hearing to a specified time and place without the necessity of notice of the same being again served or published. In the event of any continuance, a statement thereof shall be made in the record of the hearing which is continued.

Any matter or proceeding set for hearing before an Examiner shall be continued by the examiner to the next regular hearing of the Commission following the date set for the hearing before the Examiner if any person who may be affected by any order entered by the Commission in connection with such hearing shall have filed with the Commission, at least three days prior to the date set for such hearing, a written objection to such hearing being held before an Examiner. In such event the matter or proceeding shall be placed on the regular docket of the Commission for hearing.

RULE 1210. CONDUCT OF HEARINGS.

Hearings before the Commission or any Examiner shall be conducted without rigid formality. A transcript of testimony shall be taken and preserved as a part of the permanent record of the Commission. Any person testifying in response to a subpoena issued by the Commission and any person seeking to testify in support of an application or motion or in opposition thereto shall be required to do so under oath. However, relevant unsworn comments and observations by any interested party will be designated as such and included in the record. Comments and observations by representatives of operators' committees, the United States Geological Survey, the United States Bureau of Mines, the New Mexico Bureau of Mines and other competent persons are welcomed. Any Examiner legally appointed by the Commission may conduct such hearings as may be referred to such Examiner by the Commission or the Secretary thereof.

RULE 1211. POWER OF COMMISSION TO REQUIRE ATTENDANCE OF WITNESSES AND PRODUCTION OF EVIDENCE.

The Commission or any member thereof has statutory power to subpoena witnesses and to require the production of books, papers and records in any proceeding before the Commission. A subpoena will be issued by the Commission for attendance at a hearing upon the written request of any person interested in the subject matter of the hearing. In case of the failure of a person to comply with the subpoena issued by the Commission, an attachment of the person may be issued by the district court of any district in the State, and such court has powers to punish for contempt. Any person found guilty of swearing falsely at any hearing may be punished for contempt.

RULE 1212. RULES OF EVIDENCE.

Full opportunity shall be aforded all interested parties at a hearing to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made which is not supported by competent legal evidence.

RULE 1213. EXAMINERS' QUALIFICATIONS AND APPOINTMENT.

The Commission shall by ex parte order designate and appoint not more than four individuals to be examiners. Each Examiner so appointed

shall be a member of the staff of the Commission, but no Examiner need be a full time employee of the Commission. The Commission may by ex parte order, designate and appoint a successor to any person whose status as an Examiner is terminated for any reason. Each individual designated and appointed as an Examiner must have at least six years practical experience as a geologist, petroleum engineer or licensed lawyer, or at least two years of such experience and a college degree in geology, engineering or law; provided however, that nothing herein contained shall prevent any member of the Commission from being designated as, or serving as, an Examiner.

RULE 1214. REFERRAL OF CASES TO EXAMINERS.

Either the Commission or the Secretary thereof may refer any matter or proceeding to any legally designated and appointed Examiner for hearing inaccordance with these rules. The examiner appointed to hear any specific case shall be designated by name.

RULE 1215. EXAMINER'S POWER AND AUTHORITY.

The Commission may, by ex parte order, limit the powers and duties of the Examiner in any particular case to such issues or to the performance of such acts as the Commission deems expedient; however, subject only to such limitations as may be ordered by the Commission, the Examiner to whom any matter or proceeding is referred under these rules shall have full authority to hold hearings on such matter or proceeding in accordance with and pursuant to these rules. The examiner shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence, subject to such objections as may be imposed, and shall cause a complete record of the proceeding to be made and transcribed and shall certify same to the Commission as hereinafter provided.

RULE 1216. HEARINGS WHICH MUST BE HELD BEFORE COMMISSION.

Notwithstanding any other provision of these rules, the hearing on any matter or proceeding shall be held before the Commission (1) if the Commission in its discretion desires to hear the matter, or (2) if the application or motion so requests, or (3) if the matter is initiated on motion of the Commission for the enforcement of any rule, regulation, order, or statutory provision, or (4) if any party who may be affected by the matter or proceeding files with the Commission more than three days prior to the date set for the hearing on the matter or proceeding a written objection tosuch matter or proceeding being heard before an Examiner, or (5) if the matter or proceeding is for the purpose of amending, removing or adding a statewide rule.

RULE 1217. EXAMINER'S MANNER OF CONDUCTING HEARING.

An Examiner conducting a hearing under these rules shall conduct himself as a disinterested umpire.

RULE 1218. REPORT AND RECOMMENDATIONS RE EXAMINER'S HEARINGS.

Upon the conclusion of any hearing before an Examiner, the Examiner shall promptly consider the proceedings in such hearing, and based upon the record of such hearing the Examiner shall prepare his written report and recommendations for the disposition of the matter or proceeding by the Commission. Such report and recommendations shall either be accompanied by a proposed order or shall be in the form of a proposed order, and shall be submitted to the Commission with the certified record of the hearing.

RULE 1219. DISPOSITION OF CASES HEARD BY EXAMINERS.

After receipt of the report and recommendations of the Examiner, the Commission shall either enter its order disposing of the matter or proceeding, or refer such matter or proceeding to the Examiner for further hearing.

RULE 1220. DE NOVO HEARING BEFORE COMMISSION.

When any order has been entered by the Commission pursuant to any hearing held by an Examiner, any party adversely affected by such order shall have the right to have such matter or proceeding heard de novo before the Commission, provided that within 30 days from the date such order is rendered such party files with the Commission a written application for such hearing before the Commission. If such application is filed, the matter or proceeding shall be set for hearing before the Commission at the next regular hearing date following the expiration of fifteen days from the date such application is filed with the Commission. Any person affected by the order or decision rendered by the Commission after hearing before the Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1222, and said Rule 1222 together with the law applicable to rehearings and appeals in matters and proceedings before the Commission shall thereafter apply to such matter or proceeding.

RULE 1221. NOTICE OF COMMISSION'S ORDERS.

Within ten days after any order, including any order granting or refusing rehearing, or order following rehearing, has been rendered by the Commission, a copy of such order shall be mailed by the Commission to each person or his attorney of record who has entered his appearance of record in the matter or proceeding pursuant to which such order is rendered.

RULE 1222. REHEARINGS.

Within 20 days after entry of any order or decision of the Commission, any person affected thereby may file with the Commission an application for rehearing in respect of any matter determined by such order or decision, setting forth the respect in which such order or decision is believed

to be erroneous. The Commission shall grant or refuse any such application in whole or in part within 10 days after the same is filed and failure to act thereon within such period shall be deemed a refusal thereof and a final disposition of such application. In the event the rehearing is granted, the Commission may enter such new order or decision after rehearing as may be required under the circumstances.

RULE 1223. CHANGES IN FORMS AND REPORTS.

Any changes in the forms and reports or rules relating to such forms and reports shall be made only by order of the Commission issued after due notice and hearing.

DONE at Santa Fe, New Mexico on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JOHN F. SIMMS, Chairman

E. S. WALKER, Member

W. B. MACEY, Member and Secretary

ir/

RULE ____. Filing Pleadings; Copy Delivered to Adverse Party or Parties. When any party to a hearing files any pleading, plea or motion of any character (other than application for hearing) which is not by law or by these rules required to be served upon the adverse party or parties, he shall at the same time either deliver or mail to the adverse party or parties who have entered their appearance therein, or their respective attorneys of record, a copy of such pleading, plea or motion. If there be more than four adverse parties who have entered their appearance in said hearing, four copies of such pleading shall be deposited with the Secretary of the Commission and the party filing them shall inform all adverse parties who have entered their appearance, or their attorneys of record, that such copies have been deposited with the Secretary of the Commission. These copies shall be delivered by the Secretary to the first four applicants entitled thereto.

RULE 1221. Notice of Commission's Orders. Within ten (10) days after any order, including any order granting or refusing or following rehearing has been rendered by the Commission, a copy of such order shall be mailed by the Commission to each person or his attorney of record who has entered his appearance of record in the matter or proceeding pursuant to which such order is rendered.

RULE 1219. Disposition of Cases Heard by Examiner. Upon the expiration of ten (10) days after such supplemental notice has been given as provided in Rule 1218 of the receipt of the report and recommendations of the Examiner, the Commission shall either enter its order disposing of the matter or proceeding or refer such matter or proceed to the Examiner for the taking of additional evidence.

COPY

ATWOOD & MALONE
LAWYERS

JEFF D. ATWOOD
ROSS L. MALONE
CHARLES F. MALONE

E. KIRK NEWMAN
RUSSELL D. MANN

ROSWELL PETROLEUM BUILDING
ROSWELL, NEW MEXICO

July 25, 1955

Mr. J. O. Terrell Couch
Legal Department
The Ohio Oil Company
P. O. Box 3128
Houston, Texas

Re: Proposed Amendment of Rules of New Mexico Oil Conservation Commission

Dear Mr. Couch:

I am sorry that I did not have an earlier opportunity to forward my written comments on the proposed rules of procedure prepared by the committee of which you are a member. I appreciated very much the invitation to submit my views, and I am doing so herewith.

