

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

**APPLICATION OF COG OPERATING LLC  
FOR APPROVAL OF THE TOMAHAWK UNIT,  
ELIMINATION OF INTERNAL SETBACKS  
WITHIN UNIT AREA, AND APPROVAL FOR SURFACE  
COMMINGLING, EDDY COUNTY, NEW MEXICO.**

**CASE NO. 20659**

**EOG RESOURCES INC.'S OBJECTIONS TO AND MOTION TO STRIKE POST-  
HEARING AFFIDAVITS AND EXHIBITS SUBMITTED BY COG OPERATING LLC**

EOG Resources, Inc. ("EOG") objects to and moves to strike the Affidavit of Travis Macha and the Affidavit of Matt Fisher submitted by Applicant COG Operating LLC ("Concho") after the conclusion of the hearing in this case. As grounds therefor, EOG states:

1. By continuing to submit evidence for the Division after the hearing was concluded Concho is violating EOG's right to procedural and substantive due process. *See Transcontinental Bus System v. State Corp. Commission*, 56 N.M. 158, 241 P.2d 829 (1952) ("There is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.") (*quoting I. C. C. v. Louisville & N. R. Co.*, 227 U.S. 88, 93, 33 S. Ct. 185, 187 (1913)).

2. EOG was deprived of the opportunity to cross-examine these witnesses concerning the statements in their affidavits and the exhibits that are attached to them. Additionally the Exhibit to the Affidavit of Travis Macha purporting to summarize communications that "personnel in the Asset and Business Development Departments at COG" is not based on personal knowledge and is clearly inadmissible hearsay. Mr. March acknowledged at the hearing that he only recently assumed land responsibilities for the proposed Tomahawk unit and had no involvement in the communications he is purporting to summarize. His statements and exhibits are double hearsay which should be stricken. *See Ennen v. Sw. Potash Co.*, 1959-NMSC-025, ¶¶ 16, 22, 65 N.M. 307, ("It would not require the citation of authority to support the proposition that a witness may not give testimony in a cause unless he is placed under oath and the other party is given an opportunity to cross-examine him.")

3. The Division's hearing examiners are granted authority under the Oil and Gas Act to properly control the course of Division hearings. *See* NMSA 1978, §70-2-13 ( “[A]n 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.) Hearings before the Division must comport with due process and be conducted in such a manner as to protect the substantial rights of the parties. *See Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 109, 835 P.2d 819, 825 (1992) (“Due process safeguards are particularly important in administrative agency proceedings because ‘many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed’” (*quoting Reid v. N.M. Bd. of Exam'rs*, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979))). “At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation ***and an opportunity to defend.***” *Id.* (emphasis added).

4. The Division has an obligation to ensure that in a proceeding such as this where EOG’s significant property interests may be affected by the Division's exercise of authority under the Oil and Gas Act, that EOG’s rights of due process are safeguarded. *See State ex rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, ¶¶ 17-18, 108 N.M. 658 (Administrative adjudicatory proceedings involving substantial rights of an applicant must adhere to fundamental principles of justice and procedural due process). In *Battershell* the Court of Appeals held that it was error to refuse to allow a party to cross-examine witnesses offered by an adversary opposing a zoning application. *Id.*; *see also Valenzuela v. AS Horner, Inc.*, 2016-NMCA-031, ¶ 10 (Holding that it was error to consider a hearsay IME report and stating that: “administrative proceedings adjudicating substantial rights are bound by fundamental principles of justice and procedural due process, which require that testifying witnesses be sworn and be subject to cross-examination.”)

5. Allowing Concho to submit additional testimony and exhibits without affording EOG the opportunity to cross-examine the witnesses violates EOG’s right to due process and should not be allowed.

WHEREFORE, EOG respectfully requests that the affidavits of Travis Macha and Matt Fisher and their attachments be stricken from the record.

Respectfully submitted,  
MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

By: 

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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 September 19, 2019:

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