

## STATE OF NEW MEXICO

## ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

## OIL CONSERVATION COMMISSION

ADOPTION OF ANNUAL RESOLUTION SETTING FORTH REASONABLE  
NOTICE STANDARDS FOR COMMISSION PUBLIC MEETINGS PURSUANT TO  
THE NEW MEXICO OPEN MEETINGS ACT, 10-15-1.D. NMSA 1978

REPORT BY THE COMMITTEE APPOINTED BY CHAIRMAN FESMIRE TO  
STUDY RULES OF PROCEDURE BEFORE THE DIVISION AND THE  
COMMISSION

CASE NO. 13,300 *de novo* (Continued)  
CASE NO. 13,351 *de novo* (Dismissed)

2005 FEB 3 AM 8 51

## TRANSCRIPT OF PROCEEDINGS

BEFORE: MARK E. FESMIRE, CHAIRMAN  
JAMI BAILEY, COMMISSIONER  
FRANK T. CHAVEZ, COMMISSIONER

ORIGINAL

January 13th, 2005

Santa Fe, New Mexico

These matters came on for hearing before the Oil  
Conservation Commission, MARK E. FESMIRE, Chairman, on  
Thursday, January 13th, 2005, at the New Mexico Energy,  
Minerals and Natural Resources Department, 1220 South Saint  
Francis Drive, Room 102, Santa Fe, New Mexico, Steven T.  
Brenner, Certified Court Reporter No. 7 for the State of  
New Mexico.

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## I N D E X

January 13th, 2005  
 Commission Hearing  
 CASE NOS. 13,300 *de novo* (Continued)  
 and 13,351 *de novo* (Dismissed)

## PAGE

ADOPTION OF MINUTES OF THE COMMISSION MEETING  
 HELD ON DECEMBER 9th, 2004

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ADOPTION OF ANNUAL RESOLUTION SETTING FORTH  
 REASONABLE NOTICE STANDARDS FOR COMMISSION  
 PUBLIC MEETINGS PURSUANT TO THE NEW MEXICO  
 OPEN MEETINGS ACT, 10-15-1.D. NMSA 1978

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REPORT BY THE COMMITTEE APPOINTED BY CHAIRMAN FESMIRE  
 TO STUDY RULES OF PROCEDURE BEFORE THE DIVISION AND  
 THE COMMISSION

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DISMISSAL OF CASE 13,300 *de novo*

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REPORTER'S CERTIFICATE

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## A P P E A R A N C E S

FOR THE COMMISSION:

DAVID K. BROOKS, JR.  
 Assistant General Counsel  
 Energy, Minerals and Natural Resources Department  
 1220 South St. Francis Drive  
 Santa Fe, New Mexico 87505

\* \* \*

1           WHEREUPON, the following proceedings were had at  
2   9:00 a.m.:

3           CHAIRMAN FESMIRE: At this time we'll call the  
4   January 13th, 2005, meeting of the New Mexico Oil  
5   Conservation Commission to order. For the record let's  
6   note the time as nine o'clock a.m.

7           Again, the date is January 13th, 2005; the  
8   location is Porter Hall in the OCD office, in the New  
9   Mexico Energy, Minerals and Natural Resources Building,  
10   Chino Hall, in Santa Fe, New Mexico.

11           My name is Mark Fesmire.

12           To my right is Commissioner Jami Bailey.  
13   Commissioner Bailey is the designee to the Commission by  
14   State Lands Commissioner Patrick Lyons.

15           To my left is Mr. Frank Chavez. Mr. Chavez is  
16   the Energy, Minerals and Natural Resources Secretary,  
17   Joanna Prukop's designee to the Commission.

18           Let the record reflect that all three  
19   Commissioners are present.

20           Additionally this morning we have Commission  
21   Counsel, Mr. David Brooks; we have Commission Secretary  
22   Florene Davidson; and the court reporter, Steve Brenner, is  
23   also present.

24                           \* \* \*

25

1 CHAIRMAN FESMIRE: The first matter of business  
2 before the Commission today is the adoption of the minutes  
3 of the meeting held on December 9th, 2004.

4 Have the Commissioners had the opportunity to  
5 review the minutes?

6 COMMISSIONER BAILEY: Yes, I have, and I move we  
7 adopt them.

8 CHAIRMAN FESMIRE: Commissioner Chavez?

9 COMMISSIONER CHAVEZ: I have reviewed them, and I  
10 second the motion.

11 CHAIRMAN FESMIRE: The motion has been made and  
12 seconded that the minutes be adopted. All those in favor?

13 COMMISSIONER BAILEY: Aye.

14 COMMISSIONER CHAVEZ: Aye.

15 CHAIRMAN FESMIRE: All those opposed?

16 Let the record reflect that the minutes of the  
17 December 9th, 2004, meeting have been adopted, and they  
18 will be signed at this time.

19 \* \* \*

20

21 CHAIRMAN FESMIRE: The next item of business  
22 before the Commission, the first order today, is the annual  
23 Open Meetings Resolution. At this time we'd ask Counsel  
24 Brooks to please brief the Commission on this matter.

25 MR. BROOKS: Okay, the Open Meetings Act of the

1 State of New Mexico requires that any public body at least  
2 annually adopt a resolution providing what character of  
3 notice will be given of its meetings and what procedures  
4 will be used to comply with the Open Meetings Act.

5 The Commission last adopted such a resolution at  
6 its annual meeting -- first annual meeting, January 15th of  
7 2004. And of course that resolution is now expired, and I  
8 have as Commission Counsel drafted a new resolution for the  
9 year 2005. The resolution is the same with the exception  
10 of the dates, and there are a few clarifications.

11 For instance, the provision for telephone  
12 meetings, which I believe is very close to the end, I added  
13 an additional sentence to clarify or to make clear that  
14 Commissioners participating by telephone could be counted  
15 in ascertaining the existence of a quorum, and that was  
16 presumably the sense of the previous resolution, but it did  
17 not expressly say so and there had been some question  
18 raised about whether or not a valid meeting could be held  
19 if only one Commissioner was present here and two were  
20 attending by telephone. I think the new resolution makes  
21 clear that that would be a valid means of holding a  
22 meeting.

23 Otherwise, the resolution is the same as the  
24 previous resolution, except for the date of the resolution  
25 being 2005 and the dates of the meeting being the dates

1 intended for the regular meetings according to the calendar  
2 that I've been advised by the Commission secretary  
3 represents the sense of the Commission for the forthcoming  
4 year.

5 CHAIRMAN FESMIRE: Commissioner Bailey, have you  
6 had a chance to review the resolution?

7 COMMISSIONER BAILEY: Yes.

8 CHAIRMAN FESMIRE: Commissioner Chavez?

9 COMMISSIONER CHAVEZ: I just scanned over it. I  
10 didn't see anything that stood out, but I'd like to ask  
11 Counsel if he compared the type of notice for these  
12 meetings as compared to the types of notice that -- to be  
13 sure there wasn't any conflict at all required in any of  
14 these rules.

15 MR. BROOKS: Well, if we adopt the new rules,  
16 it's possible that some amendment -- I did not focus on  
17 whether an amendment to the Open Meetings Resolution would  
18 be necessary. That -- I do not think so, but I have not  
19 specifically studied that.

20 However, because we now operate under the  
21 existing rules, if there is anything that changes in the  
22 new rules, then it would be appropriate at that time to  
23 abide by the resolution to conform to the new rules.

24 COMMISSIONER CHAVEZ: Well, I notice that -- just  
25 in scanning through, it appears that notice of a meeting of

1 the Commission does have more requirements than a notice of  
2 a hearing.

3 MR. BROOKS: That is true, and that will be, I  
4 think, true in any case, because the hearing notices for  
5 the Examiner Hearings will not involve all the same  
6 procedures, necessarily, as the meetings of the Commission.

7 But we have to comply with both in the sense of  
8 whatever we determine to be the requirements for the  
9 Commission.

10 COMMISSIONER CHAVEZ: Okay, I don't have any  
11 problems with the resolution.

12 CHAIRMAN FESMIRE: Okay, at this time the Chair  
13 would entertain a motion to adopt the resolution.

14 COMMISSIONER BAILEY: I move we do so.

15 COMMISSIONER CHAVEZ: I second the motion.

16 CHAIRMAN FESMIRE: The motion to adopt the  
17 resolution having been made and seconded, all those in  
18 favor please signify by saying aye.

19 COMMISSIONER BAILEY: Aye.

20 COMMISSIONER CHAVEZ: Aye.

21 CHAIRMAN FESMIRE: All those opposed?

22 Let the record reflect that the motion was  
23 adopted by the Commission by unanimous vote, and it will  
24 now be signed.

25 The resolution has been signed by all three

1 members of the Commission.

2 \* \* \*

3  
4 CHAIRMAN FESMIRE: The next order of business  
5 before the Commission, earlier this summer the Commission  
6 established a committee to look at our rules on rulemaking.  
7 The first mission of the committee was to begin their work  
8 and give us a report at this meeting.

9 Counsel Brooks, as a member of that committee are  
10 you prepared to give us a report at this time?

11 MR. BROOKS: I am prepared to give a report. I  
12 notice that Gail MacQuesten was in the room earlier but is  
13 not here now. I don't know if she wanted to participate in  
14 this or not, but I do not see any other members of the  
15 committee present, except the Commission secretary.

16 CHAIRMAN FESMIRE: Would you like to give that  
17 report at this time?

18 MR. BROOKS: I will. You have been given a copy  
19 of a draft of proposed Commission rules. This draft was  
20 assembled by taking the existing 1200-series rules that we  
21 have, and the material that's proposed to be deleted is  
22 shown in black type with strikeouts, the material that's  
23 shown to be added is in either red or green type and  
24 underlined. The distinction between the red and the green  
25 is not important for our purposes because what it is is,



1 the red was the changes made in the first draft, after the  
2 committee's meetings, and then the green is the changes  
3 that were subsequently made in response to comments  
4 received from the members of the committee on the draft  
5 that had the red changes on it.

6 I will be happy to go through the particular  
7 changes that we are recommending, and then I believe the  
8 Commission will want to at some point address what the next  
9 step will be.

10 Starting with Rule 1201, which relates to  
11 rulemaking proceedings, this rule was recently revised by  
12 the Commission, and we began with the assumption that there  
13 probably wasn't a whole lot that needed to be done to it.  
14 However, it was concluded that there were a number of  
15 changes that basically are of a technical character that  
16 were not intended to amend any of the substance.

17 The only substantive change is the addition of  
18 the new subsection E. The numbering is a little confused  
19 because there's an error in the numbering of the  
20 subsections in the rule as it exists in the New Mexico  
21 Administrative Code. But the new subsection E is to  
22 clarify the subject of written comments.

