

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

PROPOSED REVISION OF RULE 19.15.3 NMAC (RULEMAKING)

AND

PROPOSED REVISION OF

RULES 19.15.7 AND 19.15.16 NMAC (RULEMAKING)

May 18, 2017

Santa Fe, New Mexico

BEFORE: DAVID R. CATANACH, CHAIRPERSON
EDWARD MARTIN, COMMISSIONER
DR. ROBERT S. BALCH, COMMISSIONER

This matter came on for hearing before the New Mexico Oil Conservation Commission on Thursday, May 18, 2017, at the New Mexico Energy, Minerals and Natural Resources Department, Wendell Chino Building, 1220 South St. Francis Drive, Porter Hall, Room 102, Santa Fe, New Mexico.

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ALSO PRESENT: Ms. Florene Davidson

1 (2:42 p.m.)

2 MR. BRANCARD: Okay. So Rule 19.15.3 is
3 the Commission's rules on rulemaking and, you know, one
4 of the topics we're going to discuss, but I'll bring it
5 up right away.

6 There are two ways under the current rule
7 for a rulemaking to commence, and one that you normally
8 see is if somebody files an application with the
9 Division or the Division itself files an application
10 with the Commission, and the Chair and Commissioners,
11 within ten days, meet and discuss it. Then the Chair
12 can go ahead and schedule a rulemaking. The other way
13 to do it -- and it's actually listed as the first way to
14 do it -- is that the Commission itself can commence
15 rulemaking by simply issuing an order. And so that's
16 what we're here today to convince you to do, issue an
17 order rather than filing an application and leaving it
18 up to the Chair.

19 I'm here to talk about the rule and
20 rulemaking and how we need to change it, and so this is
21 the Commission's procedures. I thought it was most
22 appropriate for the Commission itself to do the
23 rulemaking rather than asking the Division to do it.
24 And so I started drafting the rule.

25 And the reason for doing this rulemaking is

1 twofold. One is, two years ago, the legislature adopted
2 a new section in the Oil and Gas Act on how one can
3 appeal a Commission rulemaking. We actually had nothing
4 in the statute that allowed for an appeal of a
5 rulemaking, so as a result, parties would have to go to
6 the district court, in what's called a writ of
7 certiorari, and ask the district court to take
8 jurisdiction.

9 The experience of the Pit Rule, where the
10 cases sat in district court for six years, we have a
11 decision from a district court judge, led me to try to
12 initiate statutory changes, which I eventually got
13 approval from the Governor's Office and the industry to
14 make the changes.

15 And so we now have a separate section in
16 the Oil and Gas Act that deals with just the rules and
17 how we do them. They have to be done by a hearing of
18 the Commission. How you file them: You have to wait
19 until the rehearing period runs, and then we can file
20 them. And then you appeal them, if you want to appeal
21 them, you have to go all the way to the Court of Appeals
22 now, no stopping at the district court for rules. A
23 Commission order on an adjudicatory matter still goes to
24 the district court. But for a rule, you're going to
25 have to take it to the Court of Appeals, which is the

1 same for most environmental and natural resources boards
2 and commissions, approval boards. Everything about the
3 rules tend to go straight to the Court of Appeals, no
4 stopping at the district court, which makes sense. If
5 you drop off an 8,000-page record to a district court
6 judge, they're going to hope you figure out some way to
7 resolve it without them having to read the thing. So
8 the Court of Appeals is much more appropriate. So we
9 never changed our rule on rulemaking to deal with these
10 statutory changes. It's not a lot, but we wanted to
11 accomplish it.

12 But the bigger deal with this past
13 legislative session, our legislature passed on House
14 Bill 58, which is now Chapter 137 of the State's rules
15 of this year. It is a uniform rule on rulemaking. It
16 applies to all agencies on how to conduct rulemaking
17 proceedings. It's a project that started some eight
18 years ago with a task force and had been browsed
19 numerous times in the legislature. The idea sort of
20 morphed over time. But this year, the returning group
21 of legislators were willing to push hard to get it
22 through. And we had a certain opponent of the whole
23 thing who happened to not get re-elected and was not
24 there this, and so it got through, and the Governor
25 signed it. So that was a bit of a surprise to

1 everybody.

2 So what we have is a rule on rulemaking.
3 What it does is takes the State Rules Act, which is a
4 rule in the statute basically designed for how you file
5 a rule with the records center and how they publish it
6 in the "New Mexico Register" and it gets codified in the
7 New Mexico Code. Those provisions are being expanded
8 under the Rules Act that deal with how you do a
9 rulemaking and, in particular, the notice you have to
10 give to initiate the rulemaking, the hearing you have to
11 conduct and then how you file it and how you give notice
12 after you've enacted the rule, when you file it, and
13 what the record center's duties are.

14 A lot of these notions that are in that
15 state are -- the process is largely similar to what we
16 already do, notice, hearing, filing. We do it. The
17 details, however, are different, and so we need to start
18 working on getting the details right. The statute goes
19 into a lot more detail about who gets notice and when
20 they get notice, and so those are among the things that
21 in this proposal that's in your materials here. And so
22 I can go through it here quickly with you-all about what
23 is being proposed.

24 I'd also, though -- you know, this is one
25 of these rules, as we do hearings, we look at portions

1 of the rule and go, Gosh, that doesn't really make
2 sense; maybe one day we should change this. So I'm
3 going to bring up with the Commission as we go through
4 the rule some of the provisions that you may want to go
5 beyond just dealing with the statutory changes and make
6 some other cleanup to this rule.

7 COMMISSIONER BALCH: So basically, again,
8 at the end of the day, you'll want us to decide how
9 we're going to proceed with this?

10 MR. BRANCARD: Right.

11 COMMISSIONER BALCH: And there will be a
12 Commission order, and we have a subsequent meeting, or
13 have the Division bring it to us.