At the outset, I would like to express the view that experience under the rules will be the most effective means of determining the changes which should be made. The following additional changes seem to me to merit consideration. As you will note, some of them are merely matters of draftsmanship which you may disregard if you do not feel that they are an improvement.

1. I mentioned at the hearing the apparent conflict between the provisions of Rule 1204 and 1209. Rule 1204 contains the mandatory requirements that "notice of each hearing before the Commission and notice of each hearing before an examiner" shall be given by personal service and publication. Rule 1209 is entitled "Continuance of Hearing Without New Service", and provides that a matter as to which notice has been published for hearing before an examiner shall be placed on the regular docket of the Commission for hearing if an objection is filed by an interested person within three days prior to the proposed hearing. The rule then continues to provide for only a supplemental notice to persons who have appeared in the proceeding as a prerequisite for the Commission hearing. As I read the mandatory and unqualified requirement of Rule No. 1204, no valid hearing could be held before the Commission, whether on continuance under Rule 1209, or otherwise, without personal service and publication. As 1209 is written, it does not contemplate such service. One manner of eliminating the conflict would be

to insert after the words "notice of each hearing before the Commission," in Rule 1204, the following: "except hearings continued by an examiner as provided in Rule 1209".

2. The same apparent conflict exists between Rule 1209 and subparagraph (c) in Rule 1207. The latter provision requires a supplemental notice not less than ten days before the date of a hearing before the Commission, whereas under the provisions of Rule 1209, a matter set before an examiner will be continued to the next regular hearing of the Commission in case of objection without reference to whether time is available for the supplemental notice required by subparagraph (c) of Rule 1207.

3. We discussed individually the attempt of the drafting committee to combine under Rule 1207 "supplemental notices", every type of service or notice which would occur subsequent to the original service and publication. While the objective is a desirable one, it seems to me that it is not appropriate to treat the proposed report and recommendations of the examiner as a "supplemental notice" as is done in Rule 1217. The same observation could be made with reference to treating the Commission's orders as a supplemental notice under Rule 1221.

4. I believe that the phraseology of Rule 1203 would be improved if the words "known to applicant" were inserted in lieu of the words "insofar as applicant believes" appearing in the third line from the end of the rule.

5. At the June Commission hearing you will recall that there was some discussion as to the due process of law aspects of Section 1209 if notice of a hearing before an examiner is published, and the hearing is actually held before the Commission on continuance, with no publication of notice of the Commission hearing as such. I think that this may pose a problem, but that it can be handled as suggested, I believe by John Woodard, by making the published notice include the possibility of continuance for hearing before the Commission as provided by the rules and regulations of the Commission.

6. If, as suggested, by El Paso Natural Gas Company I believe, the examiner is given the express power to exclude testimony or evidence in Rule 1215, I believe that provisions should be made for making a tender of the proof so that it would be in the record when considered by the Commission. The exclusion could then be assigned as error and passed upon by the Commission.

7. With reference to Rule 1217, I am curious as to the "prosecuting function" which is referred to. I do not know of any "prosecution" that would occur before an examiner, and it would seem to me that if it is intended to prohibit the examiner

from participating in the hearing, other than as an umpire, that should be so stated. The last sentence of the first paragraph of Rule 1217 does no harm, but it seems to me that the provisions for disqualification by the parties is perfectly adequate without it. The procedure is patterned after our statute providing for disqualification of District Judges, which puts the burden on the parties to disqualify. It presumes that the judge will be impartial without an express requirement to that effect.

Of the foregoing suggestions, I consider numbers 1 and 2 to be quite important as they undoubtedly will result in an attack on the jurisdiction of the Commission if the conflicts are not eliminated. The remaining matters fall in the general category of "observations". I have the feeling that the procedure is unduly extended by the filing of the proposed report of the examiner, filing and possibly argument before the Commission of exceptions thereto, entry by the Commission of an order and thereafter a trial de novo by the Commission of the same issues, followed by the possibility of a rehearing. I am confident that only matters in which no controversy is anticipated will be heard before examiners under these circumstances, but perhaps, until the volume of cases becomes much greater, that will be desirable.

May I again express my appreciation of your invitation to file these recommendations. I am sending copies to Messrs. Gurley, Kitts, Kellahin, Sellinger and Woodard, who, I understand, composed the Committee.

With best personal regards, I am,

Sincerely yours,

Ross L. Malone

RLM:bc

cc: Mr. John W. Gurley
Mr. Willard F. Kitts
Mr. Jason Kellahin
Mr. George Sellinger
Mr. John Woodard

BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
June 28, 1955

IN THE MATTER OF:

Application of the Commission upon its own motion for an order establishing rules and regulations with regard to hearings to be conducted before examiners (as provided in Chapter 235, Laws of 1955).

Case No. 903

BEFORE:

Honorable John F. Simms
Mr. E. S. (Johnny) Walker
Mr. William B. Macey

TRANSCRIPT OF HEARING

MR. MACEY: The next case on the docket is Case 903. In connection with Case 903, the Commission appointed a Committee to suggest some rules pertaining to the examiner system, and it was the recommendation of the Committee that the entire Section N of our rules and regulations, which is entitled: Rules on Procedure, be amended. Due to this recommendation it has been necessary to re-advertise the case to include the complete revision of Section N, and, therefore, the case can not be concluded at this time by any means. The case will be re-advertised for the July 14th hearing.

Mr. Kitts, you may have some comments you wish to make on the recommendations of the Committee.

MR. KITTS: Mr. Secretary, various members of the Committee met on June 13th, 14th, 15th. The main meeting was the afternoon c June 14th, where we had four members present. At various other

times we had three or four members present. We had five members present on the afternoon of June 14th. Therefore, not every member of the Committee was in on each and every draft of the recommendations here. I think it shows pretty much of an agreement of the Committee. I hope that all of you have copies of this which were placed on the table at back of the hall.

The underlined portions constitute new language. You will notice that all of these portions pertaining to hearing examiners are merely incorporated in the standard rules of procedure. Mr. Campbell has one thing that he wants to bring to your attention, one thing that he is not satisfied about, as a member of the Commission. I will call on him in a minute.

I have one matter that the Committee wanted me to mention. Over on the last page of the rules, Rule 1220, under de novo hearing before the Commission; down about eight lines where it begins with this sentence. "In such hearing before the Commission, the Commission shall be entitled to receive and consider the record of the hearing conducted by the Examiner in such matter or proceeding." On Wednesday morning, June 15th there were four Committee members present, we were split right down the middle, two and two, as to whether or not this should be included. We decided to include it with the understanding that this would particularly be brought to your attention, this language, so that you may think about it and July 14th when we have a full hearing on this matter --

It was the feeling of those who were against this language, that the feeling was that they did not feel that the statute providing for a de novo hearing permitted the inclusion of such language as was incorporated in this sentence. I want to point that out to you speci-

fically. Undoubtedly there will be many other questions on other of our suggestions and recommendations. You will have plenty of time to look those over and raise your recommendations and objections at the July 14th hearing.

Mr. Campbell, you have one thing you wanted to specifically point out.

MR. CAMPBELL: Mr. Secretary, as a member of the Committee that suggested these rules, there is a matter that I would like to ask the attorneys particularly to consider. The Statute is pretty restrictive insofar as timing is concerned on these Examiner's hearings. The Statute specifies the number of days, for instance, prior to which a disqualification can be entered in a hearing before an Examiner, which must be not less than three days. My question is one of jurisdiction for the Commission, in the event that an Examiner is disqualified. I can visualize the situation where four days before a hearing is set before an Examiner, somebody disqualifies him. The rules then provide, as they are here written, that the matter will then be heard either before another Examiner or at the next regular hearing of the Commission, which may be two or three days after it was originally scheduled before the Examiner.

I am wondering whether in order for the Commission to have jurisdiction in a hearing where somebody changes their mind about having it heard before an Examiner, four days before an Examiner's Hearing, whether a new notice must be published before the matter can be heard at a different time and place before the Commission. In other words, whether, if I file a case and ask it be heard before an Examiner, under the Rules and Statute, I can, four days before the hearing, change my mind and decide I want it heard before the

Commission. Under the rules, as written, if the next regular hearing is five days after that it goes on the docket for that hearing after mailing notice to interested parties, and persons who are supposed to have entered an appearance won't have appeared and the Commission won't know who to notify by mail. I wonder if we are going to have to set it down at the next regular hearing of the Commission, where it has been properly published, notice has been given as required by the regular statute.

I would like to call that to the attention of the attorneys to get their reaction as to whether that would need to be changed in these rules.

Also, I think you will find that Rule 1214, though not underlined, is a new section.