23 The written comments are something that everyone  
24 is accustomed to in administrative law because there is an  
25 express provision for written comments in the Federal

1 Administrative Procedure Act. In fact, the Federal  
2 Administrative Procedure Act does not require that the  
3 agency conduct a hearing in all rulemaking proceedings.  
4 The agency may simply receive written comments and not hold  
5 a hearing.

6 Of course, our procedures have always required a  
7 hearing, and these rules will still require a hearing.  
8 However, because people are accustomed to the idea of  
9 written comments on administrative rulemaking and -- Well,  
10 as I said, the Federal Administrative Procedure Act  
11 requires federal agencies to provide a period for written  
12 comments whenever they propose a rule, and people are  
13 accustomed to that.

14 In New Mexico it has been held that there is no  
15 right to submit written comments unless it is somehow  
16 provided for, because we, of course, have an Administrative  
17 Procedure Act which doesn't apply to anything, so... This  
18 agency is among the body of all New Mexico State agencies  
19 to which the Administrative Procedure Act does not apply.

20 Anyway, the courts have held that there's no  
21 right to written comments. However, we have -- because  
22 people are accustomed to the idea, we have traditionally  
23 provided for written comments by Commission order. This  
24 rule would put in the rules a right to provide written  
25 comments on rulemaking and would prescribe the time and

1 manner of submission.

2 Rule 1203 is our existing rule for instituting  
3 rulemaking. Now, there has been some discussion among the  
4 committee, and they did not really reach a firm consensus,  
5 I don't think, on how much of this ought to apply in  
6 rulemaking proceedings. I believe this is the best I can  
7 do in expressing the consensus of the committee.

8 There was a general feeling that Rule 1203 was  
9 drawn to apply to the normal application process and not to  
10 rulemaking. However, if we say -- and there was a proposal  
11 in the committee that it be applied only to adjudicatory  
12 proceedings. However, that would leave some gaps in there,  
13 or some things that simply would not be provided for unless  
14 we wrote another rule on rulemaking, and it seemed to me  
15 that this addresses most of the issues.

16 There is one thing in here that Mr. Kellahin as a  
17 member of the committee had commented on, and his comments  
18 were received too late to get input from the other members  
19 of the committee on this.

20 The proposed rule provides, as our rules have  
21 always done, that any person may file an application.  
22 You'll note in A, the second sentence, which is the first  
23 sentence of the existing rule, says, "The division, the  
24 attorney general, any operator or producer or any other  
25 person may apply for a hearing." We changed that to

1 "...commence a rulemaking or adjudicatory proceeding..."

2 Mr. Kellahin has raised the point of, do we  
3 really want to -- is it our intention, and if it is, is  
4 that the right -- the way we should be going to confer  
5 standing on any citizen who happens to want to file any  
6 kind of an application? I don't really think that was the  
7 intention of this language originally.

8 I don't, of course, know when it was adopted or  
9 with what intention, but my assumption is that probably the  
10 standing rules still apply, and we might -- we would still  
11 entertain a motion to dismiss an application for want of  
12 standing, if it was filed by somebody who had absolutely  
13 nothing to do with the matter that they were raising in the  
14 Application.

15 But that's something the Commission may at some  
16 point want to focus on, as to whether or not we want to put  
17 some kind of limitations on who can file an application, in  
18 order to avoid a controversy if we have a situation where  
19 somebody comes in and files an application that they would  
20 not have standing to file in the normal course of events.

21 I can't really think of an example, but perhaps  
22 if it was an application that related to a specific well  
23 and that person didn't have any interest on that well or  
24 the property on which it was located or any adjoining  
25 property, we might have a standing issue.

1 CHAIRMAN FESMIRE: Well, now would be as good a  
2 time as any for the Commission to discuss that, I think.

3 My inclination would be yes, but I can see where  
4 we'd quickly get out of control. You know, any person who  
5 wanted to -- you know --

6 COMMISSIONER BAILEY: -- disrupt the process.

7 CHAIRMAN FESMIRE: Yes, that's the phrase I was  
8 looking for. -- would be able to basically file an  
9 application that we would have to consider under these  
10 rules.

11 But at the same time I don't want to be  
12 exclusionary and exclude somebody who would have a real,  
13 albeit perhaps controversial, interest in getting rules  
14 before the Commission.

15 Commissioner, would you have any --

16 COMMISSIONER BAILEY: Can we insert the words  
17 "withstanding" after "any other person, so it's clear that  
18 the standing rule applies?

19 MR. BROOKS: I think that would be one way of  
20 approaching it, just to say that any person withstanding --  
21 with respect to the subject matter or some general wording  
22 like that.

23 COMMISSIONER BAILEY: But that would not  
24 necessarily be exclusionary of the people who really should  
25 be participating.

1 COMMISSIONER CHAVEZ: Well, I wonder if that  
2 might lead to a situation where somebody might complain  
3 that that decision whether they had standing was arbitrary,  
4 and would it be too complicated to consider the  
5 possibility, if we had a question of their standing, we  
6 could have some type of a prehearing conference or a  
7 hearing on standing or something like that?

8 MR. BROOKS: I think we would want to do so in  
9 any case, if there was a motion to strike an application  
10 due to lack of standing. We'd want to have a hearing on  
11 that issue.

12 There is a body of law, of course, on the subject  
13 of who has standing to raise various issues. It's not a  
14 totally satisfactory body of law, because it involves --  
15 like so much judicial law, it involves very vague concepts  
16 that have been elucidated to a limited degree by opinions.

17 CHAIRMAN FESMIRE: Where in our rules is the  
18 definition of standing that would apply?

19 MR. BROOKS: There is not --

20 CHAIRMAN FESMIRE: Okay.

21 MR. BROOKS: -- I'm afraid. We would have to  
22 rely on common law for judicial precedent which would apply  
23 to standing in court, and would be applicable only by  
24 analogy to us.

25 COMMISSIONER CHAVEZ: Could the Application

1     itself have a person describe their standing, how they're  
2     affected, and then the -- perhaps with a provision that if  
3     the Division or the Commission thought that the standing  
4     was in question, we might hold a hearing to determine  
5     whether they had valid standing to continue with their  
6     application?

7             CHAIRMAN FESMIRE: And that would be like the  
8     eighth element in the application, a statement of standing?

9             MR. BROOKS: That would be one way to do it.

10            CHAIRMAN FESMIRE: But then we'd need to come up  
11     with some sort of basis for a decision against standing.  
12     And I don't want to be too exclusionary; I just don't want  
13     to get the process tangled up in -- boy am I inarticulate  
14     today -- that we just get the process tangled up in, you  
15     know, obstructionist-type behavior.

16            MR. BROOKS: I would note that historically it  
17     has really not been a problem. We have not had people  
18     filing applications that they didn't have a significant  
19     relationship to.

20            Now, of course, if certain -- if some elements of  
21     the environmental community were to become more interested  
22     in oil and gas, we might have more applications filed by  
23     people without direct interests in the subject matter, and  
24     that might raise standing issues that we haven't had to  
25     think about very much in the past, so...

1 COMMISSIONER BAILEY: "The times, they are a-  
2 changing."

3 MR. BROOKS: I think that's true, yes, and I  
4 don't know if it will become a problem or an issue in the  
5 future for us or not.

6 CHAIRMAN FESMIRE: Well, those are the kind of  
7 organizations that might have an interest in promulgating  
8 certain rules and regulations that we would have to  
9 address.

10 MR. BROOKS: Well, in rulemaking, I think  
11 certainly that almost any citizen has standing, and there  
12 would be very few instances when someone would not have  
13 standing in the rulemaking proceeding.

14 Generally speaking, the rule that the courts have  
15 evolved with regard to organizational standing is that if  
16 the purpose of the organization is relevant to the issues  
17 in the case and there are some members of the organization  
18 who are affected by the determination in the case, then the  
19 organization has standing.

20 CHAIRMAN FESMIRE: So it sounds like there is a  
21 basis for a determination and that if we were to make that  
22 requirement and make a statement of standing the eighth  
23 element in the application, that might address at least my  
24 concerns.

25 MR. BROOKS: I think that could be done in that



1 way.

2 CHAIRMAN FESMIRE: And we will get a chance --  
3 when this rule comes before us, we will get a chance --

4 MR. BROOKS: Oh, of course.

5 CHAIRMAN FESMIRE: -- to review it again.

6 MR. BROOKS: And we'll also at that time have the  
7 benefit of any public comments, if there are any.

8 With procedural rules, it's likely to slip  
9 through without catching people's notice, so it requires  
10 particular attention by those of us who are involved in the  
11 formulating process, because we probably will not have the  
12 benefit of extensive public comment on these rules.

13 CHAIRMAN FESMIRE: Right. So it will say  
14 something to the effect, the Division, the Attorney  
15 General, any operator or producer or any other person with  
16 standing may commence a rulemaking or adjudicatory  
17 proceeding requiring a hearing by filing an application,  
18 and then the eighth element of the application will be a  
19 statement of standing?

20 MR. BROOKS: Right.

21 CHAIRMAN FESMIRE: Okay.

22 MR. BROOKS: That's the way I understand it's now  
23 proposed.

24 Rule 1204.A, the question of the period of time  
25 for which we are required to publish notice for hearings in

1 adjudicatory cases, we have requirements for rulemaking  
2 which are back in 1201. I'm trying to remember, I have  
3 trouble keeping all these various periods of time in mind.

4 Okay, the rulemaking rule requires that the  
5 notice be published in the newspaper 20 days prior to the  
6 hearing and that it be posted to the Division's website 20  
7 days prior to the hearing.

8 Now, for adjudicatory cases, which of course  
9 normally will be held -- most of them will be before  
10 Examiners, rather than before the Commission. Of course,  
11 we don't have the -- we dropped the newspaper-publication  
12 requirement when we last amended the rules about a year  
13 ago.

14 But this rule -- There has not been a provision  
15 in the rules as to when we had to publish notice for  
16 adjudicatory proceedings. There has been a provision that  
17 we had to publish it, but there's not been a provision as  
18 to when we had to publish it.

19 Now, the proposal at the committee meeting, and  
20 the -- Well, this one really wasn't at the committee  
21 meeting. I think it wasn't discussed; that's why it's in  
22 green. Gail had raised the issue when she reviewed my  
23 draft that we needed such a provision, and I believe it was  
24 her suggestion, was the five working days, which would be  
25 one week.

1 But Tom Kellahin, in his comments that were  
2 submitted yesterday, indicated that he thought we ought to  
3 go all the way to the 20 days for notice.