14 MR. BRANCARD: Well, you can do it as a
15 Commission order and set a date for a hearing, or you
16 can say to me, You should file an application, and then
17 it would be up to the Chair to set a hearing date after
18 that.

19 COMMISSIONER BALCH: Okay.

20 MR. BRANCARD: So part of this is
21 technology, some of these changes you'll see that I've
22 deleted in places here like your ability to do things by
23 fax, which nobody does anymore. I asked Florene. I
24 said, Do we put a fax number in our public notice?
25 She's like, What? I mean, if somebody submitted

1 something by fax, we have to figure out which fax
2 machine in the office they sent it to. So the statute,
3 House Bill 58, makes no mention of faxes. It only talks
4 about written notices, mailed notices, and it talks
5 about electronic notice, electronic comments. And so
6 that's what the rule now focuses on, is mail and
7 electronic comments. So you'll see that fax is
8 eliminated.

9 We've also deleted the requirement that
10 somebody show up with six copies of an application, you
11 know. But instead it says that you should also be
12 delivering an electronic copy to Florene so she can then
13 send that out to you-all. So you don't need the six
14 copies. So just sort of dealing with electronics in
15 today's world.

16 The big changes are in Section 9, the
17 rulemaking notice, and there is a list of six ways of
18 doing notice. It is taken straight from the statute.
19 We have to put it on the Web site, which we do anyway
20 here. There is something called the Sunshine Portal.
21 Okay? This is part of the State of New Mexico's Web
22 site. There is a Sunshine Portal out there. If you
23 want to find out how much any of our agency employees
24 are paid, you can find it on there. You can find out
25 contracts. There is all sorts of information on the

1 Sunshine Portal that will now -- hopefully, the
2 Information and Technology Department will get it
3 together so that by July 1 there will be a section of
4 the Sunshine Portal that deals with rulemaking. So
5 that's a place for the public to go to find everything
6 they need. The federal government has done this for
7 years. You can search for any agency to electronically
8 find out what's pending out there.

9 Posting it in district offices. This is
10 something that's specific to this statute. Citizens
11 groups wanted to make sure that the agencies and
12 district offices, that things were posted in those
13 division offices.

14 And then the normal thing of sending --
15 people have notice, request for notices. We've done
16 that already. Florene maintains a list of people who
17 she mails out these notices to.

18 Sending it to the legislature, that's a new
19 thing, but they insisted on that, that we send notice to
20 the legislative counsel and they can distribute it to
21 the interim committees, whatever. And then the "New
22 Mexico Register," that's a newspaper of general
23 circulation.

24 What's big that we changed in here is that
25 at the beginning of that section, it says the Commission

1 shall distribute a notice of this "no later than 30 days
2 before the hearing by each of these." Okay? Our
3 current rule, the parts being deleted here, are like "20
4 days" and "10 days." So this is going to be a longer
5 notice period, and there will be a longer gap,
6 essentially, between the decision to go to rulemaking
7 and when you have the hearing, probably at least two
8 months. Because the problem with the "New Mexico
9 Register," it's only published twice a month, and they
10 have like a 10- to 14-day lead time for each
11 publication. So, you know, saying 30 days for the
12 Register means at least 45 days, by the time you get it
13 to them and they get it published. So that's kind of a
14 tricky one.

15 The content, again, that is taken directly
16 from the Bill. A lot of that is similar to what we do
17 now. They do want specific legal authority behind the
18 rule. That's generally not a problem with our rules
19 because the Oil and Gas Act gives lots of authority on
20 all kinds of rulemaking. And so if we do have technical
21 information on a rule, though, we have to make that
22 available. And so that's kind of a new thing for the
23 agency. If we're basing a rule on some sort of
24 documents, that we have guidelines from the federal
25 government, scientific reports. The agency will have to

1 sort of maintain a file of that, and let people know
2 where they can get a chance to look at that information.
3 A lot of our rulemaking is sort of rulemaking by
4 committee, so there is not like there is some document
5 we're basing it on. It's just policy decisions on where
6 to go, that sort of thing.

7 Not many other changes. I have not really
8 made any changes to the hearing -- how hearing
9 participations are going and then the conduct of that
10 because (A), House Bill 58, there is not a lot of
11 detail, and none of it really goes beyond what we
12 already have in terms of hearings. It simply says, Have
13 a hearing and allow people a reasonable opportunity to
14 participate. We will go well beyond that in how we
15 describe our hearings in our rule.

16 The last part, what I did was -- we had
17 sections -- subsections in the Hearing Section that
18 dealt with the transcripts, that dealt with
19 deliberations, dealt with filing. Because those things
20 are a little more detailed in House Bill 58, I sort of
21 took that and made that into three separate sections.
22 There is now a Section 13, deliberations; Section 14, on
23 the record; and Section 15, on filing an appeal.

24 Deliberation is basically the same as we've
25 always done it. I just sort of actually sort of

1 elaborated a little more about what our practice is,
2 about that we can do it either right then at the end of
3 the hearing, or we can do it like you did just now, have
4 a separate meeting to deliberate on that as long as you
5 put it on the notice and the agenda.

6 Under the order, you know, we say we'll
7 issue a rehearing order. I had to add a sentence to
8 this because House Bill 58 talks about a concise
9 explanatory statement that an agency has to issue with
10 its rules. You do that. You issue an order. And I
11 simply say in this rule, "The order will serve as a
12 concise explanatory statement required by the statute."
13 You're already doing what the statute requires. There
14 are a lot agencies out there that don't do anything.
15 They just take the rule and file it. So this is going
16 to be something they're going to have to do in addition,
17 but you've been doing this forever, issuing orders.

