

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

**IN THE MATTER OF PROPOSED
AMENDMENT TO THE COMMISSION'S
RULES TO ADDRESS CHEMICAL DISCLOSURE AND
THE USE OF PERFLUOROALKYL AND
POLYFLUOROALKYL SUBSTANCES AND
IN OIL AND GAS EXTRACTION,
19.15.2, 19.15.7, 19.15.14, 19.15.16 AND 19.15.25 NMAC**

CASE NO. 23580

**WILDEARTH GUARDIANS' RESPONSE TO NMOGA'S MOTION TO
EXCLUDE HORWITT TESTIMONY AND EXHIBITS**

This is a rulemaking proceeding before the New Mexico Oil Conservation Commission (“Commission” or “OCC”). The Commission has promulgated regulations applicable to rulemaking proceedings at 19.15.3 NMAC, and those provisions control the admission of evidence. *See Marker v. New Mexico Oil Conservation Commission* No. A-1-CA-37860, No. A-1-CA-38814 ¶ 21, (N.M. Ct. App. April 19, 2021) (nonprecedential) (“The Commission’s rulemaking procedures are governed by the New Mexico Rules Act, *as well as the Commission’s own procedural rules.*”) (emphasis added). In OCC rulemakings, “The commission *shall* admit relevant evidence, unless the commission determines that the evidence is incompetent or unduly repetitious.” 19.15.3.12(B)(2) (emphasis added). In New Mexico “shall” is a command. *See Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, ¶ 53. (“The word ‘shall’ is ordinarily the language of command. And when a law uses ‘shall’, the normal inference is that it is used in its usual sense—that being mandatory.”)(internal quotations and citations omitted); *see also* NMSA 1978, § 12-2A-4(A) (1997). (“‘Shall’ and ‘must’ express a duty, obligation, requirement or condition precedent.”) Therefore, if testimony is relevant to the proposed rule, it must be admitted. The only other provision in the OCC’s rulemaking regulations that provides for the

exclusion of testimony is for technical testimony that is not properly noticed. 19.15.3.12(B) NMAC. Because Mr. Horwitt's testimony and exhibits are relevant and properly noticed, they must be admitted. Any arguments made by NMOGA under the New Mexico Rules of Evidence are not applicable to this motion, because the rules of evidence do not apply to OCC rulemaking hearings. 19.15.3.12(A).

Rulemaking proceedings have a more relaxed evidentiary standard than trial courts and administrative adjudications because rulemakings do not adjudicate individual rights. *See Earthworks Oil and Gas Accountability Project v. New Mexico Oil Conservation Commission* ("administrative action is "regulatory when it furthers the public interest under the state's police powers and adjudicatory when it is based on adjudicating a private right rather than implementing public policy). 2016-NMCA-055, ¶ 5. Rulemaking hearings are "intended to be inclusive, encouraging broad public participation." *New Energy Economy v. Vanzi*, 2012-NMSC-005, ¶ 15. *See also Miles v. Bd. of Cnty. Comm'rs*, 1998-NMCA-118, ¶ 8, 125 N.M. 608. ("[T]he distinction between individualized fact-based deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication.")

Mr. Horwitt's testimony and exhibits are admissible in this proceeding because they are relevant to a proposed ban on PFAS and undisclosed chemicals in oil and gas downhole operations. Relevance is the standard for admission in this proceeding, and Mr. Horwitt's testimony and exhibits meet that standard. Under the rules for OCC rulemakings and the Amended Prehearing Order, Guardians provided timely notice to the Commission of its intent to present testimony and exhibits whether that testimony is classified as technical or nontechnical.

Because Guardians provided timely notice of Mr. Horwitt's testimony and his testimony is relevant, it should not be excluded from this proceeding.

NMOGA's Motion asks the Commission to exclude Mr. Horwitt's testimony based on two separate erroneous assertions: 1) a conflation of the Rules of Evidence with the procedural rules for this proceeding; and 2) a conflation of the definition of "technical testimony" with the admissibility standard for OCC rulemakings. As explained below, the rules of evidence do not apply to this proceeding and the definition for "technical testimony" serves to indicate what types of testimony are subject to a requirement to provide advance notice to the Commission and parties. Technical testimony is not a standard of admissibility, and technical testimony is not subject to the standard applied to expert testimony in New Mexico's trial courts. NMOGA's Motion is based on a misunderstanding of law governing this proceeding and should be denied.