4 And I want to clarify here. This is the notice  
5 provision for the publication of the notice, which is  
6 putting it on our website for Examiner Hearings or  
7 publishing in the newspaper for Commission Hearings. He  
8 said he thought we ought to go all the way out to the 20  
9 days.

10 Now, there is a separate 20-day requirement when  
11 notice must be given to the other party in an adjudicatory  
12 hearing, and this provision would not change that.

13 My concern about having a fairly long period of  
14 notice for publication requirement is that it will increase  
15 the number of times there may be slip-ups and a proceeding  
16 doesn't get to hearing because the notice was not published  
17 in time, and I'm not sure that the published notice in  
18 adjudicatory proceedings, as opposed to the notice that's  
19 mailed to the other parties, is that important. But anyway  
20 there is some disagreement, among the members of the  
21 committee as to what ought to be the rule there.

22 The status quo is, there is no rule. There's a  
23 rule requiring publication, but no statement as to when it  
24 has to be made.

25 CHAIRMAN FESMIRE: My inclination would be to

1 make it the same as the mail notice --

2 MR. BROOKS: -- which would be 20 days.

3 CHAIRMAN FESMIRE: -- the 20 days, but I'm not  
4 hard and fast committed to that idea.

5 MR. BROOKS: Okay, well --

6 CHAIRMAN FESMIRE: I would sure defer to the  
7 practicing attorneys.

8 Commissioner Bailey, did you have anything --

9 MR. BROOKS: That was Tom Kellahin's suggestion.  
10 I'm sorry.

11 COMMISSIONER BAILEY: Section C says notice of  
12 hearing shall be sent by mail or electronic mail not less  
13 than 20 days prior to public hearing to all who have  
14 requested such notice.

15 I think we should be consistent, that if we have  
16 20 days in subsection C, we should have 20 days in  
17 subsection A of 1204.

18 If you're making notice for one, you might as  
19 well go ahead and put it on the website at the same time.

20 CHAIRMAN FESMIRE: Uh-huh, that's my thinking.  
21 Commissioner Chavez?

22 COMMISSIONER CHAVEZ: I agree with that.

23 MR. BROOKS: Okay.

24 CHAIRMAN FESMIRE: We would have the same problem  
25 with 1207.B, wouldn't we?

1 MR. BROOKS: 1207, did we make any changes in  
2 1207?

3 COMMISSIONER CHAVEZ: 1207.B.

4 MR. BROOKS: B, okay, let's see, let me find  
5 that.

6 CHAIRMAN FESMIRE: It's just above 1208.

7 MR. BROOKS: Oh, yeah, yeah. That's the same --  
8 There are some different considerations involved here.  
9 This has to do with the time when a published notice must  
10 be published if it's being published because there is a  
11 party whose address is unknown, and this would be for  
12 Examiner Hearings for which there would be no published  
13 notice by us.

14 My thinking in suggesting a shorter period of  
15 time for the time when the notice was published was that  
16 this would permit a party to publish the notice after they  
17 ascertain that the mail notice was returned --

18 CHAIRMAN FESMIRE: Oh, okay.

19 MR. BROOKS: -- without having to delay the  
20 hearing.

21 CHAIRMAN FESMIRE: And do you think in 15 days  
22 the mail notice will get out and come back, and then they  
23 can publish --

24 MR. BROOKS: Well, I don't know. You know, there  
25 could be some question about that.

1 MS. DAVIDSON: Sometimes yes, sometimes no.

2 MR. BROOKS: The Post Office is much slower than  
3 they used to be, I've noticed, about processing return  
4 mail, and sometimes -- I remember when I was doing  
5 hearings, a lot of times when I would give the 20 days'  
6 notice and we would not have the receipt back by the time  
7 of the hearing. So you're right, your concern is valid and  
8 these deadlines may not serve that purpose.

9 CHAIRMAN FESMIRE: Well, my inclination would be,  
10 you know, to leave it the way it is and see what the public  
11 comment is to -- I mean, it's got a valid -- a very valid  
12 purpose behind, you know, deviating from the 20 days here.  
13 Whether we will achieve that purpose or not is another --

14 MR. BROOKS: -- is questionable.

15 CHAIRMAN FESMIRE: Okay.

16 MR. BROOKS: Okay, 1208, here we're getting into  
17 the more specifically procedural provisions. It has been  
18 customary for the Commission to request the filing of  
19 exhibits with prehearing statements. That has not been  
20 done at the Examiner level, and it's been done by the  
21 Commission on a case-by-case basis, although it's done  
22 nearly every time.

23 This would make the requirement of prefiling of  
24 exhibits the standard rule for both Commission and Examiner  
25 Hearings.

1           The language about requiring a fax number or  
2 e-mail address in the pleading was added at Gail's request,  
3 because she said people often didn't do that, which makes  
4 complying with the requirement of electronic service rather  
5 difficult.

6           That's the change in 1208.A.

7           1208.B is the one that introduces the requirement  
8 that exhibits be prefiled at the time of filing of the  
9 prehearing statement.

10           CHAIRMAN FESMIRE: On the Friday before the  
11 hearings. They're generally scheduled on Thursday, right?

12           MR. BROOKS: Right.

13           COMMISSIONER CHAVEZ: I do have some -- well, I  
14 have some questions on all of these, so I've been holding  
15 off until you finish. Is there a better way to do that?

16           MR. BROOKS: Okay, I'll go on through 1208, then.

17           The red changes at the bottom of 1208.B cover the  
18 prefiling of exhibits and also the identification of  
19 witnesses. We have never had any kind of sanction  
20 provision. We do introduce one, although it's not a very  
21 tough one, in 1208.B, providing that a witness that's not  
22 identified in the prehearing statement would not be allowed  
23 to testify unless there's a showing of good cause. There's  
24 no effort to define what would constitute a showing of good  
25 cause.

1           1208.C introduces the requirement for a  
2 prehearing statement in rulemaking proceedings if a party  
3 intends to present technical testimony. It would not apply  
4 to a party who merely intends to make comments.

5           My belief has been that this is the most  
6 practical way to handle rulemaking proceedings, and it's in  
7 accordance with the way this is done by the Water Quality  
8 Control Commission, not that I would set them up as a model  
9 for how things ought to be administered, but I do think  
10 they have a pretty good way of doing things in that  
11 respect, that the Commission needs this kind of information  
12 prior to the hearing from those parties who intend to  
13 present technical testimony in a rulemaking proceeding.

14           The status quo has been that the prehearing  
15 statement requirements did not apply to rulemaking  
16 proceedings, although sometimes we have required them by  
17 order.

18           D relates to motions for continuance. It  
19 requires that motions for continuance be filed at or before  
20 the time for a prehearing statement unless the cause arises  
21 subsequently. And that one is going to be difficult to  
22 enforce, I can tell you from my 12 years of experience in  
23 which I felt like most of what I did was rule on motions  
24 for continuance. But that seemed to be the way the  
25 committee felt that it should be done.



1           Okay, those are 1208 issues.

2           CHAIRMAN FESMIRE: Frank, do you have any --

3           COMMISSIONER CHAVEZ: Let me ask --

4           CHAIRMAN FESMIRE: -- questions?

5           COMMISSIONER CHAVEZ: -- on B, under paragraph

6 B -- Oh, I'm sorry, let's go back to paragraph A, excuse

7 me. I just had a question.

8           Have there been any issues with the problems with  
9 timing for notices, by the timing of when a person enters  
10 an appearance, that, say for example, an applicant wants to  
11 do certain types of notifications and submittals, did them  
12 at the beginning of the day, but at the end of the day  
13 another party enters an appearance. Is that an issue, or  
14 is that just --

15           MR. BROOKS: I don't know if it's ever arisen.

16 Do you know, Florene?

17           MS. DAVIDSON: I don't, not to my --

18           MR. BROOKS: It certainly could arise --

19           MS. DAVIDSON: Yeah.

20           MR. BROOKS: -- because we have no strictures on  
21 when a party can enter an appearance. The applicant has to  
22 follow some time lines, but a respondent can enter an  
23 appearance any time.

24           COMMISSIONER CHAVEZ: Okay. So if they would --

25           COMMISSIONER BAILEY: Kate has an answer.

1 COMMISSIONER CHAVEZ: Oh.

2 MS. MCGRAW: Kate McGraw, R.W. Byram. I can  
3 remember cases recently -- in fact, one of them probably  
4 prompted this request for stricter rules -- in which the  
5 applicant came in believing that the case was not objected  
6 to and that under the current rules the case could be  
7 presented by affidavit, and got here to discover that there  
8 was an opposing attorney prepared to enter an appearance  
9 and there was no witness to cross-examine, and it was a  
10 mess. The case had to be continued and witnesses brought  
11 in, and it seems to me Mr. Kellahin was the applicant's  
12 attorney in that case, and he was considerably irritated at  
13 that, that he'd had no warning that there would be this --

14 CHAIRMAN FESMIRE: -- trial by ambush, yeah.

15 MS. MCGRAW: Yeah.

16 COMMISSIONER CHAVEZ: Well, I was just bringing  
17 that up because that specifically is mentioned under  
18 paragraph A, so it might be something to take back to the  
19 committee if there might be something about timing for  
20 appearances so that the applicant's get their things done.

21 Under B, although there was no change to it, on  
22 the third line it says "at least four days". Now, we've  
23 been diligent in -- previously have been saying five  
24 working days.

25 MR. BROOKS: Yeah.

1 COMMISSIONER CHAVEZ: Would it be helpful to say  
2 four working days, or is just four days --

3 MR. BROOKS: Probably you're right if we were  
4 going to say that. It was Gail's suggestion that we put  
5 five working days, because while by statute that's what  
6 five days or four days means in New Mexico, there's a  
7 statutory provision to that effect, not everyone is aware  
8 of it, and people read our rules who are not aware of all  
9 the statutes. So she thought that we ought to specify it.  
10 The same reason would apply here as would in the other  
11 context.

12 COMMISSIONER CHAVEZ: It might be helpful to  
13 refer to that somewhere in the rule --

14 MR. BROOKS: Yeah.

15 COMMISSIONER CHAVEZ: -- I -- to the statutory  
16 requirement of what the days are. Is it included or is  
17 it --

18 MR. BROOKS: Well, if we say working days  
19 whenever we state a period of time less than 10 days -- I  
20 mean 10 or less. Mark caught me on that last time, because  
21 I had thought it was less than 10 days. Ten days or less  
22 excludes weekends and holidays. But of course it would be  
23 rather difficult to go through and be sure we've done that  
24 consistently throughout our rules.