18 The record. Again, House Bill 58 -- we
19 maintain a record. Florene maintains a record. It's
20 sort of an ad hoc thing. House Bill 58 provides detail
21 about what should be in that record. It's basically
22 what we've always complied with. Florene has always
23 complied with that.

24 The only thing that's a little odd is
25 Section B6 under 14, there is now a provision in House

1 Bill 56 [sic] that allows the state records
2 administrator, when he or she reviews the rule prior to
3 filing it, they can find -- if they find typos, they
4 find spelling errors, whatever, they can make
5 corrections prior to the rule. That's a good thing.
6 The bad thing is that they have to tell us, and then we
7 then have to publish a whole notice to the public that
8 the rule has been changed. Okay? So I think the end
9 result of that is that we will spend a little more time
10 going through it ourselves to make sure there are no
11 typos or spelling errors before we send it off to the
12 records administrator so we don't get it back from them.

13 Again, House Bill 58 has a whole provision
14 about how to provide notice. When you adopted a rule --
15 again. We normally do this. We send this out to folks.
16 They just have more specifics about who gets it and who
17 reviews it, so I had to lay that out in here.

18 There's a tricky little thing to combine
19 what was done in the statute we passed two years ago on
20 how to file a rule with the deadline we have in there
21 and the deadline that's in House Bill 58.

22 Our new statute says that once you issue an
23 order, then you have to wait 20 days minimum before you
24 file the rule with the records center. That's because
25 we allow people 20 days to petition for a rehearing,

1 like we just had here today. So -- because if you file
2 the rule prior to somebody submitting a rehearing, it's
3 too late. You can't rehear it. The rule's gone. Okay?
4 So that's why the statute we enacted two years ago
5 requires you to delay filing with the records center.
6 House Bill 58 says once you make a decision on the rule,
7 you have to file the rule within 15 days. We delay 20.
8 They require 15. Okay? That could be a problem.

9 What I did was I wrote this to say
10 basically that the decision in House Bill 58 says you
11 have to file within 15 days after the decision. The
12 decision is the end of the rehearing period. So --
13 because really you're not done until you have found out
14 whether somebody's asked for a rehearing or not. All
15 right? And you've made a decision on whether to grant
16 the rehearing or not, you know. And so that gives you
17 enough time to meet the House Bill 58 requirements, as
18 well as meeting the requirements under your own
19 statutes, combining those two time frames. So I just
20 figured if I said it right there in the rule, made it
21 clear to everybody how we're interpreting House Bill 58.
22 So that's one of the only sort of tricky things in the
23 rule.

24 The rest of Section 15 actually is -- much
25 of it is compiling -- sorry -- complying with the

1 statute that we did two years ago about where you file
2 your appeal.

3 That's how we comply with the statute.
4 That's the basic framework of which I've given you. I
5 just thought it would be a good opportunity to discuss
6 how we do rulemaking and whether the Commission would
7 want to make any other changes in here. And in the
8 email I sent you, I identified a few areas to talk
9 about, one of which we already have talked about, which
10 is you have two different ways of doing the rulemaking
11 or commencing a rulemaking and do you want to continue
12 with that. In other words, you have to come to the
13 Commission and ask for an order or file an application
14 with the director and then he can just schedule it for
15 hearing if none of you say, Let's put it on the agendas
16 for the next meeting. You have ten days to do so. If
17 you're fine with that process, you can keep it that way,
18 or, you know, you can combine it into one process.

19 What a number of other agencies do, boards
20 do, and, in fact, it's required by statute in their
21 cases -- it's not required by you. The statute says
22 nothing for you to do this. Environment Improvement
23 Act, Mining Act, whatever, they have a specific process
24 where you file an application with the agency, and the
25 board or commission must have a meeting to decide

1 whether to hold the rulemaking. So the board has to
2 decide at a meeting whether to move forward or not.
3 That seems like a bit of added time in this process.

4 On the other hand, you know, some of these
5 rulemakings are probably not going to be very
6 complicated. David's not going to be very complicated.
7 But some of these that are coming up, perhaps the
8 horizontal wells, et cetera, could be something that
9 will last two or three days. So sometimes it's useful
10 to be -- all be sitting here and say, Okay, when are we
11 going to find three days to hear this, you know, rather
12 than David perhaps having to call around to everybody to
13 figure that out. So, you know, it's helpful if the
14 parties, if the Division is bringing a rule, come to you
15 and say, Yeah, this is going to be complicated, this is
16 going to take some time to do this, maybe you ought to
17 schedule two or three days for this.

18 So that's one way -- one reason to try to
19 come up with one way of doing a rulemaking, which is
20 somebody applies to the Commission, you know, at least
21 ten days before the next meeting, and at the next
22 meeting, you decide to go ahead.

23 COMMISSIONER BALCH: Well, lately we've had
24 a full docket -- we've had a full docket almost every
25 month, so we almost need a special hearing for

1 rulemaking.

2 MR. BRANCARD: Yeah. And you could always
3 say -- you know, if a rulemaking comes up and you look
4 at the next two months and go, We're really busy. We're
5 going to do this three months from now. You know, the
6 house is not on fire. You know, we have time. You
7 know, no reason to crunch us in the next two months.
8 Just put it off. So that's one advantage of it being
9 presented to you at a meeting. You can then sort of
10 more rationally allocate your time and resources into
11 the future.

12 So that's one thing to look at here is
13 whether you want to sort of create one process for
14 having the initiation of a rulemaking. And that would
15 be basically an application to the Commission prior to a
16 meeting, and at the meeting, you know, you decide what
17 to do with the rulemaking. I'm just throwing that out
18 as --

19 CHAIRMAN CATANACH: Bill, we don't have to
20 decide this today?

21 MR. BRANCARD: Well, I mean, I'd like to
22 get some direction so I can move forward with the
23 rulemaking. And it's perfectly fine for you to say, We
24 can deal with this at a future moment, you know.

