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

APPLICATIONS OF DEVON ENERGY PRODUCTION COMPANY, L.P. FOR NON-STANDARD OIL SPACING AND PRORATION UNITS, COMPULSORY POOLING, AND DOWN-HOLE COMMINGLING, LEA COUNTY, NEW MEXICO

CASE NOS. 16099-16101

APPLICATIONS OF DEVON ENERGY PRODUCTION COMPANY, L.P. FOR NON-STANDARD OIL SPACING AND PRORATION UNITS AND COMPULSORY POOLING, LEA COUNTY, NEW MEXICO

CASE NOS. 16102-16104

APPLICATIONS OF PRIDE ENERGY COMPANY FOR COMPULSORY POOLING, NON-STANDARD SPACING AND PRORATION UNITS, AND UNORTHODOX LOCATIONS, LEA COUNTY, NEW MEXICO

CASE NOS. 16169-16174

DEVON ENERGY PRODUCTION COMPANY, L.P.'S RESPONSE TO PRIDE ENERGY COMPANY'S MOTION TO STRIKE EVIDENCE SUBMITTED WITH CLOSING ARGUMENT

Devon Energy Production Company, L.P. ("Devon") submits the following Response to Pride Energy Company's ("Pride") Motion to Strike Evidence Submitted with Closing Argument, filed in the above-referenced consolidated cases heard by the Oil Conservation Division ("Division") on June 12, 2018. Devon's exhibits submitted with its Closing Statement contain relevant rebuttal evidence that may be properly considered by the Division under its own rules. Meanwhile, much of Pride's testimony remains entirely unsupported.

LEGAL AUTHORITY

The law primarily applicable to this case is the Division's adjudication rules. *See* 19.15.4.17 NMAC. As an administrative agency, the Division has decided the rules of evidence are *guidance*, and not *controlling*. 19.15.4.17(A) NMAC ("[t]he 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."); *see also* NMSA 1978, § 12-8-11; *Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 21, 137 N.M. 161, 169, 108 P.3d 1019 ("The rules of evidence are inapplicable [in an administrative hearing] in order to facilitate rather than hinder discovery and to allow a full opportunity to prepare."); *Bransford v. State Taxation & Revenue Dept., Motor Vehicle Div.*, 1998-NMCA-077, ¶ 18, 125 N.M. 285, 290, 960 P.2d 827 (recognizing that "both hearsay and non-hearsay evidence may be considered"). This means that the evidentiary rules applicable in this case are not as restrictive as Pride has suggested by citing to cases related to "closing statements" in other types of tribunals and litigation. 19.15.4.13(B)(2) NMAC (allowing for rebuttal evidence or admission where there is otherwise other good cause for a failure to disclose earlier); *El Paso Elec. Co. v. Real Estate Mart, Inc*., 1982-NMCA-117, 98 N.M. 570, 651 P.2d 105 (defining rebuttal evidence as that which cannot be reasonably anticipated before trial).

The case law cited by Pride, which generally concerns the scope of closing trial arguments in federal court, is inapplicable to this case and may be properly disregarded. Not a single case cited involved the same procedural posture as this case that is currently pending before the Division. First, the federal cases cited by Pride are not controlling because none interpret either New Mexico law or Division rules. *Whittenburg v. Werner Enters., Inc.*, 561 F.3d 1122 (10th Cir. 2009) (appeal of a negligence action against a trucking company, arising from a collision with stalled tractor-trailer in the Western District of Oklahoma); *Gilster v. Primebank*, 747 F.3d 1007 (8th Cir. 2014) (Title VII action by employee against former employer alleging unlawful sexual harassment and retaliation in the Northern District of Iowa); *U.S. v. Lopez-Medina*, 596 F.3d 716 (10th Cir. 2010) (appeal from criminal conviction of possession of methamphetamine with intent to distribute in Utah).