25 COMMISSIONER CHAVEZ: Okay. The next question I

1 have is on the next line. It says "...on the Friday  
2 preceding the scheduled hearing." Since there's now so  
3 many holidays on Fridays, even though this isn't a -- this  
4 has to do between the applicant and opposing counsel of  
5 record or whatever, is there any issues that are raised  
6 because of possible holidays on Fridays?

7 MR. BROOKS: Could be, I hadn't thought about  
8 that one. But if there were a holiday on a Friday and if  
9 there were a hearing the next week -- Of course, four days,  
10 four working days, would kick it back into the preceding  
11 week if Friday were a holiday.

12 Well, no, wait. If the hearing were on a  
13 Friday --

14 CHAIRMAN FESMIRE: The hearing's going to be on  
15 Thursday.

16 MR. BROOKS: Yeah. Well, if the hearing's on  
17 Thursday you don't have a problem, because four working  
18 days would be the preceding Thursday if there were a  
19 holiday in there. If we had a hearing on a Friday, then  
20 four working days before would be Monday, which is why they  
21 wanted the Friday-before provision in there anyway. But if  
22 we had a hearing on the Friday and the preceding Friday  
23 were a holiday, then you'd have a problem. It's not going  
24 to arise very often, because you don't ordinarily schedule  
25 hearings on Friday, but there is a -- I can see there is a

1 potential issue there.

2 COMMISSIONER CHAVEZ: There's always a -- anytime  
3 you have a specific day --

4 MR. BROOKS: Yeah.

5 COMMISSIONER CHAVEZ: -- in a rule, that enters  
6 into it, possibly. I'm just raising that as a question.

7 Now, on the addition at the bottom of paragraph  
8 B, the second to the last line, it says "...may be excluded  
9 from evidence..." Is that -- It's in the passive voice.  
10 That's to be indicated that the Division or the Commission  
11 may exclude it from evidence?

12 MR. BROOKS: Right.

13 COMMISSIONER CHAVEZ: Is that --

14 MR. BROOKS: That would be the -- on a --

15 COMMISSIONER CHAVEZ: It would be understood.

16 MR. BROOKS: Yeah.

17 CHAIRMAN FESMIRE: And that's what you were  
18 intending --

19 MR. BROOKS: Right.

20 CHAIRMAN FESMIRE: -- to give the Examiner --

21 MR. BROOKS: Of course, normally it would be an  
22 opposing party that would raise the objection and request  
23 that it be excluded, but it would be the Examiner or the  
24 Commission who ruled on it.

25 CHAIRMAN FESMIRE: Right.

1 COMMISSIONER CHAVEZ: Okay, that's -- Okay, I  
2 just wanted to be sure that that was clear enough to --  
3 that that's what's implied here. Okay, that's all I had on  
4 that.

5 MR. BROOKS: Okay. Anybody else?

6 Okay, 1211 has a number of procedural provisions.

7 We have the subpoena power, which of course is  
8 provided by statute, and we have traditionally used it to  
9 require production of documents, and we've done so at the  
10 request of the attorneys without any particular -- I mean,  
11 we don't do anything other than just -- if somebody  
12 requests it, we issue a subpoena, but of course sometimes  
13 the other side comes in and wants to quash the subpoena.

14 So we have put in a provision for filing of a  
15 motion and for prehearing procedures, to quash subpoenas.  
16 Now, of course, that raises the issue of depositions. We  
17 have not had a lot of requests -- I don't think we've had  
18 any since I've been here, but I've only been here three  
19 years; I understand there have been a few in the history of  
20 the Commission where people request depositions of  
21 witnesses in advance of the hearing.

22 The consensus of the attorneys was that nobody  
23 thinks we really ought to get into having a lot of  
24 depositions because then it would get like the rules --  
25 like proceedings in court, where everybody felt like they

1 had to take depositions of all the witnesses, and that  
2 would slow down our procedures and make it more expensive  
3 for everybody. However, they felt like maybe there might  
4 be some cases in which it would apply, and consequently  
5 we've got the last sentence of 1211.A to provide for  
6 depositions in certain cases upon motion for good cause  
7 shown.

8           Whether that type of provision will work, I don't  
9 know. If it gets to be that we get a lot of those  
10 requests, then it could be a nuisance both to us and to the  
11 attorneys, but I don't know how it will work in practice.

12           CHAIRMAN FESMIRE: I think it's pretty  
13 reasonable, the realization by the Division that this is an  
14 extraordinary procedure and shouldn't be used readily.

15           MR. BROOKS: That's the way the attorneys viewed  
16 it.

17           CHAIRMAN FESMIRE: Okay.

18           COMMISSIONER CHAVEZ: One thing about that is the  
19 -- Let's see, in order to hear these motions, is there a  
20 process that's being used?

21           MR. BROOKS: Yeah, this is provided down in  
22 1211.C, we've put in a process for prehearing motions, and  
23 that was one of the major reasons we wanted to adopt some  
24 amendments to the procedural rules, because we didn't have  
25 any protocol for prehearing motions.

1           CHAIRMAN FESMIRE: That was one of the big  
2 changes that we wanted --

3           MR. BROOKS: Yeah.

4           COMMISSIONER CHAVEZ: Right, okay, I see it  
5 there. I forgot about that.

6           MR. BROOKS: It's not a problem at the Examiner  
7 level, because the Examiner has the statutory right to  
8 control the proceedings before him, and the Examiners have  
9 traditionally held prehearing-motion hearings. But when  
10 something is pending before the Commission there has not  
11 been any express authority for anybody to hold prehearing  
12 motions, although I think previous Directors have, in fact,  
13 done so on occasion.

14           This would give the Director the power to hear  
15 and rule on prehearing motions. Of course one of the ones  
16 that's most often going to arise is a motion to stay the  
17 Division order pending the *de novo* hearing, and in those  
18 cases we have provided that -- I forget how it ended up.  
19 We provided that the stay would remain in effect until the  
20 Commission acted otherwise, and of course that would give  
21 them a chance to raise the matter at the Commission level.

22           We changed that language a couple of times, but  
23 that's what we ended up with.

24           CHAIRMAN FESMIRE: I think that's reasonable.

25           COMMISSIONER BAILEY: Which brings up the



1 question, Yates filed a petition for a rehearing --

2 CHAIRMAN FESMIRE: Actually, I think for the  
3 limited purpose of determining the applicability of the  
4 costs, the problem they had with the costs, I think that's  
5 all they want, is for us to rule on which of those costs  
6 are valid, didn't they?

7 MR. BROOKS: Well, no, that's not really involved  
8 in the rehearing. The rehearing is -- You're talking about  
9 Yates vs. Pride?

10 COMMISSIONER BAILEY: Uh-huh.

11 MR. BROOKS: The rehearing application that's  
12 been filed is merely for -- is basically just a basis for  
13 an appeal --

14 CHAIRMAN FESMIRE: Right.

15 MR. BROOKS: -- and they raised all their issues.  
16 And of course that case is not on the agenda for today, so  
17 we can't really deal with it, but I have been advised by  
18 the parties that there are settlement negotiations in  
19 progress.

20 COMMISSIONER BAILEY: I was just curious if the  
21 Director had made a decision on it.

22 CHAIRMAN FESMIRE: We did --

23 MR. BROOKS: I don't there's been any decision --  
24 I haven't discussed it with anyone. I had assumed that  
25 there was no desire to grant the motion for rehearing, we

1 were going to allow the order to become final if it --

2 CHAIRMAN FESMIRE: On its own --

3 MR. BROOKS: Yeah.

4 CHAIRMAN FESMIRE: -- on the lapse of time, yeah.

5 MR. BROOKS: Yeah.

6 CHAIRMAN FESMIRE: I guess we're on to 1220,  
7 unless there are other questions?

8 MR. BROOKS: Okay, 1220.B does deal -- is the  
9 provision that deals expressly with motions to stay. The  
10 other prehearing procedures -- 1211 deals with other types  
11 of motions which would be basically motions for discovery  
12 or motions for continuance if they were contested; 1220  
13 deals expressly with motions for stay.

14 And the final sentence of 1220 is the one I  
15 mentioned stating that the Director -- if the Director  
16 grants a stay, the remains in effect until the Commission  
17 otherwise determines.

18 CHAIRMAN FESMIRE: That was it, wasn't it?

19 MR. BROOKS: I believe that is the -- a brief  
20 summary of the issues we addressed in this.

21 CHAIRMAN FESMIRE: The irony of this, then, is  
22 that we have to use the old rules to promulgate the new  
23 rules on rulemaking.

24 MR. BROOKS: Right. We do not have any express  
25 provision for the Commission to institute rulemaking in the

1 old -- in the existing rules, although it says any person  
2 may file an application. So I'm not sure -- I think  
3 perhaps we need to confer with the general counsel before  
4 we determine exactly what procedure we're going to use in  
5 this matter.

6 CHAIRMAN FESMIRE: Okay. So the next step, then,  
7 is a conference with the general counsel, to figure out how  
8 to proceed?

9 MR. BROOKS: I believe that would be appropriate,  
10 yes.

11 CHAIRMAN FESMIRE: Okay.

12 COMMISSIONER CHAVEZ: I chimed in on 1208. I had  
13 some questions earlier, but I just didn't know whether you  
14 wanted to --

15 MR. BROOKS: Oh, okay, I'm sorry, go ahead and go  
16 through any questions or comments you or any of the other  
17 Commissioners may have.

18 COMMISSIONER CHAVEZ: Okay, on 1201.A, we're  
19 leaving rulemaking basically to the Commission, not to the  
20 Division; is that right?

21 MR. BROOKS: Yes. We do have a specific  
22 provision in here somewhere that any rule of statewide  
23 application will be heard before the Commission.

24 COMMISSIONER CHAVEZ: That's only of statewide  
25 application?

1 MR. BROOKS: Yes.

2 COMMISSIONER CHAVEZ: Okay.

3 MR. BROOKS: And of course that kind of leaves  
4 some issues since we do have some issues now that are not  
5 of statewide application. Clearly, the main type of rules  
6 that are adopted at the -- traditionally have been adopted  
7 at the Examiner level are pool rules, and those are not --  
8 the adoption of pool rules is not a rulemaking proceeding;  
9 that's an adjudicatory proceeding.

10 COMMISSIONER CHAVEZ: Okay, well, I understood  
11 that, so I was wondering about the wording. It said  
12 "...division or commission adopts...or a duly appointed  
13 division examiner..." when we were looking at rulemaking.

14 MR. BROOKS: Right. Well, this has been in our  
15 rules all along, that we could have a -- the Division can  
16 adopt rules. And statutorily, either the Division or the  
17 Commission has the authority to adopt rules. We do have a  
18 provision here in the rules, though, that says for  
19 statewide application it would be heard. We might --  
20 Perhaps we might want to expand that. I'm not sure where  
21 that is in here, but that was adopted as a part of our  
22 previous modification of the rules.