MR. KITTS: The matter that Mr. Campbell mentioned, of course, we can't argue it out today, but I do want to give you the Committee's thought on it, that is, the members of the Committee that were present when this particular language was adopted. It was subject to a great deal of discussion, the very problem that Mr. Campbell raised, and he and I and a couple of the other members of the Committee discussed it previously. We finally came to the conclusion, as incorporated in our recommendation of the rule, that if the matter were actually called before the Examiner and continued, that jurisdiction requirements would be met. I think it is subject to some argument. It was the feeling of the members who were present at that time that certainly merely taking it off the docket without having the matter continued by the Examiner would be subject to those objections that Mr. Campbell raised. But, if it was actually called and continued by the Examiner, we believe in that way the

jruisdictional requirements would be met. That is just giving you the feeling of those who recommended this language.

MR. CAMPBELL: May I ask a question? As you indicated, I wasn't present when the final draft was prepared. Do I understand that in the Rule 1209, where it provides that "any person who may be affected by any order entered by the Commission in connection with such hearing shall have filed with the Commission, at least three days prior to the date set for such hearing, a written objection to such hearing being held before an Examiner. In such event the matter of proceeding shall be placed on the regular docket of the Commission for hearing, and the Secretary of the Commission shall promptly give a supplemental notice of such continuance to the applicant or petitioner and to each person who has entered an appearance in such matter or proceeding."

My point was, if you decide not to have an Examiner's Hearing before it is held, there is no appearance. The supplemental notice is not authorized by the Statute, of course, and my question was whether this contemplated the publication of a new notice for the hearing, the only hearing then that would be held before the Commission instead of the Examiner?

MR. KITTS: What particular language are you quoting?

MR. CAMPBELL: Where you say " At least three days prior-- Rule 1209. Suppose I file that objection, then in such event the matter is placed on the regular docket of the Commission, it doesn't say at the next hearing. It simply provides for supplemental notice to parties that have entered an appearance in the case. Up to that point no appearances will have been entered. My question is, whether or not the Commission, where there is never a hearing called before the Commission, the objection is made before the three days time

then whether the notice that they had published previously for an Examiner's Hearing will carry jurisdiction to the Commission for an initial hearing in the case? My point is that you will have to republish as to the hearing before the Commission. I believe you are correct if you go before the Examiner and the hearing is held at the time that the notice said, that he may in order there continue the matter to a Commission Hearing, but where you never reach the Examiner there is a serious question as to whether you have to republish notice for Commission Hearings.

MR. KITTS: The second paragraph of Rule 1209, I believe this is intended to cover all cases, where we state: "Any matter or proceeding set for hearing before an Examiner shall be continued by the Examiner to the next regular hearing of the Commission following the date set for the hearing before the Examiner if any person who may be affected by any order entered by the Commission in connection with such hearing shall have filed with the Commission, at least three days prior to the date set for such hearing, a written objection to such hearing being held before an Examiner. In such event the matter or proceeding shall be placed on the regular docket of the Commission for hearing, and the Secretary of the Commission shall promptly give a supplemental notice of such continuance to the applicant or petitioner and to each person who has entered an appearance in such matter or proceeding."

I believe that was the intent, that the matter would have to be called by the Examiner and continued at that time. That was the understanding I had when I agreed to this language, personally.

MR. MACEY: Mr. Woodward, do you have a statement?

MR. KITTS: He would be required to continue, that is manda-

tory.

MR. WOODWARD: I think there is a way around this situation. If the Examiner's hearing has been set, say, five days before the regular meeting of the Commission, and the Statute requires to hold the hearing before the Commission in the event of objection, at its next regular meeting, there would scarcely be time to get out a published notice before the next regular meeting when the Statute requires the hearing before the Commission.

On the other hand, if the hearing is never held before the Examiner, nobody has appeared, and consequently no one can be said to have notice of the matter before the Commission. I think the solution to the dilemma, that everybody has notice of the law, if it is not heard before the Examiner due to an objection that is interposed, it will be heard by the Commission; consequently, if your notice initially reads that this matter is going to be set before the Examiner on such and s ch a date, subject to cbjection by an interested party, in whic h event it will be held at the next regular hearing of the Commission. That supplies all the notice you are capable of giving under the law. Then, if an interested person shows up at the hearing and after all due process requires that he be afforded an opportunity to be heard, and he wants to be heard, and shows up at the Examiner's meeting and checks on it and finds that the thing has been continued until the next meeting of the Commision, he has had actual notice of the time and place where the thing will be heard. If he doesn't check with the Examiner, he has had due notice that they are going to consider that matter, for all he may know the Examiner would have heard it, and his opportunity has passed.

I don't see that you are prejudicing the rights of anyone to give a notice in that form. It simply states what the law implies. It will be held before the Examiner, or requested that the matter be heard before the Commission, and in any event heard at the next regular hearing day. I think that is all the notice you can give. If they do appear before the Examiner and find it is going to be continued they have actual notice.

MR. MACEY: Judge Foster, do you have a statement?

MR. FOSTER: Is it the purpose of the rule here to disqualify an Examiner because he has knowledge and fact?

MR. KITTS: First paragraph of Rule 1217.

MR. FOSTER: "No Examiner shall conduct any hearing in any matter or proceeding for which the Examiner has conducted any part of the investigation." In other words, if he has acquired any information about what he is going to hear he is disqualified?

MR. KITTS: The intent was to disqualify any Examiner who had been conducting a project or study of those particular -- say a particular well or area in question, so that he might come into the hearing with a preconceived notion. I think even more particularly it was intended to take care of those cases where the Examiner had, or a particular member of the staff had investigated the case so that in preparation for hearing, I mean such as members of the staff who sit over here at the side table, obviously conduct some investigation of the case and the matter before it is heard. That is what we are trying to --

MR. FOSTER: It is obvious to me that the longer the Examiners stay on the more informed they are going to be, so that obviously

they won't be qualified to hear anything.

MR. KITTS: I think that language could be susceptible to some clarification.

MR. FOSTER: It is clear enough.

MR. MACEY: Anyone else have any questions they would like to ask? Mr. Stanley?

MR. STANLEY: Shouldn't it be the duty of the chosen Examiner to study the data so that he may be qualified to hear the case?

MR. MACEY: Don't ask me the question, ask the Commission. What was the intention --

MR. KITTS: Not anymore than a Judge in a personal injury case would go out and make the accident report, make some sort of predetermination of where he thinks the merits might lie.

GOVERNOR SIMMS: You could get yourself in the position with the same man being the prosecutor and the Judge. That is what they are trying to get away from. It is easy for a member of the staff to go out on behalf of the Commission, who may be taking a definite stand in the thing, and then end up as Judge of the thing when he is one of the litigants. I think that is what they are trying to keep from doing. I don't think they have said that.

MR. WALKER: The people concerned can object to that Examiner at the time so that would take care of that, if he feels like he is going to appear before an Examiner that is going to be a prosecutor and judge both.

GOVERNOR SIMMS: I am not comparing this to the flow of liquor in New Mexico, but the Supreme Court has ruled that I can't send a man out to investigate a bar violation and let him decide on

whether or not that license is revoked. I think that is the kind of thing that is worrying Bill. It is not truly analogous, but I think that is what he is shooting at.

MR. WOODWARD: The language here clearly states that, "Any examiner who cannot accord a fair and impartial hearing and consideration to the parties in any matter or proceeding referred to such Examiner, or who is otherwise disqualified to conduct the hearing and consider the matter or proceeding, shall so advise the Secretary of the Commission and shall withdraw from such matter or proceeding."

I don't construe the words "fair and impartial" to mean that the thing. I think an informed person is capable of a fair and impartial hearing. It is only when his information or previous activities have placed him in a position where he has either a personal interest in the results of a hearing, or he has a preconceived notion by reason of his precious investigation, wherein, as an incident to some enforcement consideration, he has made an investigation. But, where he is simply well informed about conditions, I think he is in the best position, probaly, of all, to give the kind of fair and impartial hearing that you want. I see no necessary conflict there, or any reason why the inference should be drawn that if a fellow knows anything about the application at all he should be disqualified. I think the matter is a subjective thing any way.

MR. FOSTER: How does one get informed except through investigating?

MR. KITTS: It may well be that the balance of the paragraph takes care of it, that the first sentence may very well be surplus.

In other words, the provisions, bias or prejudice or unable to accord a fair and impartial hearing takes care of what we are trying to get at.

MR. MACEY: Unless the Examiner disqualifies himself it is going to be on the motion of somebody else. Suppose they ask the Examiner to disqualify himself and he says, "I won't do it, I can give you an impartial hearing". That happens more often than you think. Is there a hearing on the disqualification?

MR. KITTS: No, we provide for automatic disqualification, similar to the application in District Court.

MR. RIEDER: I would like to interject a thought that it would be difficult for any member of the staff to say that he didn't have some opinion in some way, but that in no way alters his ability in the majority of the cases to hear them freely and without bias, but it would be difficult to say that we are not informed on it, and that at one time or another we had not taken a position contrary to the applicant.

GOVERNOR SIMMS: What do your rules provide for alternate disqualification?

MR. KITTS: The rules provide that there should be no more than four Examiners at any one time. I think it would automatically go before the Commission then. We don't specifically so provide.