25 CHAIRMAN CATANACH: I don't mind dealing

1 with it today. I just want to clarify that we --

2 MR. BRANCARD: Yeah. That's the other
3 thing. The more things we add to this, the more
4 possibility for some controversy and whatever. So, you
5 know --

6 COMMISSIONER BALCH: So right now what
7 we're talking about are the changes that are required by
8 statute?

9 MR. BRANCARD: Right.

10 COMMISSIONER BALCH: So we really don't
11 have any --

12 MR. BRANCARD: You don't have any need to
13 deal with this issue at this time. We're opening up
14 this rule. If there are any other changes you'd like to
15 see made at this point, I can just go ahead and create
16 those at the same time. If not, you can put it off for
17 some other time or not deal with it at all. If you
18 think the rule is working fine the way it is --

19 COMMISSIONER BALCH: There will probably be
20 some interest to change our rules, and there may be
21 people who want to respond to that.

22 MR. BRANCARD: Yeah. I think there might
23 be.

24 The other sort of funky little thing that's
25 in our rules is that we have two pre-hearing deadlines

1 in there. One is, if you want to present technical
2 testimony or be a party to the proceedings, you file a
3 pre-hearing statement five business days --

4 MS. DAVIDSON: Yes.

5 MR. BRANCARD: -- before the hearing. But
6 the other is if you want to present a modification to
7 the proposal, you submit that separately at least ten
8 business days before the hearing. I, frankly, see no
9 reason why you need two deadlines, why you can't just
10 have one deadline for a pre-hearing submittal.

11 Your notice periods are being expanded to
12 comply with the new statute so you don't need to have
13 these deadlines be so close to the hearing. I was just
14 looking at the Environment Improvement Board's rules.
15 They have, you know, pre-hearing statements -- what are
16 they called -- Notices of Intent to Present Technical
17 Testimony, 20 days before the hearing, so people can get
18 them well in advance and have plenty of -- you include
19 in your Notices of Intent any modifications you might
20 want to make to the proposed rule. So that's one where
21 I think might make some sense, just to combine that into
22 one -- one pre-hearing submittal deadline.

23 COMMISSIONER MARTIN: If we choose the
24 earlier deadline, would that also prevent us from
25 accepting amendments to the pre-hearing statement after

1 that deadline? In other words, right now you have the
2 five days before the hearing to submit amendments of the
3 hearing statements, which is pretty good for a lot of
4 people. And if we choose to do something in ten days,
5 does that move back the deadline for the amendments?

6 MR. BRANCARD: Well, what I'm suggesting is
7 to combine them all into one.

8 COMMISSIONER MARTIN: That's right. But if
9 you say ten, then you can't make any amendments after
10 that tenth day before?

11 MR. BRANCARD: Well, we could put something
12 in there that people may submit revised pre-hearing
13 statements up to at a certain time before the hearing.
14 I mean, what's useful about these statements is you kind
15 of get a sense of how big a deal this hearing is going
16 to be, because people are going to have to identify 35
17 witnesses each talking three hours, and you get a sense
18 how big a deal this is. You know, if somebody reads
19 somebody else's statement and goes, Oh, I might want to
20 add a rebuttal witness or something, you know, I don't
21 see that as a big deal. They can change it prior to the
22 hearing. I mean, it's mostly just kind of identifying
23 who the players are and how many people they're going to
24 show up with.

25 COMMISSIONER MARTIN: I say that because

1 people use that to their advantage. They get the data
2 five days before the hearing, and you don't have time to
3 review it. The Land Office is kind of infamous about
4 that, I must admit.

5 MR. BRANCARD: You know, I certainly think
6 we need to keep in all the provisions that currently
7 say, you know, somebody wanting to make a statement at
8 the hearing and just show up. As long as you're not
9 just showing up with some expert that's going to provide
10 lots of technical testimony and exhibits, you're fine.
11 And we don't define a lot of these terms. Some of the
12 other agencies and rules and rulemaking go into detail
13 about what is technical testimony and this and that.
14 You know, we could, but we don't define that.

15 We don't define what a party is to this
16 petition, which is not a big deal, except it kind of
17 leads into the next question. Does the Commission have
18 any concerns about who has the right to examine
19 witnesses and who is subject to cross-examination at a
20 hearing? Again, your statute doesn't provide any
21 requirements in this. This is totally your rule about
22 how to conduct your hearing. As long as you -- under
23 House Bill 58, as long as you give people a reasonable
24 opportunity to comment on the rule, you know, verbally
25 or in writing, you're fine. You know, the right of

1 cross-examination is not sort of anything written in
2 statute or, in fact, generally not normal for a
3 rulemaking. You know, it's not a trial. It's your
4 opportunity to get information to help you decide on
5 rules, how helpful is it to have witnesses questioned.
6 It's certainly helpful for you-all to ask questions.
7 The issue is how helpful is it for, you know, each of
8 the parties to be going at each other? Or --

9 COMMISSIONER BALCH: As an attorney?

10 MR. BRANCARD: Yeah. And, frankly, you
11 know, if somebody in the audience shows up and just sort
12 of says, I have a real problem with this and thank you,
13 it's like should they be subject to questioning?

14 MR. BROOKS: We have a bar of people who
15 regularly practice before the Commission who would be
16 extremely upset with the Commission if they were to
17 limit the right of the attorneys to cross-examine the
18 witnesses.

19 MR. BRANCARD: Well, and you have a
20 provision that allows -- and it's -- it's unusual for
21 somebody to simply, you know, with the same deadline as
22 a pre-hearing statement, to basically say, I'm a party
23 to this proceeding; I'm not going to bring any
24 witnesses; I'm not going to bring any evidence, but I'm
25 here, which means I get to show up and ask people

1 questions.