23 COMMISSIONER CHAVEZ: Uh-huh.

24 MR. BROOKS: Yeah, it's existing 1201.C, the  
25 second 1201.C. There are two 1201.C's now. The one that

1 will be renumbered 1201.D.

2 COMMISSIONER CHAVEZ: Uh-huh. Okay, so the  
3 Division Director can direct otherwise --

4 MR. BROOKS: Right.

5 COMMISSIONER CHAVEZ: -- and that leaves that up  
6 there. Okay.

7 F under 1201 has the exception for special pool  
8 rules. I'm wondering if for ease of reference there might  
9 be a reference to that under A, something to the effect  
10 that repeals any rule except as provided under Section F of  
11 this rule, or something like that. That might clarify it,  
12 or if that just confuses things, I don't know.

13 MR. BROOKS: The only problem with that is, they  
14 make it so difficult to -- the archives and records rules  
15 make us use so many --

16 COMMISSIONER CHAVEZ: -- cross-references?

17 MR. BROOKS: Well, they make cross-references  
18 difficult by requiring that every cross-reference -- if you  
19 want to say except as provided in subsection F, you would  
20 have to say except as provided in subsection F of Section  
21 1201 -- well, no, with a subsection it's not quite as bad.  
22 You'd have to say except as provided -- you can't just say  
23 except as provided in subsection F below, you have to say  
24 except as provided in subsection F of 19.15.14.1201 NMAC.

25 COMMISSIONER CHAVEZ: Oh, okay.

1 MR. BROOKS: That's the only reason for not doing  
2 it. You get it full of a whole lot of numbers.

3 COMMISSIONER CHAVEZ: That's all I had otherwise.  
4 These cross-references sometimes can be a little helpful,  
5 but sometimes --

6 MR. BROOKS: Sometimes they are, and sometimes  
7 they're confusing, and I don't know which is best. I'll  
8 certainly invite the Commission to consider that issue.

9 COMMISSIONER BAILEY: I do have a question.  
10 Remember when we were doing the Otero County case, and some  
11 people in the audience and others wanted to cross-examine  
12 the witnesses, and there was some confusion over whether or  
13 not that should be allowed.

14 MR. BROOKS: And that is an issue that has not  
15 been addressed in here.

16 COMMISSIONER BAILEY: Shouldn't it?

17 MR. BROOKS: Probably should be. And I do not  
18 know what the Commission's sense of that is. There is a  
19 legal problem involved, and the legal problem involves the  
20 issue of what constitutes the practice of law. There is an  
21 Attorney General's opinion which holds that an organization  
22 cannot appear before the Commission except through a  
23 licensed attorney. An individual can, just as they can  
24 appear in court *pro se* and act as their own attorney, but a  
25 person cannot represent an organization unless they are a

1 licensed attorney in the State of New Mexico.

2 And if -- the cross-examining of witnesses is  
3 something that fairly clearly is the practice of law in the  
4 sense that it's something that lawyers normally do, so  
5 arguably we are legally obligated to limit the cross-  
6 examination of witnesses to attorneys and *pro se* parties.

7 That may create some problems in rulemaking  
8 proceedings, I don't know. Appearing in a rulemaking  
9 proceeding is an iffy issue because that -- I don't think  
10 appearing -- appearing merely to submit comments is not --  
11 probably not the practice of law, so an organization can  
12 probably appear through a representative that's not an  
13 attorney and submit comments. But cross-examining  
14 witnesses, that's --

15 COMMISSIONER BAILEY: That caused confusion and  
16 ill will --

17 MR. BROOKS: It does.

18 COMMISSIONER BAILEY: -- and I think if we could  
19 address that --

20 MR. BROOKS: Okay.

21 COMMISSIONER BAILEY: -- in these rules, that it  
22 would probably help public perceptions so that we're not  
23 just being arbitrarily --

24 MR. BROOKS: Probably you're right.

25 COMMISSIONER CHAVEZ: That's under Rule 1212.A.

1 MR. BROOKS: Okay, my recommendation on that  
2 would be that we prepare a proposed provision and submit it  
3 to the members of the committee, since this is going to be  
4 carried over till the next meeting, at which time we'll  
5 determine where we go with adopting the rules anyway; we  
6 can get the views of the other members of the committee on  
7 this issue since it hasn't been addressed at all in this  
8 draft. And I think you're right, it should be.

9 CHAIRMAN FESMIRE: And I think the rule ought to  
10 be very specific in what you've just said. Organizations  
11 must be represented by attorneys. Individuals can make  
12 statements, but only attorneys and *pro se* -- in rulemaking  
13 how much *pro se* --

14 MR. BROOKS: Well, I think in rulemaking  
15 proceedings it's appropriate for a person to appear as a  
16 representative of an organization, who is not an attorney,  
17 if the only purpose of their appearing is to make a  
18 statement.

19 CHAIRMAN FESMIRE: Yeah, yeah.

20 MR. BROOKS: But if they want to cross-examine  
21 witnesses, then I think they have to be licensed as an  
22 attorney.

23 CHAIRMAN FESMIRE: And I think we ought to state  
24 that in this rule. And Frank was right, was it 1212.A?

25 COMMISSIONER CHAVEZ: Uh-huh.



1           CHAIRMAN FESMIRE: You know, any party wishing to  
2 make statements may make statements as representatives of  
3 an organization. But if the intent of the party is to  
4 cross-examine or to present legal evidence, then they need  
5 to be an attorney.

6           MR. BROOKS: Yeah, right, okay.

7           COMMISSIONER CHAVEZ: Continuing on with that,  
8 actually, I know there have been issues developed over how  
9 many exhibits to present and who are parties of record.

10          MR. BROOKS: Yeah.

11          COMMISSIONER CHAVEZ: Now, that same rule under B  
12 requires that they supply a complete set of exhibits, to  
13 include the other parties of record. And how is the party  
14 of record determined? Is that those who have made  
15 appearances?

16          MR. BROOKS: That would be those who have made  
17 appearances. Now, as regards to rulemaking proceedings,  
18 there is an exception in here. Where are we now?

19          COMMISSIONER CHAVEZ: I'm on 1212.B.

20          MR. BROOKS: 1212 -- Yeah, and it doesn't apply  
21 in 1212. There's an exception, and we didn't coordinate  
22 that with 1212. We did in the prehearing statement  
23 provision, which is 1208, we put a provision, 1208.C, that  
24 in rulemaking proceedings they'll file exhibits but they're  
25 not required to provide copies.

1 I think we need -- you're right, we need to deal  
2 with that in 1212 in regard to -- in some way. And of  
3 course it's not reasonable to expect people to provide  
4 copies of exhibits to everybody who appears to make  
5 comments.

6 CHAIRMAN FESMIRE: Right.

7 MR. BROOKS: On the other hand, where you have us  
8 versus NMOGA, we're going to be exchanging exhibits between  
9 each other, between their attorney and whoever is  
10 representing the Division, and we would want that in any  
11 such case where it's a -- Perhaps it should be that for any  
12 party who has filed a prehearing statement, then they  
13 should be provided with copies of exhibits at the hearing.

14 CHAIRMAN FESMIRE: Well, again, there are going  
15 to be, you know, parties who file prehearing statements  
16 that -- Well, I don't know.

17 MR. BROOKS: Or perhaps it should be the party  
18 required to file a prehearing statement, which would be the  
19 applicant and the parties presenting -- offering technical  
20 testimony.

21 CHAIRMAN FESMIRE: I think that's a good way to  
22 handle it.

23 COMMISSIONER BAILEY: Yeah.

24 MR. BROOKS: Okay.

25 COMMISSIONER CHAVEZ: Yes.

1           CHAIRMAN FESMIRE: Yes, you're going to get,  
2           sometime -- in some deals you're going to get prehearing  
3           statements from people who, you know, will really have no  
4           interest in the technical exhibits.

5           MR. BROOKS: Right, exactly.

6           CHAIRMAN FESMIRE: You're on a roll. Anything  
7           else?

8           MR. BROOKS: Doing good, doing good.

9           COMMISSIONER CHAVEZ: Well, let's see, I think  
10          you answered all the questions I had.

11          I did -- just maybe an internal issue where you  
12          did not make a proposal. Under 1205.B, second sentence  
13          says "the number and style of the case", and --

14          MR. BROOKS: That is something that has been in  
15          this -- that's been in the rules for a long time.

16          COMMISSIONER CHAVEZ: As long as nobody has a  
17          problem with it, I don't know. I don't know for sure what  
18          "style of the case" means by itself.

19          MR. BROOKS: Well, I think I do know what it  
20          means, but of course the style of Commission cases and  
21          Division cases is somewhat less than informative.

22          COMMISSIONER CHAVEZ: Okay, as long as there's no  
23          problem with that, I --

24          MR. BROOKS: I think lawyers will not have a  
25          problem knowing what it means, because it's a term that's

1 used in court proceedings, and I think lawyers are  
2 accustomed to knowing what it means.

3 COMMISSIONER CHAVEZ: The only problem, I would  
4 wonder if somebody might object that notice was inadequate  
5 because the style of the case was in error, or, you know,  
6 there would be an objection --

7 MR. BROOKS: And that could be. You know, it  
8 shouldn't be, especially since the styles of our cases are  
9 often not that informative.

10 COMMISSIONER CHAVEZ: Well, anytime we commit a  
11 notification to contain something it may be ambiguous, we  
12 may open ourselves up for other types of things too. So  
13 it's not real clear. Maybe time to drop that, unless it's  
14 helpful.

15 CHAIRMAN FESMIRE: If we did, we might replace it  
16 with the names of the parties --

17 MR. BROOKS: Or at least the name of the  
18 Applicant, because that's all that's really shown in the  
19 style of our cases anyway. Even if there is a definite  
20 respondent --

21 CHAIRMAN FESMIRE: That's true.

22 MR. BROOKS: -- they're normally not named.

23 CHAIRMAN FESMIRE: That's true. The style is  
24 just the way the court identifies the case --

25 MR. BROOKS: Yeah.

1 CHAIRMAN FESMIRE: -- the name of the parties,  
2 the --

3 MR. BROOKS: There is, I guess, some reason to  
4 have it, because numbers can get confused, and somebody's  
5 response may get filed in the wrong case. If the number is  
6 right, that wouldn't happen.

7 But if the number is wrong -- if they have the  
8 number wrong, and they have the style, that might give them  
9 a way to correct it. If they don't have, that might cause  
10 problems.