MR. FOSTER: What would you do if you had a case where the Examiner had considered the matter and made a rule and then six months later the same kind of case came before that Examiner again, would you disqualify him?

MR. KITTS: Would I disqualify him?

MR. FOSTER: Would he be disqualified under the rules?

MR. KITTS: Who conducted any part of the investigation?

MR. FOSTER: You have the same question again before the same Examiner on a matter that he decided six months ago. He gets pretty well along in his knowledge by hearing the first case. Would that disqualify him?

MR. KITTS: I don't think so.

MR. FOSTER: I don't think it would either.

MR. MACEY: Mr. Gurley?

MR. GURLEY: In considering this thing, the terms "matter or proceeding" as we interpreted meant that particular matter or proceeding. It is like any case, it may be on the same subject, but certainly not the indicidual case that you have to rehear. That was the purpose behind that. In other words, if a man had been sent out to investigate a certain case and we brought up the point that the original Examiner might not be able to hear it, then the other Examiner who had investigated it could not be appointed to hear the thing because he had been part of the investigation team. That was behind the thought. The matter or proceeding means that particular case.

MR. FOSTER: Why would information gained disqualify a person from hearing the case?

MR. GURLEY: As the Governor mentioned when he brought up the point of the liquor situation, with which I have had some experience, it is difficult to go out and build the case and then come in and hear it.

MR. FOSTER: That is what the Commission does.

MR. GURLEY: The Examiner can't go out and build a case and have people come in and give an impartial hearing on it. That was the thought behind this phraseology.

MR. WALKER: Who is going to assign the Examiner to these cases?

MR. KITTS: The Secretary of the Commission. An Examiner must be appointed by the Commission, but once appointed he may be assigned to any individual case by the Secretary of the Commission.

MR. WALKER: Don't we naturally suppose that any Examiner he appoints is going to take an impartial attitude toward the Case?

MR. KITTS: That is the initial assumption.

MR. WALKER: I would suggest that it be that way.

MR. KITTS: This is more or less directed language.

MR. WALKER: In other words, that the Secretary is going to appoint an Examiner, we are going to assume that he will give an impartial hearing and his decision will be in accordance, then it is automatically up to who is interested in the case to disqualify him or disqualify himself. I don't know what we are arguing about.

MR. KITTS: I think this is more or less helpful language to the Secretary. No Examiner should be appointed who has such an interest or has conducted such an investigation along the lines we are discussing. That is all it is.

MR. WALKER: I am automatically going to assume, as a member of the Commission, that everybody is going to get a fair hearing.

MR. KITTS: I think that is a natural assumption. The Examiner is not going to have to act, it is going to have to be turned over to the Commission.

GOVERNOR SIMMS: Any report he makes is necessarily going to

reflect his opinion or suggestion or recommendation.

MR. KITTS: I think it should, his study of the facts.

GOVERNOR SIMMS: We don't have to go along with him.

MR. KITTS: You sure don't, there are three of you. One may go one way and two the other.

MR. LYONS: It appears that we have two matters under consideration here. The majority of these cases are going to be brought on the application of an operator. It isn't up to the Commission to build a case for him, it is up to the operator to build his own case. If the Commission brings the matter up on its own motion, any case brought up on the Commission's motion should not be heard by a staff member who has done the investigation. I think that is proper. I see no reason --

GOVERNOR SIMMS: That would be particularly true in enforcement matters which were not an application by an operator.

MR. LYONS: Yes, sir.

MR. MACEY: Do these rules provide anything for the Commission's application on its own motion?

MR. KITTS: I don't think so.

MR. MACEY: I don't think it was the intent that the Commission's cases called on its own motion would be heard by an Examiner.

MR. LYONS: In that event there would be no reason for the Commission to build a case. All they need to do is to get a background on the facts behind it and let the operator build his own case.

GOVERNOR SIMMS: And the protestant tear it down, the Commission just listens.

MR. LYONS: That is right.

MR. MACEY: Mr. Hiltz, did you have something?

MR. HILTZ: Not being a lawyer, some of the language confuses me in Rule 1217, the last few words reading, "nor shall any Examiner perform any prosecuting function." It may be a naive question. Does that preclude an Examiner from asking any questions that might bring facts to light, whether the applicant be an applicant or protestant?

GOVERNOR SIMMS: No, I don't think so. They don't want him to take one side or the other and beat the drum.

MR. MACEY: Does anyone else have anything further in this matter?

MR. WOODWARD: I would like to comment on this Rule 1220, concerning a hearing by the Commission after the case has been heard by the Examiner. It states: When any order has been entered by the Commission pursuant to any hearing held by an Examiner, any party adversely affected by such order shall have the right to have such matter or proceeding heard de novo before the Commission, provided that within 30 days from the date such order is rendered such party files with the Commission a written application for such hearing before the Commission. If such application is filed, the matter or proceeding shall be set for hearing before the Commission at the next regular hearing date following the expiration of fifteen days from the date such application is filed with the Commission. In such hearing before the Commission, the Commission shall be entitled to receive and consider the record of the hearing conducted by the Examiner in such matter or proceeding."

I think that is an important provision and will have a very important practical consequence. It is awfully easy to get before the Commission, as the Statute reads: "Knowing that in advance there may be a tendency on the part of the applicant where they suspect that they will have any reason to seek the Commission's review, to simply ask for a Commission hearing and by-pass the Examiner".

Now, in a great number of cases, even where the Commission review may be contemplated, the basic facts are uncontroverted, the inferences to be drawn from the facts may vary, or the application of the conservation facts may vary, but those are matters that the Commission can pass on by reviewing a record taken before an Examiner.

One of the benefits to be derived from the Examiner's system isn't the handling of the few uncontested matters, but the saving in time on the part of the Commission, and everybody that shows up, which would result by eliminating two and three hours of taking evidence about which there is no contest whatever, the basic facts are the same. Let us assume, in the hearing before the Examiner and the hearing before the Commission, the time of everybody that shows up here is taken, and would be taken by simply reiterating those facts and putting into evidence again those exhibits. Now, of course, the trial before the Commission is de novo, but I think very appropriately one of the exhibits which might be introduced into evidence at that time is the record at the previous hearing. That wouldn't prejudice anyone's rights to add additional testimony or to contest anything in the record. In probably a majority of the cases, the argument before the Commission would involve the inferences to be

drawn from these uncontraverted facts, or some argument dealing with the law applicable to the facts.

If you are going to make the thing work, and, of course, I think it is the spirit in which it is administered, and the spirit in which the industries participate that will make it work. Consequently, I think it is extremely important for each operator to take the responsibility of eliminating as much unnecessary testimony given before the Commission as they can. In other words, go before the Examiner and put the basic facts in and then if you want to argue about what they mean before the Commission you are not going to take the time of 50 people who have no interest in the case whatever.

So, I think with that in mind the sentence should be left in the rule and, more important perhaps, when the orders are circulated if they are to be circulated, they be accompanied by a policy statement from the Commission, indicating the spirit of which these things are offered, and the purpose they are expected to achieve. I don't believe there is any denial of due process or disregard of the Statute calling for trial de novo. The party gets that even though the old record goes in as an exhibit.

GOVERNOR SIMMS: They are certainly going to have to cooperate voluntarily. Many Commission's practices develop into--it is an important enough matter that they know there is going to be an appeal to the Commission from the Examiner, so they withhold maybe controversial evidence and facts for the purpose of surprise, or something else, knowing there is going to be an appeal anyway. They don't bring it out when they are before the Examiner, and spring it on them at the last minute when it comes to the Commission.

I hope the Commission will adopt a policy statement urging it,

and the industry will cooperate by making a full disclosure, as much as possible, at the Examiner level. If they don't we won't save the time, they will wait until they get up to the Commission.

MR. WOODWARD: The net practical result of those tactics would be that you would waste a couple of times, before the Examiner and you would get before the Commission with a surprise; the other side asks for a continuance and instead of saving time you multiply it by about three.

GOVERNOR SIMMS: Exactly. It is going to be largely up to representatives of the industry who litigate these issues before the Examiner, to make as full a disclosure, and get as much stuff out of the way for the special matter feature of the Examiner's report, if you want to put it that way.

MR. WOODWARD: I don't think that kind of cooperation will serve and it is a courtesy that every other operator ought to appreciate, it would be just a needless waste of time.

MR. MACEY: Mr. Gurley?

MR. GURLEY: In considering this particular Statute again, and that particular part of the paragraph, whether or not the original transcript of the hearing could be entered into evidence, or whether it could be entered on the review, there is some question as to whether the question would so provide. This particular Statute, it says that the matter shall be heard de novo before the Commission. In comparing it with other Commission Statutes, in practically all of them it goes ahead to say that such transcript of the original hearing may be entered into evidence and considered. Mr. Couch and I, in this last session that we had, both felt there was some question as to whether it would be legal under the Statute to allow the

transcript of the original hearing to be considered in evidence, in that it says de novo -- to get back to the definition of the term "de novo", but the thing that stopped us on that was the fact that the other Commission's statutes, when the transcript was to be considered, it was so mentioned in the Statute. I question whether it would be legal under this particular Statute to allow the transcript for review.

