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

IN THE MATTER OF THE APPLICATION OF PRIDE ENERGY COMPANY FOR COMPULSORY POOLING, NON-STANDARD SPACING AND PRORATION UNIT, AND UNORTHODOX LOCATION LEA COUNTY, NEW MEXICO.
CASE NO. 16169

IN THE MATTER OF THE APPLICATION OF PRIDE ENERGY COMPANY FOR COMPULSORY POOLING, NON-STANDARD SPACING AND PRORATION UNIT, AND UNORTHODOX LOCATION LEA COUNTY, NEW MEXICO.
CASE NO. 16170

IN THE MATTER OF THE APPLICATION OF PRIDE ENERGY COMPANY FOR COMPULSORY POOLING, NON-STANDARD SPACING AND PRORATION UNIT, AND UNORTHODOX LOCATION LEA COUNTY, NEW MEXICO.
CASE NO. 16171

IN THE MATTER OF THE APPLICATION OF PRIDE ENERGY COMPANY FOR COMPULSORY POOLING, NON-STANDARD SPACING AND PRORATION UNIT, AND UNORTHODOX LOCATION LEA COUNTY, NEW MEXICO.
CASE NO. 16172

IN THE MATTER OF THE APPLICATION OF PRIDE ENERGY COMPANY FOR COMPULSORY POOLING, NON-STANDARD SPACING AND PRORATION UNIT, AND UNORTHODOX LOCATION LEA COUNTY, NEW MEXICO.
CASE NO. 16173

IN THE MATTER OF THE APPLICATION OF PRIDE ENERGY COMPANY FOR COMPULSORY POOLING, NON-STANDARD SPACING AND PRORATION UNIT, AND UNORTHODOX LOCATION LEA COUNTY, NEW MEXICO.
CASE NO. 16174

CONSOLIDATED WITH:

DEVON ENERGY PRODUCTION COMPANY CASES—16099, 16100, 16101, 16102, 16104

MOTION TO STRIKE EVIDENCE SUBMITTED WITH CLOSING ARGUMENT

Pride Energy Company ("Pride Energy"), by and through its undersigned counsel, moves the Division to strike portions of Devon Energy Production Company's ("Devon") Closing Argument (Argument) insofar as the Argument contains newly created evidence in the form of

rebuttal evidence which Pride Energy was not able to rebut at the hearing. As grounds for this motion, Pride Energy states:

A. Introduction.

At the close of the hearing held on June 12, 2018 the issue of closing arguments by the parties was discussed by and among the Hearing Examiner Jones, counsel for the Division Mr. Brooks, and respective counsel for the parties Pride Energy and Devon. It was agreed that closing arguments would be submitted after the transcript of the hearing was prepared by the court reporter. On July 27 the parties submitted their respective closing arguments.

The intended purpose of submittal of closing argument until after the transcript of the hearing was submitted was to allow counsel to refer to the transcript so that they could argue those points made during the hearing in respect of their positions. Indeed, the purpose of closing arguments is for the parties to argue the merits of their respective case based on the evidence submitted at the hearing or inferences that could be drawn from the evidence and testimony.

Devon's closing argument goes beyond fair play. Devon's closing argument brings in newly created evidence that could have been prepared as part of their case. A glaring example, is the Affidavit of Timothy J. Prout, by which Devon introduces us to new AFEs for its proposed Bone Spring wells. The new AFEs are north of $2M dollars from those submitted and defended by Devon at the hearing. This slight of hand deprived Pride Energy the opportunity to cross examine Mr. Prout about the reason for the change or to examine specific line items in the new AFEs. Obviously, the real reason for the new AFEs was the very strong testimony of Pride Energy's expert witness. In this regard, Pride Energy's closing argument emphasizes Devon's clearly erroneous AFEs—all based on the record of the hearing.

As will be more fully discussed below, Devon's attempt to introduce newly created evidence is simply wrong. It is not based on the record and should not be allowed.

B. Specific Newly Created Evidence That Should be Striken.

1. <u>Amended AFEs.</u>

Paragraph 5 of Mr. Prout's affidavit states that "[s] the June 12, 2018 hearing, Devon has updated its AFE estimates for its proposed 2nd Bone Spring wells." Should not that updating have been made for the hearing? When Mr. Prout was asked in cross-examination why there was such a disparity between the cost of drilling and completing a Wolfcamp well (at $10,758,166) and a Bone Spring well (at $4,925,402), he deferred to his engineer and did not why there was such a disparity. See, TR 46 (22-25)-47 (1-5). Mr. Sharma, Devon's engineering witness explained the disparity as being that the Wolfcamp required additional drilling and casing, and higher completion costs. See, TR 112 (14-25)-113 (1-13). Not having current or inaccurate information on costs of drilling wells is deceptive and a fraud on the tribunal-- the Division.

2. <u>Exhibits A, B, C, D, E, F, G, H of Devon's Closing Argument.</u>

All of the additional exhibits submitted with Devon's closing argument could have been submitted at the hearing in some form or another.

<u>Exhibit A</u> could have been compiled for hearing with any sort of diligence. Pride Energy did not have an opportunity to challenge the "prudent" self –serving statement of the exhibit.

<u>Exhibit B</u> is absolutely newly created evidence that should have been presented as Devon's case in comparing 2-mile laterals and 1-mile laterals and their efficiencies. Again, Pride Energy got no chance to challenge this exhibit.

Exhibits C, D, and E are altered variations of Pride Energy's Exhibit 18 which was designed to show the difference between drilling N-S instead of E-W. It had nothing to do with whether Pride Energy or Devon was a more prudent or better operator. Pride's engineer discussed Exhibit 18 as an analysis of production from Devon and other operator's production. See TR 224 (7-25)-225. Simply stated, Devon could have prepared comparable exhibits for hearing. It did not.