11 I don't know, I don't think we've had any  
12 problems with this provision over time, but it could  
13 happen.

14 COMMISSIONER CHAVEZ: Not being an attorney, I  
15 didn't understand what that meant, so I was wondering if,  
16 when we have these things up here, if as part of a notice,  
17 if somebody wanted to object that the notice was  
18 inadequate --

19 MR. BROOKS: Yeah.

20 COMMISSIONER CHAVEZ: -- because of what we said  
21 was style and what they said was style or something.

22 MR. BROOKS: Yeah, I think we would probably not  
23 require them to republish for that reason, but I don't know  
24 for sure.

25 Of course, when we -- Did you want to comment on

1 that?

2 MS. MCGRAW: Kate McGraw. You know, I was just  
3 going to say that style gets adjusted and amended in  
4 Examiner cases all the time, you know, they drop the 40-  
5 acre spacing on a comp. pooling because they're not going  
6 into any formations that actually require 40-acre spacing  
7 or something like that. Nobody ever requires renotice on  
8 the basis of that; it's just considered how they list it on  
9 the docket.

10 MR. BROOKS: I think that's probably true. Now,  
11 if they -- although I don't know. I have seen examiners  
12 require it be renoticed if there's a --

13 MS. MCGRAW: If there's a substantive --

14 MR. BROOKS: -- in a compulsory pooling case, if  
15 the -- if it's a nonstandard location and the application  
16 doesn't include -- of course, that's because of what's in  
17 the notice.

18 If the notice doesn't state that it's also an  
19 application for a nonstandard unit, then they would say  
20 that was a defective notice.

21 MS. MCGRAW: Yes.

22 CHAIRMAN FESMIRE: Right.

23 MS. MCGRAW: Yeah, it doesn't really have  
24 anything to do with the style because -- what's in the  
25 application or what's in the notice.

1 COMMISSIONER CHAVEZ: Okay, thanks. That's all I  
2 have.

3 CHAIRMAN FESMIRE: Anything else?

4 COMMISSIONER BAILEY: I don't believe so.

5 CHAIRMAN FESMIRE: Mr. Counsel, is there a need  
6 for the Commission to move for an adoption of the report  
7 and to vote on it, or can we leave it the way it is?

8 MR. BROOKS: I think we can just leave it just  
9 that report has been received. I don't think it's  
10 necessary for the Commission to take any formal action at  
11 this time.

12 CHAIRMAN FESMIRE: Okay. So let's let the record  
13 reflect that the report of the committee was received.

14 I want to commend Counsel Brooks, secretary  
15 Davidson and the members of the committee. I think this is  
16 a pretty good start on what we needed.

17 I would like to address the concern in the future  
18 that Commissioner Bailey had about who can practice before  
19 the Commission and what constitutes that practice.

20 MR. BROOKS: I agree, that is something that has  
21 long needed to be clarified.

22 \* \* \*

23

24 CHAIRMAN FESMIRE: The next matter before the  
25 Commission is Cause Number 13,300. It's the Application of

1 HEC Petroleum, Inc., to amend the special rules and  
2 regulations for the Cinta Roja-Morrow Gas Pool in Lea  
3 County, New Mexico.

4 It's my understanding that the Applicant has  
5 requested that this case be dismissed and that the case has  
6 been dismissed; is that correct?

7 MS. DAVIDSON: (Nods)

8 \* \* \*

9  
10 CHAIRMAN FESMIRE: The next cause before the  
11 Commission is Cause Number 13,351, the *de novo* Application  
12 of Edge Petroleum Corporation Company to restrict the  
13 effect of the special rules and regulations for the Dos  
14 Hermanos-Morrow Gas Pool in Eddy County, New Mexico.

15 And it is my understanding that the Applicant in  
16 that case has requested that this case be continued to the  
17 February meeting and that there has been no objection to  
18 that continuance.

19 MS. DAVIDSON: (Nods)

20 \* \* \*

21  
22 CHAIRMAN FESMIRE: With that having been said, I  
23 will ask the Commission if there is any further business  
24 before the Commission today?

25 MR. BROOKS: Back to the HEC case, I believe an



1 order -- I believe the Commission secretary has prepared an  
2 order dismissing that case.

3 CHAIRMAN FESMIRE: Absolutely correct.

4 MR. BROOKS: And I believe there should be a  
5 motion to adopt that order.

6 COMMISSIONER CHAVEZ: I move the dismissal order  
7 be adopted for Case --

8 COMMISSIONER BAILEY: Second.

9 CHAIRMAN FESMIRE: The motion has been moved and  
10 seconded that the -- in Cause Number 13,300, order to  
11 dismiss be signed.

12 All those in favor?

13 COMMISSIONER BAILEY: Aye.

14 COMMISSIONER CHAVEZ: Aye.

15 CHAIRMAN FESMIRE: Opposed?

16 The motion passes. The order will be signed.

17 MR. BROOKS: The signing of the -- Going back to  
18 the committee report for one moment, if the Commission  
19 would like there's one other observation I would like to  
20 offer.

21 CHAIRMAN FESMIRE: Go ahead, please.

22 MR. BROOKS: The signing of the order reminded me  
23 of that.

24 There was some consideration of whether or not we  
25 needed to have a provision about signing of orders in the

1 procedural rules. However, there is a provision in the Oil  
2 and Gas Act which says that any document signed by -- it's  
3 not specific to Commission orders, but it says that any  
4 document signed by the Director and impressed with the seal  
5 of the Commission will be *prima facie* evidence of its  
6 validity.

7 And my conclusion was that that provision is  
8 probably adequate, so that if we don't -- all the  
9 Commissioners are not available to sign, the signature of  
10 the director and the secretary placing the seal on it is  
11 sufficient.

12 So I've concluded it's probably not necessary to  
13 address that in the rules.

14 CHAIRMAN FESMIRE: Okay. Is there any further  
15 business before the Commission today?

16 COMMISSIONER BAILEY: No.

17 COMMISSIONER CHAVEZ: I have none.

18 CHAIRMAN FESMIRE: There appearing to be none,  
19 the Chair will entertain a motion to adjourn.

20 COMMISSIONER BAILEY: I move we adjourn.

21 COMMISSIONER CHAVEZ: I second the motion.

22 CHAIRMAN FESMIRE: The motion to adjourn has been  
23 moved and seconded.

24 All those in favor?

25 COMMISSIONER BAILEY: Aye.

1 COMMISSIONER CHAVEZ: Aye.

2 CHAIRMAN FESMIRE: Opposed?

3 The meeting is adjourned at 10:12 on the day of  
4 its beginning.

5 (Thereupon, these proceedings were concluded at  
6 10:12 a.m.)

7 \* \* \*

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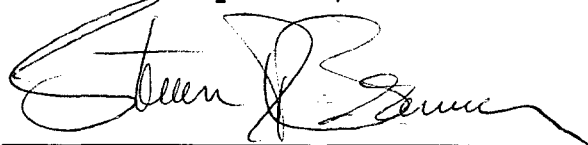
## CERTIFICATE OF REPORTER

STATE OF NEW MEXICO    )  
                              )   ss.  
COUNTY OF SANTA FE    )

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL January 14th, 2005.



STEVEN T. BRENNER  
CCR No. 7

My commission expires: October 16th, 2006

#### **19.15.14.1201 RULEMAKING PROCEEDINGS:**

**A.** ~~Before any rule, including a revocation or amendment of an existing rule, shall be made by~~ the division or commission adopts, amends or repeals any rule, a public hearing before the commission or a duly appointed division examiner shall be held at such time and place as may be prescribed by the commission in accordance with Section 10-15-1 NMSA 1978; provided that the hearing may be continued in accordance with 19.15.14.1209 NMAC without additional notice.

**B.** ~~When the commission, the division, an operator or any interested person applies to adopt, amend or rescind~~ repeal any rule, such application shall constitute a request for rulemaking, and ~~the division shall publish notice of the proposed rulemaking, stating the date, time and place of the hearing and the date by which public comments thereon must be received, provided that the time for public comment may be extended without additional notice. Published notices shall be issued in the name of "The State of New Mexico" and signed by the director of the division, and the seal of the commission shall be impressed thereon. The division shall publish such notice of the proposed hearing:~~

(1) ~~one time in a newspaper of general circulation in the counties in New Mexico affected by the proposed rule (or if the proposed rule will be of statewide application, in a newspaper of general circulation in this state), with the publication date not less than 20 days prior to the date set for the public hearing;~~

(2) ~~one time in the New Mexico register, with the publication date not less than 10 days prior to the public hearing; and~~

~~(4)(3)~~ (3) ~~by posting to the division's website not less than 20 days prior to the public hearing.~~

**C.** ~~In addition, notice of the hearing shall be given on the applicable docket for the commission or division hearing docket at which the matter will be heard, which shall be sent by regular mail or electronic mail not less than 20 days prior to the public hearing to all who have requested such notice, not less than 20 days prior to the public hearing;~~

**CD.** ~~If the rule proposed to be adopted, amended or rescinded~~ repealed ~~is of statewide application, the hearing shall be conducted before the commission in the first instance unless the division director otherwise directs.~~

**DE.** Any person may submit written comments on any proposed rule, which comments shall be made a part of the record of the hearing. Such comments must be received by the division not later than five working days before the date when the hearing is scheduled to commence, unless the time for filing such comments is extended by the director or the commission.

**E.** 19.15.14.1201 NMAC shall not apply to special pool rules, which may be adopted, amended or rescinded in adjudicatory proceedings subject to the notice provisions of Sections 1204 and 1207 of 19.15.14 NMAC.

[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1201, 8-29-03; A, 06/15/04]

**19.15.14.1202 EMERGENCY ORDERS AND RULES:**

A. Notwithstanding any other provision of 19.15 NMAC, in the event an emergency is found to exist by the division or commission, which requires adoption of a rule or the issuance of an order without a hearing, such emergency rule or order shall have the same validity as if a hearing had been held before the division or commission after due notice. Such emergency rule or order shall remain in force no longer than 15 days from its effective date.

B. Notwithstanding any other provision of 19.15.14 NMAC, in the event an emergency is found to exist by the division or commission, a hearing may be conducted upon any application within less than twenty-three (23) days after the filing thereof, and notice of such hearing may be given within such lesser time than twenty (20) days as the director of the division shall order.