MR. WOODWARD: We did some research on that point sometime back to see. If they set up the trial examiner system on its own, a lot of people come in and make a statement -- Unless you know affidavits and sworn statements can be introduced in evidence at any trial de novo, as a matter of fact, a great many of the hearings held before this Commission are based, are heard on the basis of affidavits and sworn statements, and go into the record. Considering the record before the Examiner, in that light, with the opportunity afforded for additional evidence, objections to the introduction of that evidence, if someone feels that is a particularly unreliable evidence, that testimony taken before the Examiner, they have the opportunity to object; they have an opportunity to refute, or add additional testimony. While the cases are not harmonious on this point, you are absolutely right there, I think that the weight of authority would permit this introduction as an item of evidence.

What the Commission could not do, I feel certain, is to exclude any other fact of evidence and act solely on the basis of that position that the trial examiner has taken. I think, considering that as an item, if both parties want to rest and rely on it, then I think there is a sufficient body of evidence for the Commission to make a rule that would not be arbitrary and unreasonable if it could

be supported by substantial evidence.

MR. GURLEY: Is it your feeling that if one party objects to the transcript being in the record, it could not be considered?

MR. WOODWARD: No, I think the Commission ruling on that would be similar to the objection directed at any other affidavit or sworn statement. It would be a matter of credence whether or not they would let it in. If, for example, the reason the review is shown is for some bias that the Examiner has shown during the course of the proceedings, and some right of cross examination has been deprived, for example, and the printed record is a distortion of the factual situation, and the objection is entered on that ground, like, perhaps the Commission has a basis for keeping it out entirely. But that is purely a matter of discretion with the Commission to decide whether it has sufficient probative value to let it in or keep it out, just as they would in the form of any other sworn statement.

MR. GURLEY: The cases that you investigated, were they built around such a de novo statute as this is or not?

MR. WOODWARD: Some of them dealt with term and other due process requirements as to what was required as a constitutional matter. I think that custs two ways, the legislature would presume to have a proper, an act that was constitutional, or at least it would not have an act that was unconstitutional. That de novo before the Commission after the objection, there have also been cases that satisfied the de novo requirement. They are really not satisfactory, but what the Commission did was to include all other kinds of evidence and --

MR. KITTS: (Interrupting) Mr. George Selinger and I are

the ones that wanted to include that language. It was our feeling that first of all there is no mandatory provision that it should be considered by the Commission, and that in introducing the transcript or offering the transcript, certainly the other party would not, by this language, waive any objection it would have to the introduction, or any grounds it might have similar to the objection of any other type of evidence.

Also we felt that the Statute, although it does say that the party may have the right to have the matter heard de novo, I think it is fairly flexible in that regard also. It doesn't mean every case. We felt that you start from the beginning and go right through the case again. Although, there is certainly that right.

MR. FOSTER: Why shouldn't the Commission be entitled to hear sworn testimony? Do you have to swear to it again, what is the value of this? I don't see any use to the Examiner system if you are going to get involved in legalistic ideas and kick the ball around like this. I assume the Examiner is qualified to hear these cases. If you come before the Examiner and try your case and the witnesses are all there and they are sworn, and the testimony is taken down and transcribed, what is the advantage of having this particular witness come in and repeat that again to the Commission orally instead of letting the Commission study the matter from the transcript. They are trying to save time. He wouldn't be any better off swearing to it twice than once. I don't see what the Commission gains. I think you ought to take a broad practical view of this thing. Certainly if I come before an Examiner, I don't see any reason. I have got one witness, I put him on and I swear him, and his testimony is there under oath, presumed that he

has testified to all he knows anyway, then when he comes before the Commission, if the other side comes up here, why can't the Commission decide that thing on the record? Why have another record. I don't suppose it would make it any better.

MR. KITTS: Because the Statute provides that the party shall have the right to have the hearing de novo before the Commission. It doesn't say de novo on the record.

MR. FOSTER: What is your idea on de novo?

MR. KITTS: There have been many interpretations of de novo.

MR. FOSTER: What is your interpretation?

MR. KITTS: It means opening the matter up again from the beginning.

MR. FOSTER: It seems that you defeat your purpose.

MR. KITTS: It doesn't provide for any specific review of the record.

GOVERNOR SIMMS: I don't think everybody will come back up here again. That is what we are talking about when I say cooperation.

MR. FOSTER: Governor, I am saying, somebody gets a little dissatisfied with the Examiner. He comes in here and I don't see any reason why the Commission says,"Until the Court decides it, I am going to take the record. If you don't like it take it over to the Courthouse", instead of setting the policy of not letting anybody submit anything on the record to the Commission.

GOVERNOR SIMMS: I think there is a second thing why the Commission wouldn't conscientiously be biased, if the Commission thought anyone was coming up de novo with their witness to testify to the thing that was in the provision, I think it would be against

him in the ultimate disposition, and I think he would realize it was against him if he was doing it to be ornery.

MR. FOSTER: I view it from statutory interpretation. I think the Commission can adopt the policy of construing it that way until the Court decides.

MR. KITTS: I don't think that on de novo that all the New Mexico agrees with the Texas decisions. Is it provided in your Statute, or is it by Court interpretation that it is de novo on the record?

MR. FOSTER: Ours says just de novo, our Statute has been interpreted entirely contrary.

MR. KITTS: A completely new case?

MR. FOSTER: A completely new case, swear them over and take it again. It looks silly to me. I don't care if it is good Texas law.

MR. KITTS: It was the feeling to provide the Examiner system that we will expedite matters by having a lot of routine cases where there are no protestants, or maybe one or two protestants, that those could be heard by Examiners, and we anticipate that in a large number of those cases, they will not be taken before the Commission thereafter. Maybe that is a wild assumption. You have seen your cases, where several cases, during any hearing where the case takes no more than five or ten minutes, with no protestant, but at the same time a great number of those cases being time consuming, that is at least part of the idea in providing for an Examiner system.

MR. KELLAHIN: I think we are overlooking one thing in this discussion. In the first place when the hearing has been held before the Examiner, the Commission then enters the order and they enter

their order on the basis of the record. What the purpose of coming back then for hearing de novo, certainly I agree wholeheartedly that the record should be introduced in the hearing before the Commission on a de novo hearing. At the same time, it was the intent of the law, in my opinion, that the hearing de novo means they would have the opportunity to argue about this record and to introduce additional testimony, if any were available, to the Commission.

There is some question under our Statute. I don't believe what Mr. Kitts says agrees with what I am going to say. When the Statute says de novo, that means a new trial. I don't believe the Supreme Court of New Mexico says that. In some cases you may be faced with the proposition that the de novo hearing means de novo on the record. If that were the interpretation under this Statute, it would be meaningless because you have had a review of the record by the Commission. While I approve of the language that the record can't be offered in a hearing before the Commission, I would like to hear it expanded, and let them --

GOVERNOR SIMMS: I know that two members of the Commission will. It is not de novo on the record, the record will be considered and you can introduce additional evidence.

MR. KELLAHIN: I understood that. I think that is correct, in the matter of interpretation that may have.

GOVERNOR SIMMS: Suppose we had the matter that we were hearing this morning, about this decision down at Eunice, and you had a trial examiner who had heard the whole thing, and it had gone six months and the study had been completed, and there were facts that you didn't know about at the time of the Examiner's recommendation or ruling, I think it would be very discriminatory not to be able

to introduce new evidence as a result of this additional study.

MR. KELLAHIN: I agree with you, and I think that was the intent of the Statute. The point I am trying to make, I think the Commission should solely interpret the Statute and proposals, even in their rules which would give us a precedent in case we need it.

GOVERNOR SIMMS: The only case we have that applies to us says de novo on the record, and it is a Supreme Court --

MR. KELLAHIN: (Interrupting) District Court. We have had no Supreme Court cases on the Statute. That is the reason I am a little concerned about the interpretation about this Statute. I think the interpretation placed on it by the Commission will be material.

GOVERNOR SIMMS: I think Bill is interpreting it as really de novo and not de novo on the record.

MR. KITTS: I feel that way. Is that the way you feel about it?

MR. KELLAHIN: Yes. I think you ought to consider the record before the Examiner.

MR. KITTS: Then we are in agreement.

MR. MACEY: Anyone else? Does anyone else have anything further in Case 903? The Case will be continued to July 14th. We will take a recess until 1:15.

(Noon recess.)

STATE OF NEW MEXICO)
: ss.
COUNTY OF BERNALILLO)

I, ADA DEARNLEY, Court Reporter, do hereby certify that the foregoing and attached transcript of proceedings before the New Mexico Oil Conservation Commission at Santa Fe, New Mexico, is a true and correct record to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF I have affixed my hand and notarial seal this 5th day of July, 1955.