1. The standard for admission of testimony is relevance and Mr. Horwitt's testimony is relevant to this proceeding.

As explained above, the standard for admissibility in OCC rulemaking hearings is relevance, and the Commission must admit relevant evidence. 19.15.3.12(B)(2); *See Yedidag*, 2015-NMSC-012, ¶ 53; NMSA 1978, § 12-2A-4(A) (1997). The rules governing this proceeding only provide one other basis for excluding evidence, and that is if technical testimony is not properly noticed. *See* 19.15.3.11(B)(3) NMAC. Accordingly, if testimony is relevant and properly noticed, it must be admitted in OCC rulemaking proceedings. While NMOGA's motion does not argue that Mr. Horwitt's testimony is not relevant, this Response will briefly address relevance to explain why Mr. Horwitt's testimony must be admitted.

Evidence is relevant if it "tends to establish a material proposition." *State v. Romero*, 1974-NMCA-015, ¶ 18, 86 N.M. 99. Because Mr. Horwitt's testimony and exhibits are relevant, and Guardians provided proper notice, they must be admitted. Mr. Horwitt's testimony is

relevant to this proceeding and directly addresses Guardians' proposed rule that seeks to ban PFAS and undisclosed chemicals used downhole in New Mexico. Mr. Horwitt is a lawyer and the author of seven reports related to the use of PFAS and the loopholes which prevent full disclosure of chemicals used in oil and operations, including a report focused on New Mexico. (WG. Ex. 10 Horwitt Direct Bates 0382). His testimony draws on these reports and his research to explain that PFAS have been used in New Mexico oil and gas operations, gaps exist in New Mexico's chemical disclosure reporting requirements, and that these gaps prevent regulators and the public from knowing all chemicals that are used in oil and gas downhole operations. (WG Ex. 10 Horwitt Direct *inter alia*). His testimony further explains that other states have closed similar data gaps. (WG Ex. 10 Horwitt Direct Bates 0383). This testimony and the accompanying exhibits are directly relevant to Guardians' proposed rule, which seeks to protect the public health and the environment by banning PFAS and the use of undisclosed chemicals in downhole operations.

2. Mr. Horwitt's testimony can be fairly characterized as technical or nontechnical but the distinction does not matter for admissibility or weight.

Mr. Horwitt's testimony meets the definition of technical testimony. Technical testimony is "[s]cientific, engineering, economic, or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing." 19.15.3.7(B) NMAC. Mr. Horwitt's testimony falls into the "other specialized testimony" category. As stated above, his testimony documents the known instances of PFAS use in New Mexico oil and gas operations, the legal gaps that allow nondisclosure of oilfield chemicals and provides context to how those legal gaps are important for the Commission to consider in this rulemaking. *See e.g.* (WG Ex. 10 Horwitt Direct Bates 0387-0389). He has written seven reports that outline PFAS use in oil and gas operations and the legal provisions that

allow chemical nondisclosure. (WG. Ex. 10 Horwitt Direct Bates 0382). His testimony contains extensive citations to reliable sources, including scientific studies, legal provisions, government data and websites, and FOIA requests, among others. (WG. Ex. 10 Horwitt Direct *inter alia*). The fact that his reports and testimony rely on publicly available data has no bearing on admissibility in this proceeding.¹ The definition of technical testimony does not require any specific type or source of data. Because Mr. Horwitt’s testimony meets the relevance standard for admissibility in OCC rulemakings, it must be admitted. 19.15.3.12(B)(2).

The rules outlining submission of nontechnical testimony and technical testimony in OCC rulemakings serve to ensure that parties give advance notice when submitting technical testimony. 19.15.3.11 NMAC. This section of the rules only provides one ground for excluding technical testimony – improper notice. 19.15.3.12(B)(3) (“The commission may exclude any expert witnesses or technical exhibits not identified in or attached to the pre-hearing statement.”)

A party that intends to provide technical testimony must identify their witnesses, provide a concise statement of the testimony, provide the witnesses’ qualifications, estimate the time needed to present the testimony and provide proposed modifications to the rule change, and this notice must be given at least 10 days prior to the commencement of the rulemaking hearing. 19.15.3.11(B)(2) NMAC. Here, that notice was extended to three weeks under Paragraph 3(a) of the Amended Procedural Order.