[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1201, 8-29-03; A, 06/15/04]

**19.15.14.1203 INITIATING A RULEMAKING OR ADJUDICATORY PROCEEDING HEARING:**

A. The commission may commence a rulemaking proceeding by issuing an order initiating rulemaking. The division, the attorney general, any operator or producer or any other person may ~~apply for a hearing~~ commence a rulemaking or adjudicatory proceeding requiring a hearing by filing an application. The application shall be signed by the person seeking the hearing or by an attorney representing that person. Two copies of the application must be filed and shall state:

- (1) the name of the applicant;
- (2) the address of the applicant or its attorney for service, including an email address and fax number (if available);
- (3) the name or general description of the common source or sources of supply or the area affected by the order or rule sought;
- ~~(3)~~(4) briefly, the general nature of the order or rule sought;
- ~~(4)~~(5) a list of the names and addresses of persons to whom notice has been sent;
- ~~(5)~~(6) a proposed notice advertisement for publication; and
- ~~(6)~~(7) any other matter required by these rules or order of the division.

B. Applications for hearing before the division or commission must be in writing and received by the division at least 23 days in advance of the hearing on that application.

[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1203, 8-29-03]

**19.15.14.1204 PUBLICATION OF NOTICE OF ADJUDICATORY HEARING:**

A. The division shall give notice of each adjudicatory hearing before the commission or a division examiner at least five working days before the hearing by (1) posting notice on the division's website, and (2) delivering notice by ordinary first class United States mail or electronic mail to each person who has requested in writing to be notified of such hearings.

B. In addition, the division shall give notice of each hearing before the commission by publication once in accordance with the requirements of Chapter 14, Article 11 NMSA 1978, in a newspaper of general circulation in the counties that are affected by the application or, if the effect of the application will be statewide, in a newspaper of general circulation in this state.  
[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1204, 8-29-03; A, 06/15/04]

**19.15.14.1205 CONTENTS OF NOTICE OF ADJUDICATORY HEARING:**

A. Published notices shall be issued in the name of "The State of New Mexico" and signed by the director of the division, and the seal of the commission shall be impressed thereon.

B. The notice shall specify: whether the case is set for hearing before the commission or a division examiner; the number and style of the case; the time and place of hearing; and the general nature of the application. The notice shall also state the name of the applicant. If the application seeks to adopt, revoke or amend special pool rules, establish or alter a non-standard unit, permit an unorthodox location, or establish or affect the allowable of any well or proration unit, the notice shall specify each pool or common source of supply that may be affected if the application is granted. If the application seeks compulsory pooling or statutory unitization, the notice shall contain a legal description of the spacing unit or geographical area sought to be pooled or unitized. In all other cases, the notice shall reasonably identify the subject matter so as to alert persons who may be affected if the application is granted.  
[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1205, 8-29-03; A, 06/15/04]

**19.15.14.1206 [RESERVED] [Formerly "PREPARATION OF NOTICES"]**

**19.15.14.1207 NOTICE REQUIREMENTS FOR SPECIFIC ADJUDICATIONS:**

A. Applicants for the following adjudicatory hearings before the division or commission shall give notice in addition to that required by 19.15.14.1204 NMAC as set forth below:

(1) Compulsory pooling and statutory unitization.

(a) Notice shall be given to any owner of an interest in the mineral estate of any portion of the lands proposed to be pooled or unitized whose interest is evidenced by a written document of conveyance either of record or known to the applicant at the time of filing the application and whose interest has not been voluntarily

committed to the area proposed to be pooled or unitized (other than a royalty interest subject to a pooling or unitization clause).

(b) When notice is given as required in Subparagraph (a) of Paragraph (1) of Subsection A of 19.15.14.1207 NMAC, of an application for compulsory pooling and the application is unopposed by those owners located, the applicant may file under the following alternate procedure. The application shall include the following:

- (i) a statement that no opposition is expected and why;
- (ii) a map outlining the spacing unit(s) to be pooled, showing the nature and percentage of the ownership interests and location of the proposed well;
- (iii) the names and last known addresses of the interest owners to be pooled and the nature and percent of their interests and an attestation that a diligent search has been conducted of all public records in the county where the well is located and of phone directories, including computer searches;
- (iv) the names of the formations and pools to be pooled (note: this procedure does not apply to an application to pool a spacing unit larger in size than provided in 19.15.3.104 NMAC or applicable special pool orders);
- (v) a statement as to whether the pooled unit is for gas and/or oil production (see note under item (iv) of Subparagraph (b) of Paragraph (1) of Subsection A of 19.15.14.1207 NMAC;
- (vi) written evidence of attempts made to gain voluntary agreement including but not limited to copies of relevant correspondence;
- (vii) proposed overhead charges (combined fixed rates) to be applied during drilling and production operations along with the basis for such charges;
- (viii) the location and proposed depth of the well to be drilled on the pooled units; and
- (ix) a copy of the authorization for expenditure (AFE) to be submitted to the interest owners in the well.

(c) All submittals required shall be accompanied by sworn and notarized statements by those persons who prepared the submittals, attesting that the information is correct and complete to the best of their knowledge and belief.

(d) All unopposed pooling applications will be set for hearing. If the division finds the application complete, the information submitted with the application will constitute the record in the case, and an order will be issued based on the record.

(e) At the request of any interested person or upon the division's own initiative, any pooling application submitted shall be set for full hearing with oral testimony by the applicant.

(2) Unorthodox well locations.

(a) Definition "affected persons" are the following persons owning interests in the adjoining spacing units:

- (i) the division-designated operator;
- (ii) in the absence of an operator, any lessee whose interest is evidenced by a written document of conveyance either of record or known to the applicant as of the date the application is filed; and



(iii) in the absence of an operator or lessee, any mineral interest owner whose interest is evidenced by a written document of conveyance either of record or known to the applicant as of the date the application was filed. In the event the operator of the proposed unorthodox well is also the operator of an existing adjoining spacing unit and ownership is not common between the adjoining spacing unit and the spacing unit containing the proposed unorthodox well, then "affected persons" include all working interest owners in that spacing unit.

(b) If the proposed location is unorthodox by being located closer to the outer boundary of the spacing unit than permitted by 19.15.3.104 NMAC or applicable special pool orders, notice shall be given to the affected persons in the adjoining spacing units towards which the unorthodox location encroaches.

(c) If the proposed location is unorthodox by being located in a different quarter-quarter section or quarter section than provided in special pool orders, notice shall be given to all affected persons.

(3) Non-standard proration unit. Notice shall be given to all owners of interests in the mineral estate to be excluded from the proration unit in the quarter-quarter section (for 40-acre pools or formations), the one-half quarter section (for 80-acre pools or formations), the quarter section (for 160-acre pools or formations), the half section (for 320-acre pools or formations), or section (for 640-acre pools or formations) in which the non-standard unit is located and to such other persons as required by the division.

(4) Special pool orders regulating or affecting a specific pool.

(a) Except for non-standard proration unit applications, if the application involves changing the amount of acreage to be dedicated to a well, notice shall be given to:

(i) all division-designated operators in the pool; and  
(ii) all owners of interests in the mineral estate in existing spacing units with producing wells.

(b) If the application involves other matters, notice shall be given to:

(i) all division-designated operators in the pool; and  
(ii) all division-designated operators of wells within the same formation as the pool and within one (1) mile of the outer boundary of the pool which have not been assigned to another pool.

(5) Special orders regarding any division-designated potash area. Notice shall be given to all potash lessees, oil and gas operators, oil and gas lessees and unleased mineral interest owners within the designated potash area. (a) through (d). The material on unorthodox locations was moved to Paragraph (2) of Subsection A of 19.15.14.1207 NMAC.

(6) Downhole commingling. Notice shall be given to all owners of interests in the mineral estate in the spacing unit if ownership is not common for all commingled zones within the spacing unit.

(7) Surface disposal of produced water or other fluids. Notice shall be given to any surface owner within one-half mile of the site.

(8) Surface commingling. Notice shall be given as prescribed in 19.15.5.303 NMAC.

(9) Adjudications not listed above. Notice shall be given as required by the division.

**B.** Type and content of notice. Any notice required by 19.15.14.1207 NMAC shall be sent by certified mail, return receipt requested, to the last known address of the person to whom notice is to be given at least 20 days prior to the date of hearing of the application and shall include a copy of the application, the date, time and place of the hearing, and the means by which protests may be made. When an applicant has been unable to locate all persons entitled to notice after exercising reasonable diligence, notice shall be provided by publication, and proof of publication shall be submitted at the hearing. Such proof shall consist of a copy of the legal advertisement that was published at least five working days before the hearing in a newspaper of general circulation in the county or counties in which the property is located or if the effect of the application is statewide, in a newspaper of general circulation in this state.

**C.** At the hearing, the applicant shall make a record, either by testimony or affidavit signed by the applicant or its authorized representative, that: (a) the notice provisions of 19.15.14.1207 NMAC have been complied with; (b) the applicant has conducted a good-faith diligent effort to find the correct address of all persons entitled to notice; and (c) pursuant to 19.15.14.1207 NMAC notice has been given at that correct address as required by 19.15.14.1207 NMAC. In addition, the record shall contain the name and address of each person to whom notice was sent and, where proof of receipt is available, a copy of the proof.

**D.** Evidence of failure to provide notice as required in 19.15.14.1207 NMAC may, upon proper showing, be considered cause for reopening the case.

**E.** In the case of an administrative application where the required notice was sent and a timely filed protest was made, the division shall notify the applicant and the protesting party in writing that the case has been set for hearing and the date, time and place of the hearing. No further notice is required.  
[1-1-86...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1207, 8-29-03; A, 06/15/04]

**19.15.14.1208 PLEADINGS, COPIES, AND PRE-HEARING STATEMENTS, EXHIBITS AND MOTIONS FOR CONTINUANCE:**

**A.** For pleadings and correspondence filed in cases pending before a division examiner, two copies must be filed with the division. For pleadings and correspondence filed in cases pending before the commission, five copies must be filed with the division. The division will disseminate copies to the members of the commission. The party filing the pleading or correspondence shall at the same time serve copies thereof upon either hand deliver or transmit by facsimile or electronic mail to any each party who has entered an appearance therein or the attorneys of record, ~~a copy of the pleading or correspondence.~~ Service shall be accomplished by hand delivery or transmission by facsimile or electronic mail, except that service upon a party who has not filed a pleading containing a FAX number or email address may be made by ordinary first class mail. An appearance of any interested party shall be made either by letter addressed to the division or in person at any proceeding before the commission or before a division examiner, with notice of such appearance to the parties of record. Any written entry of appearance or

other initial pleading filed by a party other than the applicant shall include the address of the party or its attorney for service, including an email address and fax number (if available).