Ada Dearnley
Notary Public, Court Reporter

My Commission Expires:

June 19, 1959

LAW OFFICES OF
CAMPBELL & RUSSELL
J. P. WHITE BUILDING
ROSWELL, NEW MEXICO

JACK M. CAMPBELL
JOHN F. RUSSELL

TELEPHONES
4975 - 4287

Aug. 12, 1955

W. F. Kitts, Attorney
New Mexico Oil Conservation Commn.
P. O. Box 871
Santa Fe, New Mexico

Dear Bill:

I have your letter of August 8th concerning a meeting of the Commission's Committee on Rules and Procedure. I am scheduled to attend a meeting of the State Board of Finance at 9:00 A.M. on August 16th, and if it is completed I will be glad to attend the committee meeting at 1:30 P.M. on the same date.

With kindest regards, I am

Very truly yours,

Jack

Jack M. Campbell

JMC:le

BEFORE THE

Oil Conservation Commission

SANTA FE, NEW MEXICO

IN THE MATTER OF:

CASE NO. 903

TRANSCRIPT OF PROCEEDINGS

ADA DEARNLEY AND ASSOCIATES
COURT REPORTERS
ROOMS 105, 106, 107 EL CORTEZ BUILDING
TELEPHONE 7-9546
ALBUQUERQUE, NEW MEXICO

BEFORE THE
OIL CONSERVATION COMMISSION
STATE OF NEW MEXICO
Santa Fe, New Mexico

May 18, 1955

IN THE MATTER OF:

Application of the Commission upon its own motion for an order establishing rules and regulations with regard to hearings to be conducted before examiners (as provided in Chapter 235, Laws of 1955). Case No. 903

Before: Honorable John F. Simms, E. S. (Johnny) Walker, and William B. Macey.

TRANSCRIPT OF HEARING

MR. MACEY: The next case is 903. Does anyone have a statement or testimony they wish to give in regard to Case 903? Mr. Woodward.

MR. WOODWARD: At the risk of wearing out our welcome, we would like to make a very brief statement as to the types of orders which we think should be adopted in supplementing this statute. Pursuant to Senate Bill 229, we think the Commission should issue a procedural order that would make some provision for the following matters.

We are not prepared to make any recommendation, but based on the examiner system in other states, I think it would be appropriate to cover the following things. Of course, the Commission is working within the framework set up by the statute and must exercize its powers with reference to those provisions.

The first of these provisions that I think the Commission has to deal with in the statute is the clause that authorizes them to provide for the appointment of one or more examiners to be members

of the staff of the Commission. Pursuant to this authority we think an order should be issued providing for the appointment of the examiners and specifying in a general way their qualifications. It must be a member of the staff, and we think a member with engineering or geological training should be qualified to serve as an examiner.

The second provision would deal with this sentence in the statute, "The Commission shall promulgate rules and regulations with regard to hearings to be conducted before examiners and the powers and duties of the examiners in any particular case may be limited by order of the Commission to particular issues or to the performance of particular acts." That appears to be a permissive power to specify the kinds of cases that the examiner can hear. I think it would be extremely desireable in a general way to indicate the types of matters that the examiner is expected to hear. Ordinarily a general or state-wide rules are appropriate for the consideration of the Commission. Short of that I would see no necessity to limit by a procedural order, the types of matters the examiner could hear.

There is also a question concerning the time sequence of the examiners for the time of hearings. The statute provides that"no matter or proceeding referred to an examiner shall be heard by such examiner where any party who may be affected by any order entered by the Commission in connection therewith, shall object thereto within three days prior to the time set for hearing". In view of that time limitation we would suggest that by this order the Commission require those applicants that wanted their case heard by the examiner, to so state in the application, and that would appear

in the notice. It would serve both as a general notice of the hearing and also that the applicant wants it heard by the examiner. That would then permit the people affected, that might be affected by the application and order, to make known any objections they would have to the examiners hearing.

There is also a question about scheduling the examiners hearing during the middle of the month. For example, if such a hearing is scheduled during the middle of the month and shortly before the hearing is to be held sometime prior to the three-day limitation, an affected person asked that it be heard by the Commission, the matter would then be deferred until the next hearing date. That might work something of a hardship insofar as the preparation of cases and people traveling long distances, I realize that. I don't know what might be done about it unless it is possible to clear up these examiner hearings three days before the regular hearing date. Then you know at the time the hearing is scheduled that it will either be heard within the three-day period or at the next Commission hearing.

The disadvantage to that, of course, is that it concentrates your hearing and might interfere with the presentation of some of these things at Hobbs which may be a very desirable feature.

The last recommendation would not be based on any specific language of the Act, but I think it is implied that the examiner may publish his findings and recommendations. It has eliminated in some cases and some states, unnecessary hearings by the Commission itself where the examiner's findings and recommendations are submitted to the parties appearing sometime prior to the issuance of the order. That would give an opportunity to those adversely affected

to make known their exemptions.

There appears to be nothing in the Act that would prohibit the Commission if it agreed with the exceptions, from remanding the case to the examiner, or setting it up for hearing on its own motion, and if it agreed with the findings of the trial examiner, of course, it could make that fact known by order.

In the absence of such machinery, a party disagreeing with the examiner has no other choice that he ask that his case be heard de novo before the Commission itself, in a thirty-day period. It may seem cumbersome, but it has in the past eliminated some unnecessary hearings before the Commission. The request for a re-hearing before the examiner in fact.

Beyond those recommendations I think the Act itself spells out in some detail the procedure, and undoubtedly the order would reiterate a number of the features of the features prescribed by the statute.

MR. MACEY: Thank you, Mr. Woodward. Off the record.

(Discussion off the record.)

MR. MACEY: On the record. I have a suggested five man member committee with one of the members being Mr. Kitts of the Commission staff. I would like to appoint Mr. Kellahin as Chairman, Mr. Couch, Mr. Woodward, and Mr. Campbell to serve on that Committee and come up with some recommendations.

MR. WOODWARD: If I may suggest another name, Mr. Sellinger has had a lot of experience with this system in Texas and Oklahoma.

MR. MACEY: I wasn't aware of that and we would be glad to have you serve.

MR. KELLAHIN: I am happy to serve on a Committee and I am not trying to dodge any duties, but I think it would be more

appropriate if a representative of the Commission rather than an individual be Chairman of the Commission. I would suggest that Mr. Kitts be designated. I am perfectly happy to work on it, but I think it would be better to have a Commission member as the Chairman and he could coordinate it a little better.

MR. MACEY: I think you have a good point. Mr. Kitts, you are the Chairman. Does anyone have anything further? We are going to continue the case to the June hearing. If no one has anything further we will consider the case continued.

C E R T I F I C A T E

I, ADA DEARNLEY, Court Reporter, do hereby certify that the foregoing and attached transcript of proceedings in the matter of Case 903 was taken by me on May 18, 1955, that the same is a true and correct record to the best of my knowledge, skill and ability.

Ada Dearnley
Reporter

BEFORE THE

Oil Conservation Commission

SANTA FE, NEW MEXICO

July 14, 1955

IN THE MATTER OF:

CASE NO. 903

TRANSCRIPT OF PROCEEDINGS

ADA DEARNLEY AND ASSOCIATES

COURT REPORTERS

605 SIMMS BUILDING

TELEPHONE 3-6691

ALBUQUERQUE, NEW MEXICO

BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
July 14, 1955

Application of the Commission upon its own motion for an order revising Section "N" - RULES ON PROCEDURE of the Commission's Rules and Regulations to provide for additional rules governing hearings to be conducted by Trial Examiners and for any necessary revision in the existing rules.	Case 903

BEFORE:

Honorable John F. Simms
Mr. E. S. (Johnny) Walker
Mr. William B. Macey

TRANSCRIPT OF HEARING

MR. MACEY: The next case is Case 903.

MR. KITTS: I have a statement I would like to make. If it please the Commission, at this time I would like to introduce into the record in this Case the draft which was prepared during the month of June by the Committee appointed by the Commission.

Note has been made of the various recommendations as appeared in the record last time; and the Committee felt it best, rather than to attempt another full revision before this hearing, to merely make note of the suggestions that have been made, and it is of course anticipated that other parties will have either suggested rules or suggested revision to the draft we are submitting.

MR. MACEY: Did you mark that as an exhibit?

(Exhibit No. 1 marked for identification.)

MR. KITTS: Yes, I offer it in evidence.

MR. MACEY: Is there objection to the introduction of this exhibit in this case? Without objection it will be received.

Do you have anything further?

MR. KITTS: No.

MR. MACEY: Anything further in Case 903? Statements, comments they would like to make pertaining to the Committee Report?

MR. MADULE: Ross Madule, in behalf of Magnolia Petroleum Company, Dallas, Texas. It is the suggestion of Magnolia Petroleum Company that there be added to this proposed draft a new rule, copies of which I will introduce into the record, providing that in any pleading filed by any attorney in any case pending, that copies of those pleadings, motions and so forth, shall be served upon the opposing parties or their attorneys of record.