2 COMMISSIONER BALCH: Karin Foster is pretty
3 good at doing that.

4 MR. BRANCARD: We have people who do that.

5 COMMISSIONER BALCH: You know, I think
6 there is value in the attorneys' cross-examinations.
7 They think of things I don't think of or we don't think
8 of.

9 CHAIRMAN CATANACH: Yeah. I think at the
10 Division level, I think we mostly require -- we don't
11 let anybody ask questions. We generally require counsel
12 ask questions.

13 COMMISSIONER BALCH: So I guess the -- I've
14 been on with a couple of different Chairs and sometimes
15 even with the same Chair, and from hearing to hearing,
16 they'll get a little bit of difference in who is allowed
17 to cross-examine. And it might not hurt to have
18 something formal in there about what's allowed and who
19 is allowed to do it.

20 MR. BRANCARD: Yeah. And, you know, we
21 have --

22 COMMISSIONER BALCH: In the order, for that
23 matter. Sometimes there is debate about that.

24 CHAIRMAN CATANACH: Well, you don't want to
25 get too rigid either. You want to have some flexibility

1 to allow somebody, if you think it's necessary, to ask
2 questions at the hearing.

3 MR. BRANCARD: A person who testifies at a
4 hearing -- it just says "a person who testifies at a
5 hearing" -- so that means they could be a member of the
6 public -- "is subject to cross-examination by a person
7 who has filed a pre-hearing statement on the subject
8 matter of the person's direct testimony." And then the
9 Commission can, you know, limit cross-examination to
10 prevent harassment. So basically if you've filed a
11 pre-hearing statement -- and you can file a pre-hearing
12 statement without saying you're going to testify
13 yourself or have a witness -- you are now essentially a
14 party. We don't call them a party, but you are a party
15 who can then conduct cross-examination of that witness.

16 There actually is a reason -- legal reason
17 to use the word "party" in these rules. We don't, but
18 we can call anybody who submits a pre-hearing statement
19 a party. And the reason for that is about three, four
20 years ago, the Supreme Court -- New Mexico Supreme Court
21 was faced with a situation with appeals in the
22 Environment Improvement Board, Water Quality Commission
23 where some of the parties were trying to settle the case
24 and some of the other parties said, Why weren't we
25 allowed to be involved in this settlement? And the

1 Court of Appeals said, You're not a party; just because
2 you're a party in the EIB or WQC doesn't mean you're a
3 party in the appeals. The Supreme Court said, No, no,
4 no; there are party rules specific to rulemaking. If
5 you're a party below, you have the right to come into
6 the Court of Appeals and say, Supreme Court, I want to
7 be a party here, and that's it. You're a party.

8 And they then adopted a formal rule that
9 codified this and said certain persons who participated
10 in the rulemaking hearing have a right to be a party on
11 the appeal. And one of the categories is if the agency
12 has the definition of a party and you fit that, you
13 automatically become a party on appeal.

14 So that's kind of a reason why we could
15 start using the word "party" in these rules, because it
16 has a real effect if somebody appeals the decision than
17 anybody who is a party, which has presumably presented
18 technical evidence, you know, filed a pre-hearing
19 statement. They would then have the right, if they
20 wanted to, to be party in the appeal, you know, to
21 somebody else's appeal, in other words. So there is a
22 certain value in using that term, "party," that we could
23 start using. And in some ways, it would help these
24 rules because sometimes we have to sort of say any
25 person who filed a pre-hearing statement can -- it's

1 simpler to say "a party can" if we've already defined it
2 as such. So that's another suggestion to use the word
3 "party" here.

4 So if you want to change it -- there is the
5 process of how we start the rulemaking. There is the
6 process of when you file pre-hearing statements and
7 modifications, and then there is the question of who has
8 the right to cross-examine witnesses, which we can keep
9 the same way it is but just call them parties. Let me
10 know if you want me to make any of those changes now or
11 put it off for another day.

12 COMMISSIONER MARTIN: I think that using
13 the term "party" would simplify the language quite a
14 bit.

15 CHAIRMAN CATANACH: We can just tell you
16 directly and you put those in the rule change and use
17 your best judgment? Is that what you think we should --

18 COMMISSIONER MARTIN: The deadline makes
19 sense.

20 COMMISSIONER BALCH: Maybe color code
21 statutory stuff from the stuff that's another change.
22 That way people aren't coming in and appealing the
23 statutory change, which would just waste time.

24 CHAIRMAN CATANACH: Yeah. Truly.

25 COMMISSIONER BALCH: That's simpler for us.

1 CHAIRMAN CATANACH: I guess -- do we need
2 to vote on that?

3 MR. BRANCARD: Well, I just -- (A) give me
4 some direction. Would you like for me to move forward
5 with in addition to what I've given you already? And
6 (B) I guess just a motion to -- I think we can do this
7 hearing in July, unless we are already busy for July.

8 COMMISSIONER BALCH: Mewbourne moved to
9 July.

10 MS. DAVIDSON: One de novo case.

11 MR. BRANCARD: Oh, yeah, the case from
12 today.

13 COMMISSIONER MARTIN: Having one deadline
14 makes sense. I'm not sure what it should be, but --

15 COMMISSIONER BALCH: Yeah. I think that's
16 fine. I think everything you recommended is at least
17 worth looking at.

18 CHAIRMAN CATANACH: I agree.

19 COMMISSIONER BALCH: If not changing, at
20 least looking at it.

21 CHAIRMAN CATANACH: Put it to a vote,
22 Commissioners. Do I have a motion to have Bill Brancard
23 work on that?

24 COMMISSIONER MARTIN: So moved.

25 COMMISSIONER BALCH: And seconded.

1 CHAIRMAN CATANACH: All in favor?

2 (Ayes are unanimous.)