**B.** Parties to an adjudicatory proceeding who intend to present evidence at the hearing shall file a pre-hearing statement, and serve a copy thereof on opposing counsel of record in the manner provided in Subsection A of 19.15.14.1208 NMAC, at least four days in advance of a scheduled hearing before the division or the commission, but in no event later than 5:00p.m., Mountain Time, on the Friday preceding the scheduled hearing. The statement must include: the names of the parties and their attorneys; a concise statement of the case; the names of all witnesses the party will call to testify at the hearing; the approximate time the party will need to present its case; and identification of any procedural matters that are to be resolved prior to the hearing. Copies of all exhibits that any party to an adjudicatory proceeding proposes to offer in evidence at the hearing shall be filed and served with that party's pre-hearing statement. Witnesses not identified in a pre-hearing statement, or exhibits not filed and served therewith, may be excluded from evidence unless the party offering such evidence makes a satisfactory showing of good cause for failure to disclose the same.

**C.** In rulemaking proceedings, any party intending to offer technical testimony at the hearing shall file with the division a pre-hearing statement and copies of exhibits in the manner and within the time provided in subsection B of 19.15.14.1208 NMAC but shall not be required to serve copies thereof on any other party.

**D.** Motions for continuance shall be filed and served no later than the date for filing the pre-hearing statement, unless the reasons for requesting a continuance arise subsequent to such date, in which event the motion shall be filed as expeditiously as possible after the moving party becomes aware of the need for a continuance.  
[9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1208, 8-29-03; A, 06/15/04]

#### **19.15.14.1209 CONTINUANCE OF HEARING WITHOUT NEW SERVICE:**

Any hearing before the commission or a division examiner held after due notice may be continued by the person presiding at such hearing to a specified time and place without the necessity of notice of the same being again served or published.  
[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1209, 8-29-03; A, 06/15/04]

#### **19.15.14.1210 CONDUCT OF HEARINGS:**

**A.** Hearings before the commission or a division examiner shall be conducted without rigid formality. A transcript of testimony shall be taken and preserved as a part of the permanent records of the division. Any person testifying shall do so under oath. However, relevant unsworn comments and observations by any interested party will be designated as such and included in the record.

B. The division director may order the parties to file prepared written testimony in advance of the hearing for cases pending before the commission. The witness must be present at the hearing and shall adopt, under oath, the prepared written testimony, subject to cross-examination and motions to strike unless the presence of the witness at hearing is waived upon notice to and without objection of the parties. Pages of the prepared written testimony shall be numbered and contain line numbers on the left-hand side.

[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1210, 8-29-03]

**19.15.14.1211 POWER TO REQUIRE ATTENDANCE OF WITNESSES AND PRODUCTION OF EVIDENCE; PRE-HEARING PROCEDURE**

A. The commission or any member thereof and the division director or the division director's authorized representative have statutory power to subpoena witnesses and to require the production of books, papers, and records in any proceeding before the commission or division. A subpoena will be issued for attendance at a hearing upon the written request of any party. In case of the failure of a person to comply with the subpoena issued, an attachment of the person may be issued by the district court of any district in the state. Any person found guilty of testifying falsely at any hearing may be punished for contempt. The director or the director's authorized representative shall, upon request of a party, issue a subpoena for the production of books, papers or other tangible things in advance of the hearing. Any motion for protection or to quash any such subpoena may be considered as a pre-hearing motion pursuant to subsection C of 19.15.14.1211 NMAC or may be reserved for consideration at the hearing on the merits, in the discretion of the director or the examiner assigned to hear the case. Subpoenas for the deposition of witnesses in advance of the hearing of a case shall be issued only in extraordinary circumstances, upon motion for good cause shown.

B. A pre-hearing conference may be held prior to the hearing on the merits in cases pending before the division or the commission either upon request of a party or upon notice by the division director or a division examiner. The pre-hearing conference will be to narrow issues, eliminate or resolve other preliminary matters and to encourage settlement. The division director or the division examiner may issue a pre-hearing order following the pre-hearing conference. The director or examiner shall cause written or oral notice of such pre-hearing conference to be given to the applicant and to all other parties who, at the time such conference is scheduled, have filed appearances in the case.

C. The director or any hearing examiner may rule on motions that are necessary or appropriate for disposition prior to hearing on the merits. If the case is pending before the commission, the director shall rule on any such motion; provided that the director may refer any such motion for hearing by a hearing examiner specially designated for such purpose who, if the case is a *de novo* application, shall not have participated in the case prior to the filing of the application for *de novo* hearing. Prior to ruling on any such motion, the director or examiner shall give written or oral notice to any party who has filed an appearance in the case and who may have an interest in the disposition of such motion (except any party who has indicated that it does not oppose such motion), and shall allow any such interested party an opportunity, reasonable under

the circumstances, to respond thereto. The director or examiner may conduct a hearing on any such motion, following written or oral notice to all interested parties, either at a pre-hearing conference or otherwise. If oral testimony is received at any such hearing, a record shall be made thereof as at other hearings.

[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1211, 8-29-03]

**19.15.14.1212 RULES OF EVIDENCE AND EXHIBITS:**

A. Full opportunity shall be afforded all interested parties at a hearing before the commission or division examiner to present evidence and to cross-examine witnesses. In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served. No order shall be made that is not supported by competent legal evidence.

B. Parties introducing exhibits at hearings before the commission or a division examiner must provide a complete set of exhibits for the court reporter, each commissioner or division examiner and other parties of record.

[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1212, 8-29-03]

**19.15.14.1213 DIVISION EXAMINERS' QUALIFICATIONS AND APPOINTMENT:**

The division director shall appoint division examiners. Each division examiner so appointed shall be a member of the staff of the division. Each individual appointed as a division examiner must have at least six years of experience as a geologist, petroleum engineer or licensed lawyer, or at least two years of such experience and a college degree in geology, engineering or law; provided however, that nothing herein shall prevent any member of the commission from serving as a division examiner.

[9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1213, 8-29-03]

**19.15.14.1214 REFERRAL OF CASES TO DIVISION EXAMINERS:**

The division director may refer any matter or proceeding to a division examiner for hearing in accordance with these rules. ~~The division examiner appointed to hear any specific case shall be designated by name.~~

[9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1214, 8-29-03]

**19.15.14.1215 DIVISION EXAMINER'S POWER AND AUTHORITY:**

The division director may limit the powers and duties of the division examiner in any particular case to such issues or to the performance of such acts as the director deems expedient; however, subject only to such limitations as may be ordered by the director, the division examiner to whom any matter is referred under these rules shall have full authority to hold hearings on such matter in accordance with these rules. The division examiner shall have the power to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including administering oaths to witnesses and receiving testimony and exhibits offered in evidence subject to such objections as may be imposed. The division examiner shall cause a complete record of the proceedings to be made and transcribed and shall certify same to the director as hereinafter provided.

[9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1215, 8-29-03]

**19.15.14.1216 HEARINGS THAT MUST BE HELD BEFORE COMMISSION:**

Notwithstanding any other provisions of these rules, the hearing on any matter shall be held before the commission if:

- A. it is a hearing pursuant to Section 70-2-13 NMSA 1978; or
  - B. the division director desires the commission to hear the matter.
- [9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1216, 8-29-03]

**19.15.14.1217 [RESERVED]**

[9-15-55...2-1-96; Repealed 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1217, 8-29-03]

**19.15.14.1218 REPORT AND RECOMMENDATIONS FROM DIVISION EXAMINER'S HEARING:**

Upon the conclusion of any hearing before a division examiner, the division examiner shall promptly consider the proceedings in such hearing, and based upon the record of such hearing the division examiner shall prepare a written report with recommendations for the disposition of the matter or proceeding by the division. Such report shall either be accompanied by a proposed order or shall be in the form of a proposed order and shall be submitted to the division director with the certified record of the hearing.

[9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1218, 8-29-03]

**19.15.14.1219 DISPOSITION OF CASES HEARD BY DIVISION EXAMINERS:**

After receipt of the report of the division examiner, the division director shall enter the division's order disposing of the matter.

[9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1219, 8-29-03]

**19.15.14.1220 HEARING BEFORE COMMISSION AND STAYS OF DIVISION ORDERS:**

A. When an order has been entered by the division pursuant to a hearing held by a division examiner, a party of record adversely affected by the order has the right to have the matter heard de novo before the commission, provided that within 30 days from the date the order is issued the party files with the division a written application for such hearing. If an application is filed, the matter or proceeding shall be set for hearing before the commission.

B. Any party requesting a stay of a division or commission order must file ~~the request~~ a motion with the division and provide copies ~~of the request~~ thereof to the parties who have entered appearances of record or their attorneys in the case at the time the request is filed. The ~~request~~ motion must have attached a proposed stay order. The director may grant a stays pursuant to such a motion (or upon his or her own initiative after according all parties who have appeared in the case notice and an opportunity to respond) under other circumstances if such a stay is necessary to prevent waste, protect correlative rights, protect public health ~~and or~~ the environment or prevent gross negative consequences to any affected party. Any order of the director staying an order of the commission shall be effective only until the commission acts on the motion.

C. Any party of record adversely affected by the order issued by the commission after hearing may apply for rehearing pursuant to 19.15.14.1222 NMAC. [9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1220, 8-29-03]

**19.15.14.1221 COPIES OF COMMISSION AND DIVISION ORDERS:**

Within 10 days after an order, including any order granting or refusing rehearing or order following rehearing, has been issued, a copy of such order shall be mailed by the division to each party or its attorney of record. For purposes of 19.15.14.1221 NMAC only, the parties to a case are the applicant and each person who has entered an appearance in the case, in person or by attorney, either by filing a protest, pleading or notice of appearance with the division or by entering an appearance on the record at a hearing.

[9-15-55...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1221, 8-29-03; A, 06/15/04]

**19.15.14.1222 REHEARINGS:**

Within 20 days after entry of any order of the commission any party of record adversely affected thereby may file with the division an application for rehearing on any matter determined by such order, setting forth the respect in which the order is believed to be erroneous. The commission shall grant or refuse any such application in whole or in part within 10 days after it is filed and failure to act within such period shall be deemed a refusal and a final disposition of such application. In the event the rehearing is granted, the commission may enter a new order after rehearing as may be required under the circumstances.

[1-1-50...2-1-96; A, 7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1222, 8-29-03]

**19.15.14.1223 EX PARTE COMMUNICATIONS:**

A. In an adjudicatory proceeding, except for filed pleadings, at no time after the filing of an application for hearing shall any party, interested participant or their representatives communicate regarding the issues involved in the application with any commissioner or the division examiner appointed to hear the case when all other parties of record to the proceedings have not had the opportunity to be present.

B. The prohibition in Subsection A of 19.15.14.1223, above, does not apply to those applications that are believed by the applicant to be unopposed. However, in the event that an objection is filed in a case previously believed to be unopposed, the prohibition in A, above, is immediately applicable.

[7-15-99; 19.15.14 NMAC - Rn, 19 NMAC 15.N.1223, 8-29-03]