Exhibits F and G are absolutely new information. The information in these two exhibits is not newly discovered information. It was available at the time of the hearing and it could have been presented at the time of the hearing.

Exhibit H compares the amended AFE costs with Pride Energy's AFEs for 2nd Bone Spring wells. It is simply incredulous that Devon now compares costs that were not addressed or presented at the hearing with Pride Energy's costs that were upgraded to the time of hearing with then current bidding.

C. Authorities and Argument.

Rule 19.15.4.17 states the rules of evidence for adjudicatory hearings. It states:

> **A. Presentation of evidence.** Subject to other provisions of 19.15.4.16 NMAC, the commission or division examiner shall afford full opportunity to the parties at an adjudicatory hearing before the commission or division examiner to present evidence and to cross-examine witnesses. The rules of evidence applicable in a trial before a court without a jury shall not control, but division examiners and the commission may use such rules as guidance in conducting adjudicatory hearings. The commission or division examiner may admit relevant evidence, unless it is immaterial, repetitious or otherwise unreliable. The commission or division examiner may take administrative notice of the authenticity of documents copied from the division's files.
> **B.** Parties introducing exhibits at hearings before the commission or a division examiner shall provide a complete set of exhibits for the court reporter, each commissioner or division examiner and other parties of record.
> **C.** A party requesting incorporation of records from a previous hearing at a commission hearing shall include copies of the record for each commissioner. (emphasis ours.)

Nowhere does this rule state that exhibits may be offered following the close of a hearing,

unless, perhaps, by order of the hearing examiner or agreement of the parties.

But more importantly, the additional exhibits deny Pride Energy to rebut them and to cross-examine Mr. Prout and the persons who prepared the other exhibits.

The rule of the scope of a closing argument is expressed in Whittenburg v. Werner Enterprises Inc., 561 F.3d 1122, 1128–29 (10th Cir. 2009). This case states:

> … the cardinal rule of closing argument: that counsel must confine comments to evidence in the record and to reasonable *1129 inferences from that evidence. *See Lambert v. Midwest City Memorial Hosp. Auth.*, 671 F.2d 372, 375 (10th Cir.1982); *see also* Model Rules of Prof'l Conduct R. 3.4 ("A lawyer shall not ... in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."); Restatement (Third) of Law Governing Lawyers § 107 (2000); Jacob Stein, Closing Arguments, § 1:14 (2d ed. 2005) ("[C]ounsel is restricted to the law in the case, the evidence adduced from the witnesses, the exhibits admitted into evidence, and the inferences reasonably deductible from the testimony and exhibits.").

An Eighth Circuit Court of Appeals case, citing Whittenburg, reversed a conviction because of the prosecutor's personal experience remarks, said that the remarks "were not 'minor aberrations' made in passing." The court further concluded that the remarks were made "when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond." Gilster v. Primebank, 747 F.3d 1007, 1011 (8th Cir. 2014). See also, U.S. v. Lopez-Medina, 596 F.3d 716, 740 (10th Cir. 2010) to the same effect.

New Mexico case law in cases going beyond the scope of the record in closing arguments deals with prosecutorial misconduct in closing arguments where prosecutors may have injected prejudice by making non-evidentiary references or remarks. In judicial review cases from appeals of administrative agencies, the record is generally not allowed to be supplemented. See, for example, Esquibel v. City of Santa Fe, 27,548, 2009 WL 6560437, at *4 (N.M. App. June 17, 2009) which upheld a trial court's ruling that struck three affidavits submitted after the matter was heard, stated in a memorandum opinion:

> There are strong policy considerations behind the rules for limiting supplementation of a record on appeal. In *Swisher v. Darden,* 59 N.M. 511, 515-16, 287 P.2d 73, 76 (1955), *superseded by statute on other grounds as stated in Sanchez v. Board of Education,* 80 N.M. 286, 454 P.2d 768 (1969), our Supreme Court noted that, in the absence of a statute, "review is limited to the record made in the administrative proceeding, and the courts [should] decline to hear new ... evidence ... especially where the evidence was available and could have been introduced in the administrative tribunal. To allow [otherwise] would [be to] substitute the court for the administrative tribunal." *Swisher,* 59 N.M. at 515-16, 287 P.2d at 77-76 (internal quotation marks and citation omitted).

Introduction of eleven newly created exhibits through Devon's closing argument gave Pride Energy no opportunity to respond to these exhibits and certainly prejudices Pride Energy. Admittedly, this case is an administrative hearing with relaxed rules of evidence as stated in Rule 19.15.4.17 above, but here Pride Energy is given absolutely no notice of these new exhibits. No motion to supplement the record was made by Devon to admit these exhibits.

D. Conclusion.

Introduction of the new Devon exhibits are not argument based on the evidence and testimony given at hearing held on June 12. These exhibits could have been created as part of Devon's case to support its application for drilling 2-mile horizontal wells. Given Devon's assertions of superior knowledge and standing in the oil and gas industry in Southeast New Mexico, it could have prepared those exhibits as part of their case. There simply is no basis that the Division should allow rebuttal or amended exhibits after close of the hearing.

WHEREFORE, Pride Energy requests that:

A. The Division examiner strike the Exhibits A-H attached to the Devon's closing argument and the Affidavit of Timothy J. Prout and attached AFEs.

B. The Division examiner strike those portions of Devon's Closing Argument that directly or indirectly relies on the new exhibits.

C. For such other relief as the Division deems appropriate under the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing was served to counsel of record by electronic mail this 16th day of August, 2018 to:

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