Guardians disclosed Mr. Horwitt’s direct testimony and exhibits to the parties and the Commission by the October 21 deadline for technical testimony as required in the Paragraph

¹ It is interesting to note that NMOGA’s witnesses also rely on publicly available data like government websites, and even acknowledge a lack of publicly available data related to the toxicity of many PFAS compounds. *See* Anderson Testimony at P. 3 (“robust toxicological information on the majority of PFAS is lacking”). This lack of publicly available data is one of the issues this rulemaking seeks to remedy.

3(A) of the Amended Procedural Order. Guardians' submission was properly noticed and that is all that matters for purpose of distinguishing between technical and nontechnical testimony.

However, if the Commission decides that Mr. Horwitt's testimony is not technical testimony, it can accept his testimony as nontechnical testimony under 19.15.3.11(A) NMAC. The notice requirements for submitting nontechnical testimony are lower than for technical testimony. Nontechnical testimony does not require filing of testimony prior to the hearing and does not require a prehearing statement. 19.15.3.11(A). Exhibits may be offered for nontechnical testimony, and the standard for admission is, again, relevancy to the proposed rule. 19.15.3.11(A)(2). Here, Paragraph 4(d) of the Amended Procedural Order set a deadline of October 21, 2024 for exhibits to nontechnical testimony. Guardians provided proper notice under the provisions governing this proceeding for Mr. Horwitt's testimony, because it met the deadline and notice requirements regardless of how the testimony is classified.

The rules governing this proceeding do not require that the Commission give one type of relevant testimony more weight than the other. The Commission can hear technical and nontechnical testimony, ask questions of either type of witness, observe cross-examination, and then assign due weight at the conclusion of testimony. The distinction between the two types of testimony serves the purpose of notice as outlined above; the distinction is not one of weight.

If Guardians did not submit Mr. Horwitt's testimony under the requirements and deadline for technical testimony, it could have been attacked as technical testimony that was noncompliant with the notice requirements. Again, Guardians' submission complies with either the rules for technical or nontechnical testimony, and the rules do not require that more weight is given to one type than the other. Relevance is the standard for admissibility and the hearing

process will allow the Commission to make weight determinations. Whether Mr. Horwitt's testimony is classified as technical or nontechnical, it is admissible and should not be excluded.

3. NMOGA's Motion conflates the Rules of Evidence with the rules governing this proceeding.

NMOGA's Motion conflates the standards that apply in a state trial court with those that apply to the present rulemaking proceeding. As plainly stated in the Commission's regulations for rulemaking proceedings, "The rules of civil procedure and the rules of evidence shall not apply." 19.15.3.12(A)(1) NMAC. Looking to other forums, the Water Quality Control Commission ("WQCC") likewise does not apply the rules of civil procedure or the rules of evidence to its rulemaking hearings. 20.1.6.300(A) NMAC ("The rules of civil procedure and the rules of evidence shall not apply.") This is a more relaxed standard than is applied to administrative adjudications at the OCC and WQCC.

In the rules governing adjudications in these administrative forums, the rules of evidence and civil procedure are used as guidelines, and the regulations are explicit about this. Compare the rulemaking provisions for the OCC and WQCC quoted above with the adjudicatory regulations quoted below:

- OCC Regulations for Adjudications 19.15.4.17(A) NMAC ("[]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.* []")
- WQCC Regulations for Adjudications 20.1.3.8 NMAC ("In the absence of a specific provision in this part governing an action. *The commission may look to the New Mexico Rules of Civil Procedure [] and the New Mexico Rules of Evidence for guidance.*") (emphasis added)

In *Marker*, the New Mexico Court of Appeals rejected an attempt to conflate the rules for OCC adjudications and OCC rulemakings. *Marker*, No. A-1-CA-37860, No. A-1-CA-38814 ¶ 18. In that case the court stated, “In arguing that the Commission failed to meet the notice requirements, Petitioner asserts that the notice rules for adjudicatory hearings, rather than rulemaking hearings, should have been applied. We disagree.” *Id.*

When promulgating regulations for rulemaking hearings, these bodies could have used the same language used in the adjudication regulations and provided the rules of evidence are guidelines, but they did not. Therefore, NMOGA’s arguments that rely on the standard for expert testimony outlined in Rule 11-702 NMRA are inapplicable to this proceeding.