3 MR. BRANCARD: Florene, is it a pain to
4 deal with business days versus calendar days, because
5 you're the one who has to put down the date in the
6 notice?

7 MS. DAVIDSON: I know. No, it's not a
8 pain.

9 MR. BROOKS: We have the statute in the --
10 we get confused specifying when we're dealing with
11 business days, because not everybody's mindful all the
12 time of what the exact -- I think I know what the
13 statute provides, and I think most lawyers do, but it's
14 confusing to people sometimes.

15 MR. BRANCARD: There is actually a uniform
16 time statute out there. I think it's -- if you do ten
17 days or less, you can do business days. If it's more
18 than ten days, you do calendar days.

19 CHAIRMAN CATANACH: So, Bill, is that
20 everything that you found that you feel like there needs
21 to be changes on? Do you want to give a shot at it?

22 MR. BRANCARD: Yeah. I just wanted to
23 cover a few big things.

24 CHAIRMAN CATANACH: Okay. So with regards
25 to the -- to whether or not we're going to issue an

1 order on this -- well, I guess what would be a
2 recommendation on that, as far as the rulemaking?

3 MR. BRANCARD: I mean, you can either --
4 based on your motion today, you can delegate to David to
5 issue an order, or I can file an application.

6 CHAIRMAN CATANACH: And what's the
7 difference in those two processes?

8 MR. BRANCARD: Well, you'd have to wait ten
9 days with an application.

10 COMMISSIONER BALCH: We're going to wait
11 ten days anyway.

12 MR. BRANCARD: I mean, David wants to move
13 ahead faster on his rule, so he's going to ask you for
14 an order, and you can move ahead right away, you know.
15 So if you direct David to issue an order based on your
16 motion today, he'd still wait until I had a draft. So
17 the order could have a draft attached to it.

18 COMMISSIONER BALCH: I think that would be
19 fine.

20 CHAIRMAN CATANACH: Okay.

21 COMMISSIONER BALCH: Let's do it that way.

22 MR. BRANCARD: Okay. Will do.

23 COMMISSIONER BALCH: Another precedent for
24 you asking us to do the same thing.

25 MR. BROOKS: Yes. And I have a little bit

1 different reason. Somebody named McQueen told me that
2 this was a very high priority.

3 COMMISSIONER BALCH: Steve McQueen? I
4 thought he was dead.

5 (Laughter.)

6 MR. BROOKS: I have called him Steve from
7 time to time.

8 COMMISSIONER MARTIN: I've done that a
9 couple of times.

10 (Laughter.)

11 MR. BROOKS: Anyway --

12 CHAIRMAN CATANACH: They called him
13 something else at the Legislature. They missed his
14 first name.

15 MR. BROOKS: They called you something else
16 over in that county -- what was it -- that county
17 hearing you went to.

18 CHAIRMAN CATANACH: Sandoval?

19 MR. BROOKS: Sandoval, yeah.

20 CHAIRMAN CATANACH: Besides liar?

21 MR. BROOKS: That's the one I heard about.

22 (Laughter.)

23 MR. BROOKS: Anyway, what I have proposed
24 is a very simple change. It does two things. One, it
25 changes the fracking disclosure rule to require the

1 filing of a form on the national database called
2 FracFocus rather than filing a separate form that we now
3 have that has to be filed with us. And then the
4 FracFocus form, under the new rule, would be filed with
5 us as well. But if it would be filed on FracFocus, it
6 could be accessed by anybody, and it would be the same
7 format, have the same information as it does in other
8 states.

9 COMMISSION BALCH: Well, I remember exactly
10 why we didn't do that in the first place.

11 COMMISSIONER MARTIN: So do I.

12 COMMISSIONER BALCH: We didn't do that in
13 the first place because FracFocus was evolving, and it
14 was not required for them to do that. And somebody
15 could shut that site down tomorrow because they're
16 bored, and then you lose the ability to have that
17 information collected here. Or they can make a change
18 in their form which then gives you less information than
19 you need for our rule.

20 MR. BROOKS: Well, that is the problem,
21 because the way I have worded it is that you file the
22 current edition of FracFocus whenever you file it. And,
23 of course, it kind of has to be that way if you're going
24 to utilize FracFocus because we don't have any control
25 over what their form provides at any given time.

1 COMMISSIONER MARTIN: It was a control
2 thing.

3 COMMISSIONER BALCH: It was making sure we
4 got the information that we felt we needed and
5 ensuring --

6 MR. BROOKS: Well, we sure have determined
7 that the information they do not presently call for that
8 our forms do call for is not necessary.

9 CHAIRMAN CATANACH: Well, it's contained in
10 other forms --

11 MR. BROOKS: Yeah. It's in other forms.

12 COMMISSIONER BALCH: But they could change
13 our form next week, FracFocus could --

14 MR. BROOKS: They could.

15 COMMISSIONER BALCH: -- and we might lose a
16 piece of information that is important. That's why we
17 did it the way we did it. I believe we made it optional
18 for people to file with FracFocus as well.

19 MR. BROOKS: Well, I get the feeling, then,
20 that there -- it sounds like there is a majority
21 developing -- a movement developing which encompasses a
22 majority of the Division to not make this change.

23 COMMISSIONER BALCH: I'm just telling you
24 what our -- I was on that Commission, and that was our
25 thought process.

1 MR. BROOKS: I was not involved.

2 COMMISSIONER BALCH: But this is a
3 different Commission, so they may have --

4 MR. BRANCARD: But I think at that time,
5 too, FracFocus was sort of in growing stages, going
6 through some growing pains. I think there were
7 questions about would it continue, would it be
8 maintained, and I think we now have another five, six
9 years and it's become more of an accepted avenue for
10 most states now.