That is to permit the attorney or the representative of the company to be up to date on the proceedings in that particular case. There are times when, after an order of the Commission is entered, motions for rehearing are filed and there have been times in the past when those motions have not been received by the opposing parties. For the first time after the motion for rehearing has been granted, the attorney on the other side is advised of the fact that a motion for rehearing had been filed. I think that it is necessary in the orderly procedure of these cases before the Commission that a rule of this nature, not of my draftmanship but of any other similar rule which would permit and require, just as it does that we now have in the Courts, that copies of any pleadings, motions, be served upon the opposing parties. That is the purpose of that proposed rule.

The next change that Magnolia Petroleum Company suggests is

that we make a change in the proposed Rule 1221 as the rule now stands. Rule 1221 provides that the Commission orders shall be served upon the parties and labels it a "supplemental" notice. Under Rule 1207 of the same proposed draft, it is provided that a supplemental notice, that the failure to give a supplemental notice is non-jurisdictional. If we permit these rules to go in, so as to say that the order of the Commission which was entered is a supplemental notice, lawyers failing to receive a copy of the notice within the time to perfect an appeal or whatever other action they might desire, may wake up and find themselves out of Court. I don't feel we ought to put ourselves in that position. I think we ought to have a rule there where a copy of the order of the Commission shall be served by mail upon the opposing parties or their attorneys of record within ten days. That will permit time, which if my memory is correct, it is twenty days from the order overruling the motion for rehearing that you can perfect your appeal to the Courts. The only other suggestion that I have is to effect, to rewrite 1219, merely as a matter of draftmanship, to provide that you shall dispose of the recommendations and order of the Examiner after the expiration of ten days, rather than it now reads, simply upon the filing that you shall dispose of it; to be consistent with the previous rule which says any party has ten days in which to file objections to the proposed order or proposed findings and rulings of the Trial Examiner, because theoretically, you could think that you had ten days in which to file exceptions to the proposed findings of the Examiner or the proposed order, if the findings are incorporated in the order, and get yourself in at the expiration of the ten days and find out that the Commission had already disposed of the matter before

you filed your objection and exception to the findings. That is simply a suggested revision in draftmanship to coincide with the previous rule. That is all thatMagnolia has.

(Exhibits 2, 3 and 4 marked for identification.)

MR. MACEY: Anyone else have anything else in this case? I suggest that we introduce these in the record.

MR. MADULE: I offer those as exhibits for the purpose of the record.

MR. MACEY: Exhibits 2, 3 and 4 will be so marked and entered in the record.

(Exhibit 2. RULE___. Filing Pleadings; Copy Delivered to Adverse Party or Parties. When any party to a hearing files any pleading, plea or motion of any character (other than application for hearing) which is not by law or by these rules required to be served upon the adverse party or parties, he shall at the same time either deliver or mail to the adverse party or parties who have entered their appearance therein, or their respective attorneys of record, a copy of such pleading, plea or motion. If there be more than four adverse parties who have entered their appearance in said hearing, four copies of such pleading shall be deposited with the Secretary of the Commission and the party filing them shall inform all adverse parties who have entered their appearance, or their attorneys of record, that such copies have been deposited with the Secretary of the Commission. These copies shall be delivered by the Secretary to the first four applicants entitled thereto.)

(Exhibit 3. RULE 1221. Notice of Commission's Orders. Within ten (10) days after any order, including any order granting or re-

fusing or following rehearing has been rendered by the Commission, a copy of such order shall be mailed by the Commission to each person or his attorney of record who has entered his appearance of record in the matter or proceeding pursuant to which such order is rendered.)

(Exhibit 4. Rule 1219. Disposition of Cases Heard by Examiner. Upon the expiration of ten (10) days after such supplemental notice has been given as provided in Rule 1218 of the receipt of the report and recommendations of the Examiner, the Commission shall either enter its order disposing of the matter or proceeding or refer such matter or proceeding to the Examiner for the taking of additional evidence.)

MR. MACEY: Anyone else have anything further in this case?

MR. NESTOR: E. W. Nestor for Shell Oil Company. I have to appear as representative for our attorneys today. They are unable to be here. While I am not qualified to present this largely legalistic opinion, I have talked it over with our people and believe that I understand it rather well.

I refer first to Rule 1216. We feel that in order to strengthen the position of the Examiners that we should eliminate from this article 2 and 3. We fear that if we don't do that, actually the Examiner system may not prove very effective. We would suggest further that another item be added, to wit: If the matter or proceeding is Commission called "-- we think that in that case the hearing should be held before the Commission.

MR. KITTS: Repeat that again.

MR. NESTOR: If the matter or proceeding is Commission called.

GOVERNOR SIMMS: If the Commission calls it, the Commission

should hear it?

MR. NESTOR: Yes. In Rule 1217, we just have a question. We would like some deliberation over the last sentence in paragraph two, which says that: "Such affidavit may be filed at any time prior to three days before the date such matter or proceeding is set for hearing." We are wondering what happens if you are unable to determine that the Examiner is disqualified until after three days, until you have passed that period of three days before the hearing. It is simply something to think about.

In Rule 1220, we thought quite a bit about this and believe it might be better to eliminate the de novo hearing before the Commission completely and let the motion of rehearing specified in Rule 1222 suffice. Again the idea being to strengthen the hand of the Examiners. Then an item that we also think is worth considering is in Rule 1203 in item (4). We wonder whether the applicant should be able to request any particular place for hearing and think it might be better if the Rule provided that the Commission would select the place where the hearing would be held, with the thought in mind that it would probably be in some city of jurisdiction near the place where the field or fields are located. The idea being that we might think of a situation where the company having offices in Midland or Hobbs might operate in the San Juan Basin and they might have a hearing which involved a great number of operators in the Basin and then ask that the hearing be held in Hobbs, which would work a hardship on a lot of people as far as travel. We think that in that case the people should go to some place in the Basin to present their testimony.

That concludes Shell's recommendations.

MR. MACEY: Anyone else have anything further in Case 903? Mr. Howell.

MR. HOWELL: Ben Howell, representing El Paso Natural Gas. We have a question with respect to Rule 1215, that portion of it which reads as follows: "The Examiner shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence, subject to such objections as may be imposed." Does that give the Examiner the power to exclude evidence or only to receive it subject to objections? Was it the intention that the Examiner would rule upon evidence offered and either admit it or exclude it? We think he should have such power..

MR. HINKLE: If the Commission please, Clarence Hinkle, representing the Humble Oil and Refining Company. The Humble wishes to go on record to the effect that these proposed rules as a whole appear to be acceptable, with the exception or two that I will point out. Of course, we realize that this is a new thing and it is going to take some experience in actual practice to determine the best procedure. I think those are matters that can be corrected as time goes on, in case there are any inequalities that would be worked by the adoption of these rules.

I do want to point out, in connection with Rule 1213, the Act itself provides that any member of the Commission can act as Examiner. The proposed rules set up qualification for the Examiner "at least six years practical experience as a geologist, petroleum engineer or licensed lawyer, or at least two years of such experience and a

college degree in geology, engineering or law." Unfortunately, that might exclude the Land Commissioner, in this particular instance, from being an Examiner. I would suggest in order to conform with the law that a provision be added to that particular section providing nothing herein contained shall prevent any member of the Commission from being designated as an Examiner, because that is set up by the Act itself. The Shell has pointed out some objections to Rule 1216 and also to Rule 1220. I believe the Commission will find that in connection with those objections that the proposed rules essentially track the Statutes and that these provisions which are suggested in regard to the three days notice and also as to the de novo hearing are in the Act itself.

MR. MACEY: Anyone else have anything further in this case?

MR. FOSTER: May it please the Commission, I only have three suggestions to make. Two of them I made at the last hearing. Just for the purpose of this record, I would just like to call the Commission's attention to those two objections.

First, being the rule disqualifying the Examiner on affidavit, or a member of the Commission who may serve as an Examiner from sitting as an Examiner. It seems to me that the three day Statutory provision for objecting to a matter being referred to an Examiner is sufficient in that instance. If you add this rule that would permit anybody that might choose to do so to just file successive affidavits to the hearing before any particular Examiner that might be designated to hold the hearing, the result would be that by filing these affidavits you couldn't get a hearing at all before an Examiner. You couldn't find one that could qualify. I don't believe it would be the purpose of the rule to do that. For example,

if you appoint one Examiner and I file an affidavit against him, why, he is out. You appoint somebody else, I can still file an affidavit as to him, and he would be out. You would appoint somebody else and I would file an affidavit as to him, and he would be, and it would just -- you will run the whole string out that way. If a party doesn't want to have a hearing before the Examiner, why, he has the Statutory right to just make his objection to having the hearing before the Examiner, within three days, and then the Commission has to hear it. I believe that is what the Statute provides. It seems to me like that is safeguard enough.

The second objection and one of the two that I raised before was the disqualification provision in the rules, with respect to disqualifying a man because he happened to be well informed about the matter on which he was going to conduct the hearing. I think that rule should not obtain.