NMOGA’s citations to *State v. Smith*, 2024-NMCA-068, and *State v. Duran*, 2015-NMCA-015, are likewise inapplicable. Both cases involved the application of Rule 11-702 to expert witness testimony in criminal jury trials. This is not a jury trial, the Rules of Evidence explicitly do not apply to this proceeding, and the Commission is comprised of members that have specialized knowledge in the area in which they regulate. *See* NMSA 1978 § 70-2-4 (“The designees of the commissioner of public lands and the secretary of energy, minerals and natural resources shall be persons who have expertise in the regulation of petroleum production by virtue of education or training.”) (OCD director is a member of the OCC) and § 70-2-5 (OCD director “shall” [] “by virtue of education and experience have expertise in the field of petroleum engineering.”) These experts can weigh all relevant evidence and give it due weight when making a decision on the proposed rule.² The Commission is not a jury that needs to be protected by Rule 11-702 NMRA. *See Miles*, 1998-NMCA-118, ¶ 8 (distinguishing trials and

² In fact, on appeal “Special weight will be given to the experience, technical competence and specialized knowledge of the Commission.” *Viking Petroleum, Inc. v. Oil Conservation Comm'n*, 1983-NMSC-091, ¶ 8, 100 N.M. 451.

administrative adjudications which involve constitutional protections like due process from legislation and rulemaking to which constitutional protections do not apply).

4. NMOGA conflates the definition of “technical testimony” with the standard for admission.

NMOGA’s Motion also conflates the definition of “technical testimony” with the standard for admissible evidence. The definition for technical testimony in the rules governing this rulemaking is not a standard for admissibility. Instead, it serves to distinguish between technical and nontechnical testimony for the purpose of notice. *See* 19.15.3.11 NMAC.

As explained above, technical testimony is subject to several advance notice requirements outlined in 19.15.3.11(B). Those rules further provide that technical testimony and exhibits can be excluded when “not identified in or attached to the pre-hearing statement.” 19.15.3.11(B)(3) NMAC. The rules distinguishing technical testimony from nontechnical testimony provide that technical testimony may be excluded when a party fails to provide sufficient notice of its intent to file technical testimony. The rules do not provide for the exclusion of technical testimony based on the standard of Rule 11-702 NMRA, and if the Commission wanted to make that the standard for technical testimony in rulemakings it could have done so. Instead, the Commission’s rules explicitly state that the Rules of Evidence do not apply, relevance is the standard for admissibility, and the only reason for excluding technical testimony other than relevance is improper notice. 19.15.3.12(A)(1) and 19.15.3.12(B)(2).

The arguments NMOGA raises in its motion can all be addressed in cross-examination at the hearing. 19.15.3.12(B)(3) NMAC. The Commission will have an opportunity to read Mr. Horwitt’s testimony, ask him questions about it, and listen to cross-examination by the parties. Then the Commission can decide how much weight it grants to Mr. Horwitt’s testimony. Under OCC rules, “[t]he commission shall admit relevant evidence.” 19.15.3.12(B)(2) NMAC. Once

admitted, cross-examination gives the Commission and the parties an opportunity to probe that evidence. 19.15.3.12(B)(3) NMAC. (“A person who testifies at the hearing is subject to cross-examination by the commissioners, commission counsel or a party on the subject matter of the person’s direct testimony.[.]”) Cross-examination can address the qualifications and background of a witness. *Id.* At the end of this process the Commission can make determinations related to the weight of relevant evidence.

5. **Conclusion**

To accept NMOGA’s arguments and exclude Mr. Horwitt’s testimony would foreclose Guardians’ ability to offer relevant testimony and exhibits for consideration by the Commission. Relevance is the standard for admission in this proceeding, and NMOGA does not argue that Mr. Horwitt’s testimony and exhibits are not relevant. For the reasons stated above, Guardians requests that the Motion is denied.

WHEREFORE, WildEarth Guardians respectfully requests that the motion be denied.

Respectfully submitted October 4, 2024 by:

/s/ Tim Davis

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CERTIFICATE OF SERVICE

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