11 MR. BROOKS: That's why --

12 MR. BRANCARD: And I think it's become kind
13 of the norm. I think they worked out some of the kinks.
14 I think it's easier for people to access the information
15 now. So I think -- the hesitancy back then was -- we
16 were one of the first states to do the fracking
17 disclosure, and FracFocus was in its infancy. So I
18 think the director then was very concerned about relying
19 on this outside, you know, avenue, with, I think, good
20 reason. But I think time has shown that it has become a
21 more mature --

22 COMMISSIONER BALCH: As long as any change
23 is sure to -- will enable us to collect the information
24 if FracFocus stops collecting something that we need,
25 then that's fine.

1 COMMISSIONER MARTIN: Is the idea to switch
2 all the reporting over to FracFocus and no reporting to
3 us directly?

4 MR. BROOKS: Except for things that are
5 otherwise required to be reported to us, yes.

6 COMMISSIONER MARTIN: In other avenues?

7 MR. BROOKS: Right.

8 CHAIRMAN CATANACH: Well, and the proposal,
9 as I understand it, is to have them file with FracFocus
10 and provide us a copy in the well file.

11 MR. BROOKS: Right.

12 CHAIRMAN CATANACH: And we don't have all
13 that data in our well files.

14 MR. BROOKS: We have enough worked out, how
15 that process will physically take place, but the rule
16 just requires the form filed by FracFocus be also filed
17 with us.

18 MR. BRANCARD: We could add a provision
19 that says if FracFocus is discontinued, your obligation
20 to file with us continues.

21 COMMISSIONER BALCH: And revert back to the
22 previous form.

23 MR. BROOKS: That's true. And the reason
24 the Secretary wanted to do this, I think, was -- as
25 explained to me, was to put us in the same basket as

1 other states so that the public could access information
2 on wells in New Mexico from the same site, the same time
3 frame, in the same manner.

4 CHAIRMAN CATANACH: Well, it's a much more
5 reasonable way to access this data in New Mexico than
6 our current system.

7 COMMISSIONER BALCH: The file-by-file
8 system?

9 CHAIRMAN CATANACH: Yeah. You've got to go
10 file by file to find this data, in fact, and you'd be
11 able to compile a lot of data.

12 MR. BROOKS: That is one thing that this
13 proposed rule does.

14 The other thing the proposed rule does is
15 to extend the time for filing a completion report on a
16 horizontal well from 20 days to 45 days. That's been
17 requested by industry. It was brought up at the
18 Horizontal Well Rule meeting, and it was in connection
19 with this test allowable policy that we've been working
20 on for a long time, which we just issued last week -- or
21 earlier this week, I believe. But that is one thing we
22 have to change by rule because the 20-day provision is
23 very specifically provided in the rule, and it says we
24 shall cancel their allowable if they don't file within
25 20 days. They wanted it extended. I asked people how

1 long, and somebody said 45 days, and everybody agreed,
2 yeah, that would be good. So that's what the proposal
3 is. And if the Commission wants to do it for a
4 different period of time, they can do that.

5 COMMISSIONER BALCH: Are you proposing we
6 do both of these rule changes at the same time?

7 MR. BROOKS: Yes.

8 CHAIRMAN CATANACH: It's in the same rule.

9 MR. BROOKS: Yeah. It's in the same
10 section of the rule.

11 COMMISSIONER BALCH: Okay.

12 MR. BROOKS: And that's what I'm proposing.
13 The reason I wanted to get the order signed today is
14 that that will enable us to put it on the June 13th
15 docket, and that will eliminate all questions about what
16 the present law or House Bill 58 applies to this
17 rulemaking and, therefore, make it clear what our notice
18 requirements are. And if we go into House Bill 58, that
19 will extend the lead time from 20 days to 45 days. The
20 Secretary said it was a priority, so I thought we ought
21 to do it within that time frame.

22 COMMISSIONER BALCH: So we have
23 deliberations on the Artesian Roswell Basin, and we also
24 have -- I think we also have another case on June 13th.

25 MS. DAVIDSON: Yes, the Mewbourne injection

1 cases. It's a de novo case.

2 CHAIRMAN CATANACH: Is that the R?

3 COMMISSIONER BALCH: My question is will we
4 have enough time to do this also on June the 13th?

5 MR. BROOKS: I would not think this would
6 take much time, but I can't answer whether you'll have
7 enough time or not because I don't know how long the
8 other matters will take. I think this will be pretty
9 brief because I don't think anybody will oppose it.

10 CHAIRMAN CATANACH: Yeah. Industry
11 actually is in favor of all this, so I don't
12 anticipate --

13 MR. BROOKS: They are, yes. Everybody I've
14 talked to in the industry is in favor.

15 COMMISSIONER BALCH: I can go over to the
16 14th, anyway.

17 CHAIRMAN CATANACH: I'm available, too.

18 MR. BROOKS: I've prepared a draft order
19 and sent it to Bill and Cheryl. It was very late
20 yesterday afternoon. But it's kind of winging it
21 because this is not a procedure we've ever used before.

22 COMMISSIONER MARTIN: If that 13th hearing
23 bleeds into the 14th, Ocean is going to have to change
24 her Horizontal Well Rule meeting.

25 MR. BROOKS: Well, I asked David if we

1 could do it first. If we can do it first, I think it
2 won't be a problem because 9:00 would be the time the
3 Commission would start. This would not take long.
4 We're not scheduled to start the Horizontal Well Rule
5 meeting until 11:00, and I've already had Ocean sound
6 out to people about changing it to 1:00. So I think it
7 can be done.