Now, the third objection and the one that I did not mention in the previous hearing and because at that time I didn't have available to me the Statute recently passed by the last Legislature, incorporating the provisions of Senate Bill 229. I think that portion of Rule 1220 which is contained in the last sentence of the rule and which reads: "Any person affected by the order or decision rendered by the Commission after hearing before the Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1222, and said Rule 1222 together with the law applicable to rehearings and appeals in matters and proceedings before the Commission shall thereafter apply to such matter or proceeding." I believe that provision of the rule is objectionable because the Commission there is seeking a standby rule, the right

of judicial review to an order made on a de novo hearing. If anyone is willing to concede that there might be anything to the suggestion that the right of judicial review does not extend to an order of the Commission made on a de novo hearing, then that provision of the rule that I have called your attention to should be eliminated. I don't believe the Commission should be placed in the position, either upon its own motion or by way of adopting the suggestions that might be made by the Committee, of attempting to forecast beforehand just what the applicable law is with respect to the right of a judicial review of an order made on a de novo hearing. At least, to my mind there is a very serious question as to whether or not an order made by this Commission upon a de novo hearing is subject to a judicial review within the provisions of Section 69-223 of the Statutes. Therefore, I do not believe that this Commission should attempt by rule to extend to an order entered upon a de novo hearing before it, the right of judicial review. Now it may be that such a right exists, in my judgment it doesn't, but I believe that this rule would bring about a great deal of confusion and certainly a great deal of misunderstanding and perhaps could and might and probably would result in injury and harm and injustice to those who might appear before this Commission relying upon this provision of the rule in which the Commission tells them that they have unquestionably and without any argument about it, a right of judicial review of these orders entered on de novo hearing. In other words, a person before this Commission might very well rely on that and then find that in the ultimate determination of the fact, that he didn't have any such right to rely. I would like to suggest to the Commission that it would be much better to let

each individual who comes before this Commission assume the responsibility of making that determination for himself. I haven't had the time so far to put my exact views in writing, but I would like to write this Commission a letter and send all the members of the Committee a copy of it, pointing out why I think the right of judicial review which applies to proceedings on rehearing do not extend to orders entered in a de novo hearing.

MR. MACEY: Mr. Foster, we would like to have your thoughts on that matter. How long do you think it will take?

MR. FOSTER: I won't be able to get it in next week. It will be week after next.

MR. MACEY: Toward the end of the month?

MR. FOSTER: Yes, sir. I planned to attend the Rocky Mountain Institute at Boulder.

MR. MACEY: Does anyone else have anything further in this case?

MR. MALONE: If it please the Commission, Ross Malone. I would like to just suggest that the provisions of the rules dealing with notice are perhaps the most important provisions of all, because they may well be jurisdictional and affect the validity of the action which the Commission takes. There are, I believe, some apparent conflicts in the rules between the requirement for the giving of notice in case of any hearing before the Commission and the provision of Rule 1209 providing for continuance without new service. In particular, I would like to suggest that the Committee consider whether or not Rule 1204, which requires publication of notice of every hearing before the Commission, is going to be applicable, as it is now written, to the continuance of the hearing which

has been set before an Examiner in case a request is made that the matter be heard not by the Examiner but by the Commission. At the last monthly hearing of the Commission, that matter was discussed from the point of view whether due process of law was afforded, but it isn't that question to which my remarks are directed, but rather the inconsistency in the wording of the two rules which at present, under Section 1204, requires a published notice for every hearing before the Commission; and then in 1209 apparently purports to authorize a hearing before the Commission which does not require notice to be published, or in a situation in which time may not be available for a publication of notice of a usual hearing before the Commission.

I think the Committee should consider the possible inconsistency between those two sections as they now stand, because of the possibility that the jurisdiction of the Commission might be affected.

MR. MACEY: Anyone else have anything further in this case?

MR. KITTS: If it please the Commission, earlier this week W. D. Girand, Jr., of Hobbs wrote to me a letter incorporating certain suggestions, with copies to various members of the Committee, and I believe to yourself as well, Mr. Secretary. I think this should be introduced in the record as Exhibit 5. I so offer it.

(Exhibit 5 marked for identification.)

MR. MACEY: Without objection it will be received.

Does anyone else have anything further in Case 903? If nothing further, we will take the case under advisement.

Exhibit 5

"Mr. William F. Kitts,
c/o Oil Conservation Commission,
Santa Fe, New Mexico.

Dear Mr. Kitts:

The writer respectfully proposes certain changes in the proposed Rules of Procedure offered by your Committee at the June meeting of the Oil Conservation Commission.

Since Rule 1202 is being amended, I think that the emergency Order should be valid for more than 15 days. I would suggest thirty days.

I suggest the following changes in the Rules enumerated:

1. In Rule 1207, in the first paragraph, sub-number (a), that the words, "give or" in lines one and two be deleted;

2. In Rule 1216, delete after the word, "Commission", on line two before the numeral (1) through the word "or" appearing on line three before the numeral (2) and re-number;

3. In Rule 1217, delete the first sentence. I would also suggest under Rule 1217, that Paragraph 3 be amended so that a time be fixed in which to inaugurate proceedings to disqualify an examiner;

4. In Rule 1218, in the last paragraph thereof, delete the period and insert a comma and add, "and copies of such exceptions, objections and suggestions to such Order be furnished to each person who entered an appearance of record at the hearing".

6. Rule 1219, I suggest that after the word, "or", on Page 8, be added the following: "Order further Hearing", and delete that portion of the Rule appearing on Page 9;

7. I suggest that Rule 1220 be deleted in its entirety. In regard to this Rule, I see no need for it in light of your Rule 1222 for the reason that a trial De Novo before the Commission on a matter which the Commission has referred to an examiner and entered its Order based upon the examiner's report and the record made before the examiner would serve no purpose except to delay the entry of a final Order.

I take this opportunity to compliment you and your Committee on the fine job done in the preparation of the proposed Rules and offer the above only as suggestions.

Respectfully submitted,

NEAL & GIRAND, by:/s/ W. D. Girand, Jr.

STATE OF NEW MEXICO)
: ss.
COUNTY OF BERNALILLO)

I, ADA DEARNLEY, Court Reporter, do hereby certify that the foregoing and attached transcript of proceedings before the New Mexico Oil Conservation Commission at Santa Fe, New Mexico, is a true and correct record to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF I have affixed my hand and notarial seal this 19th day of July, 1955.

Ada Dearnley
Notary Public, Court Reporter

My Commission Expires:

June 19, 1959.

SENATE BILL NO. 229

Introduced by

F. J. Danglade

AN ACT

RELATING TO THE NEW MEXICO OIL CONSERVATION COMMISSION; GRANTING AUTHORITY TO THE COMMISSION TO APPOINT EXAMINERS TO CONDUCT HEARINGS WITH RESPECT TO MATTERS COMING BEFORE THE COMMISSION AND TO MAKE FINDINGS AND RECOMMENDATIONS WITH RESPECT THERETO.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. In addition to the powers and authority, either express or implied, granted to the Oil Conservation Commission by virtue of the statutes of the State of New Mexico, the Commission is hereby authorized and empowered in prescribing its rules of order or procedure in connection with hearings or other proceedings before the Commission to provide for the appointment of one or more examiners to be members of the staff of the Commission to conduct hearings with respect to matters properly coming before the Commission and to make reports and recommendations to the Commission with respect thereto. Any member of the Commission may serve as an examiner as provided herein. The Commission shall promulgate rules and regulations with regard to hearings to be conducted before examiners and the powers and duties of the examiners in any particular case may be limited by order of the Commission to particular issues or to the performance of particular acts. In the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence subject to such objections as may be imposed, and shall cause a complete record of the proceeding to be made and transcribed and shall certify the same to the Commission for consideration together with the report of the examiner and his recommendations in connection therewith. The Commission shall base its decision rendered in any matter or proceeding heard by an examiner, upon the transcript of testimony and record made by or under the supervision of the examiner in connection with such proceeding, and such decision shall have the same force and effect as if said hearing had been conducted before the members of said Commission; PROVIDED, HOWEVER, no matter or proceeding referred to an examiner shall be heard by such examiner where any party who may be affected by any order entered by the Commission in connection therewith, shall object thereto within three days prior to the time set for hearing, in which case such matter shall be heard at the next regular hearing of the Commission. When any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party adversely affected shall have the right to have said matter heard de novo before the Commission upon application filed with the Commission within 30 days from the time any such decision is rendered.

Twenty-Second Legislature State of New Mexico

BISHOP PRINTING & LITHO CO. — PORTALES, N. M.

Referred to Conservation Committee

Reported Out:.....**Senate Action 3rd Reading:**.....

House Action:.....**Governor's Action:**.....

Senate Bill No. 229

Introduced by:

F. J. Danglade

AN ACT

RELATING TO THE NEW MEXICO OIL CONSERVATION COMMISSION; GRANTING AUTHORITY TO THE COMMISSION TO APPOINT EXAMINERS TO CONDUCT HEARINGS WITH RESPECT TO MATTERS COMING BEFORE THE COMMISSION AND TO MAKE FINDINGS AND RECOMMENDATIONS WITH RESPECT THERETO.

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