Next, the only New Mexico case cited is likewise inapplicable because it involved a statutory appeal to district court, pursuant to Rule 1-074 NMRA. *Esquibel v. Santa Fe*, 2009 WL 6560437 (June 17, 2009) (deciding whether the district court, in reviewing the Santa Fe City Council's action, should have stricken affidavits of three City councilors submitted to the court to *supplement the record* as evidence that the Council's vote had been influenced by the purportedly incorrect advice from the City attorney). In *Esquibel*, the New Mexico Court of Appeals provided its analysis on the appropriateness of supplementing a record on *appeal* where a reviewing court would be performing a "whole record" review of the evidence available to the administrative tribunal. *Id.* Unlike *Esquibel*, which was on appeal, this case is still pending before the Division and Devon is not seeking to supplement the record, but rather to provide graphical information—based either on publicly-available data or data presented by Pride itself—either to rebut Pride's testimony and evidence, or to summarize Devon's own testimony.[1]

Given these distinctions, it is clear these cases are not binding authority on the Division's decision here. Rather than considering the unpersuasive cases cited by Pride, the Division's rules provide all the necessary guidance on the applicable evidentiary rules. *See* 19.15.4 NMAC. And in fact, those rules support a determination that Devon's exhibits may be properly considered by the hearing examiners in this case.

ARGUMENT

A. Devon's closing argument exhibits appropriately fall within the Division's evidentiary rules and may be properly considered by the hearing examiners.

Each of Devon's challenged exhibits fits squarely within the Division's evidentiary rules and may be properly considered. Many of these exhibits, described hyperbolically by Pride as "altered variations" and "absolutely new information," could not have prepared in advance

[1] The exception is Devon's Closing Argument Exhibit No. 11 (Affidavit of Timothy Prout and updated AFEs), which is discussed separately below.

because they turned on Pride's presentation of its own evidence at the hearing. They do not go beyond the scope of the testimony presented at hearing by the parties. In fact, Devon's closing argument exhibits generally present in graphical format data that is either publicly-available or was presented by Pride itself. As such, as further explained herein, these exhibits are proper rebuttal and/or summary evidence.

Exhibit A presents, in a graphical format, publicly-available data demonstrating that Pride has not drilled, completed, or produced a single horizontal well in southeastern New Mexico in any horizon. Given Pride's land witness's testimony to the contrary, *see* Tr. 159:13-160:23, this is an appropriate rebuttal exhibit. Furthermore, the Division may independently take notice of data from its own online database and other publicly-available sources. *See* 19.15.4.7(A) NMAC. Exhibit A appropriately presented these data in graphical format for rebuttal purposes.

Exhibit B is similarly appropriate rebuttal evidence that was produced in support of Devon's testimony that longer laterals are undeniably the industry trend. Devon was surprised by testimony from Pride—who presented their cases after Devon's—suggesting the contrary, *compare* Tr. 29:3-9, 44:24-46:13, *with* 258:24-263:4. Devon had no reason to know this would be Pride's position, given the obvious industry trend, and discovered that Pride's testimony was easily rebuttable with data not readily available in real time at the hearing. The resulting Exhibit B is consistent with Devon's testimony presented at the hearing and does not present new substantive information. Exhibit B, like Exhibit A, is a graphical presentation of data from OCD's own online database and other publicly-available sources, of which the Division may take notice. *See* 19.15.4.7(A) NMAC.

Using Pride's own data, **Exhibits C**, **D**, and **E** indisputably provide rebuttal evidence of Pride's own analysis of its Exhibit #18 from the hearing. *See* Tr. 241:1-3; 259:10-12. It was not

until Pride's presentation, when Devon had its first opportunity to review Exhibit #18, that Devon became aware of the need to rebut such evidence. *Id.* Critically, Devon's Exhibits C, D and E use the exact same data points used by Pride in its Exhibit #18. Devon's exhibits demonstrate that Pride's Exhibit #18 tells more of the story than Pride revealed at hearing. Any argument by Pride that it did not have the opportunity to rebut its own Exhibit #18 is illogical, and when questioned about Pride's Exhibit #18 at hearing, its engineering witness plead ignorance of the quality and meaning of the data he used. Tr. 240:3-241:12. Each of these three exhibits is appropriately before the Division to rebut Pride's testimony and underscore Pride's lack of local knowledge in this area of the Delaware Basin.

Exhibit F and **G** are compiled from publicly-available data to rebut Pride's testimony concerning its proposed completion and casing techniques, and to show that Pride's proposals are inadequate and do not meet current industry standards. *See* Pride's Hearing Exhibit #14; Tr. 229:12-230:20. Devon has no access to Pride's completion plans prior to hearing, and no opportunity to rebut its testimony with actual data at hearing. This information presented in Exhibits F and G is necessary to show the completion technique and casing plan proposed by Devon at hearing are rooted in its expertise, while the completion and casing plan proposed by Pride at hearing expose Pride's lack of local knowledge and experience. Tr. 97:1-23; 98:10-21; 99:1-100:6. And again, these exhibits simply present in graphical format publicly-available data the Division may take notice of in its determination of this matter.