8 COMMISSIONER MARTIN: Okay.

9 COMMISSIONER BALCH: I guess you can notice
10 it and see if there is anybody who is going to be a
11 party, and that will tell you if it's going to take
12 longer.

13 MR. BROOKS: Yeah. You know, it could be
14 continued. Now, if we go to the 14th for the July 13th
15 hearing, that raises a question about whether the notice
16 is sufficient and whether it is required to comply with
17 House Bill 58, which in my reading of the bill, it's not
18 clear.

19 MR. BRANCARD: Yeah. I had a discussion
20 with the Attorney General's Office about this, and they
21 sort of came to the same conclusion I did, which is if
22 you start the rulemaking -- House Bill 58 is effective
23 July 1. If you start the hearing prior to that, you go
24 with whatever law was in effect.

25 COMMISSIONER BALCH: So if we continue in

1 July, it's all right.

2 MR. BRANCARD: Yeah. But House Bill 58
3 rule will apply to those parts of your proceeding that
4 get started after July 1. So, like, how you file the
5 rule, you'll have to -- but the notice -- if you do the
6 notice prior to July 1, you comply with whatever notice
7 rules are in effect at that time.

8 MR. BROOKS: One of the worst things about
9 House Bill 58 is that it requires concluding rulemaking
10 within two years, and that's not been precedent with the
11 OCD.

12 (Laughter.)

13 COMMISSIONER BALCH: So the week of the
14 19th of June, I'm available also, if we want to
15 continue. If we have to continue, we can continue it on
16 the 19th or 20th or something like that.

17 CHAIRMAN CATANACH: Yeah. I don't
18 anticipate that that June 13th hearing would be that
19 long.

20 MR. BROOKS: This hearing won't be very
21 long at all.

22 CHAIRMAN CATANACH: I'm thinking the
23 Roswell --

24 COMMISSIONER BALCH: The wild card is the
25 Mewbourne.

1 CHAIRMAN CATANACH: The Julian Ard case is
2 a contested well costs, isn't it?

3 MR. BROOKS: Yes.

4 MR. BRANCARD: Yes.

5 MR. BROOKS: And it took a full day with
6 the Division hearing in which I presided.

7 CHAIRMAN CATANACH: We're probably looking
8 at two days, but we could probably get you out of here
9 the morning of the 13th.

10 MR. BROOKS: That would be helpful.

11 COMMISSIONER BALCH: We could take care of
12 two -- that one and then deliberations before we
13 actually go into the other case.

14 CHAIRMAN CATANACH: Yeah. But David
15 doesn't have to be here for deliberations on Roswell.

16 MR. BROOKS: I don't have to be here. You
17 wouldn't let me say anything anyway.

18 COMMISSIONER BALCH: We like it when
19 nobody's here, actually.

20 MR. BROOKS: Well, I can't imagine more
21 than an hour.

22 COMMISSIONER BALCH: Probably less.

23 CHAIRMAN CATANACH: Well, if you guys
24 agree, maybe less than that.

25 So your draft order, have you reviewed

1 that, Mr. Brancard?

2 MR. BRANCARD: Yeah. I think it's longer
3 than necessary. We can actually cut it back, make it
4 simpler, because really it's just sort of --

5 CHAIRMAN CATANACH: I'm sorry. For all
6 three of us to sign or just myself or --

7 MR. BRANCARD: For you to sign.

8 CHAIRMAN CATANACH: It has to be signed
9 today?

10 MR. BRANCARD: David's does, yes.

11 MR. BROOKS: Yeah. Mine should be signed
12 today because the Commissioners are all here today, and
13 there is not another meeting scheduled until the 13th,
14 and that's when we want to have the hearing.

15 MR. BRANCARD: I mean, you-all can approve
16 it and delegate David to sign it.

17 MR. BROOKS: David Catanach --

18 MR. BRANCARD: Yes.

19 MR. BROOKS: -- not me.

20 CHAIRMAN CATANACH: So do I have motion to
21 approve the David Brooks' proposal today?

22 COMMISSIONER BALCH: I would move to accept
23 the proposed order and allow you to sign it.

24 COMMISSIONER MARTIN: Second.

25 CHAIRMAN CATANACH: All in favor?

1 (Ayes are unanimous.)

2 CHAIRMAN CATANACH: Okay. Motion passed.

3 So if you would get that to me ASAP, and
4 I'll get it signed.

5 MR. BROOKS: I've given it to Bill and --

6 CHAIRMAN CATANACH: Is there anything
7 further in this Commission meeting?

8 MR. BROOKS: Not from me.

9 I would note what Bill said about them
10 changing the rule to correct typos -- the administrator
11 changing the rule to correct typos. I'm not sure that
12 is a good thing because they might be like Microsoft
13 Word and decide that "well control" has to be changed to
14 "good control."

15 COMMISSIONER BALCH: Yeah. There could be
16 some real problems.

17 MR. BRANCARD: Yeah. And apparently that's
18 happened in the past.

19 COMMISSIONER BALCH: That's the first thing
20 I thought of. There is no chance for us to review that
21 after they make those changes?

22 MR. BRANCARD: Yes. There actually is a
23 period. They will do it, and they will send it to us,
24 and we have like ten days to do that. But once it's
25 done, we have to then notify the whole world that it's

1 happened.

2 COMMISSIONER MARTIN: In the second
3 go-around, they have another shot at changing stuff?

4 MR. BRANCARD: No.

5 COMMISSIONER MARTIN: Good.

6 COMMISSIONER BALCH: No. But it adds
7 administrative hassle to us.

8 MR. BRANCARD: Yeah.

9 CHAIRMAN CATANACH: All right. We're
10 keeping these gentlemen from their --

11 So this Commission meeting is adjourned.

12 (The proceedings conclude, 3:35 p.m.)

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2 COUNTY OF BERNALILLO

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