Exhibit H compares Devon's amended AFE costs with Pride's AFEs for its proposed Bone Spring wells. This comparison was required to rebut the testimony of Pride's witnesses in conjunction with Pride's Exhibit #8, and to explain the gross difference in cost estimates as between Pride and Devon. *Compare* Pride's Hearing Exhibit #8, Tr. 149:14-17, *with* Exhibit H. This exhibit is nothing more than a graphic presentation of the parties' respective AFE numbers.

Finally, **Exhibit I** is Devon's updated AFE estimates for Devon's proposed Bone Spring wells, supported by an affidavit from Devon's land expert. All parties agreed that AFEs, by their very nature, are only estimates. At hearing, Devon's experts testified that Devon's Hearing Exhibit No. 7 reflected Devon's most recent AFE for these wells. Devon has provided these revised AFEs in good faith because the Division requires the most accurate estimate of Devon's AFEs in order to make its determination. These numbers are admissible at this stage in the proceeding, consistent with 19.15.4.13(B)(2) and 19.15.4.17(A) NMAC. There has been no "fraud on the tribunal," as alleged by Pride. Motion at 3. Instead, Devon has good cause for submitting this information with its closing statement to provide its most updated cost estimates.

In sum, Devon's closing statement exhibits have been submitted with the intent of providing graphical summaries of public data and Pride's own data, in the service of rebutting Pride's unanticipated testimony at hearing, and to provide the Division with Devon's updated AFE estimates. These exhibits are closely related to the testimony and evidence proffered at hearing and have been submitted in good faith. Pride's motion should be denied.

B. Pride's motion seeks to strike Devon's exhibits—which carefully rebut or summarize hearing testimony using appropriate data—while Pride, for its part, presented a largely unsupported case for its proposed wells.

It is ironic that Pride attempts here to strike Devon's appropriate and helpful exhibits, where so much of Pride's testimony was unsupported at hearing and remains unsupported despite opportunity to provide support in closing statement. Time and again, Pride's witnesses proffered testimony that should not be accepted by the Division due to a lack of any evidentiary support whatsoever.

For instance, Pride's land witness testified to wells operated by Pride that do not appear in the public record. *Compare* Tr. 159:13-160:23 *with* Exhibit A. Its engineering contractor "guessed" as to any wells he'd drilled in the vicinity of the subject lands. Tr. 227:19-20. He

lacked adequate supporting anticipated EUR data for Pride's proposed wells. Tr. 223:13-17, 223:13-224:6, 238:9-240:2. He could not testify with any accuracy to the differences in pressure gradient between the Wolfcamp and the Bone Spring in the project area that, in his opinion, did not require additional casing in Pride's Wolfcamp wells. Tr. 229:12-231:22.

Further, Pride's engineering consultant testified that Pride's AFE costs will change as the result of substantial changes he is making to Pride's initial frac design, but other than insisting the estimates would remain within 10% of Pride's latest AFE, he had no numbers supporting his confidence that this is true. Tr. 235:6-237:5. He spoke of "studies" concerning resin-coated sand, but did not cite to any specific authority for his position that it is not needed in Pride's wells. Tr. 237:6-238:8. He maligned Devon's completion plan as causing a "Christmas tree" effect, but had no data, science, or authority supporting this characterization. Tr. 208:2-6. He testified to the sophistication and superiority of Pride's completion techniques without providing any modelling or data. Tr. 241:17-242:10. And he didn't know Pride's saltwater disposal capacity, but claimed—without adequate basis—that he could drill an additional SWD "tonight." Tr. 242:11-12, 243:10-11.

For the Division to accept any of the foregoing testimony at face value is to accept the unsupported, sometimes entirely off-the-cuff testimony of Pride's hired contractor. In the final analysis, Pride's motion seeks to strike Devon's exhibits—which carefully rebut or summarize hearing testimony using appropriate data—while Pride, for its part, presented a largely unsupported case for its proposed wells.

CONCLUSION

For the above reasons, the evidence presented by Devon in support of its closing argument is appropriately before the Division as relevant, rebuttal evidence that may be properly considered by the hearing examiners for purposes of deciding these consolidated cases.

Additionally, much of Pride's testimony must be disregarded as unsupported.

Devon's wells are on its October drilling schedule. Despite the delay caused by the filing of Pride's motion, Devon reiterates its earlier request for an expedited Division order in these cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following counsel of record by electronic mail on August 23, 2018:

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