

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

**APPLICATION OF GOODNIGHT
MIDSTREAM PERMIAN, LLC FOR APPROVAL
OF A SALTWATER DISPOSAL WELL, LEA COUNTY,
NEW MEXICO**

**CASE NO. 24123
ORDER NO. R-22869-A**

**APPLICATIONS OF GOODNIGHT MIDSTREAM
PERMIAN, LLC FOR APPROVAL OF
SALTWATER DISPOSAL WELLS
LEA COUNTY, NEW MEXICO**

CASE NOS. 23614-23617

**APPLICATION OF GOODNIGHT MIDSTREAM
PERMIAN LLC TO AMEND ORDER NO. R-22026/SWD-2403
TO INCREASE THE APPROVED INJECTION RATE
IN ITS ANDRE DAWSON SWD #1,
LEA COUNTY, NEW MEXICO.**

CASE NO. 23775

**APPLICATIONS OF EMPIRE NEW MEXICO LLC
TO REVOKE INJECTION AUTHORITY,
LEA COUNTY, NEW MEXICO**

CASE NOS. 24018-24020, 24025

**EMPIRE NEW MEXICO LLC’S RESPONSE TO GOODNIGHT MIDSTREAM’S
MOTION TO STRIKE EMPIRE’S REBUTTAL WITNESS DISCLOSURE**

Empire New Mexico LLC (“Empire”) hereby submits its response to Goodnight Midstream Permian LLC’s (“Goodnight”) Motion to Strike Empire’s Rebuttal Witness Disclosure dated January 15, 2025. For the reasons explained below, the Motion should be denied.

ARGUMENT

1. Goodnight Bears the Initial Burden of Proof

As explained in Empire’s Motion for Clarification on Scope of Hearing and Burden of Proof, filed August 26, 2024 (“Motion for Clarification”), Goodnight has the initial burden of proof to establish that its proposed injection does not result in waste or impair correlative rights. *See id.* at 6-7. Notably, Goodnight’s applications for permits to drill new saltwater disposal wells were the first-filed cases in this matter and include Div. Case No. 22626 (on de novo review as Comm.

Case No. 24123) and Case Nos. 23614-23617. *See* caption above. The next-filed case, No. 23775, is Goodnight's application to increase its approved injection rate for an existing well in which Goodnight was injecting in violation of an existing permit. It cannot be disputed—as the applicant, Goodnight bears the burden to prove that injected water will be contained within the injection zone, that injected water is compatible with the receiving formation, and that its injection operations will not result in waste or impair correlative rights. *See* Application for Authorization to Inject, Form C-108, Parts III(B)(5), VII(4-5); 19.15; *see also* NMSA 1978, Sections 70-2-2 (1949), 70-2-3(A) (1965); 19.15.26.8(B)(1) NMAC (“The operator shall apply for authority to construct and operate an injection well by submitting form C-108 complete with all attachments to the division.”). *See generally* NMSA 1978, Sec. 70-2-11 (1977) (stating the commission's duty to prevent waste and protect correlative rights).

Nonetheless, without citation to authority, Goodnight contends that “Empire has the initial burden of establishing beyond a preponderance of the evidence in its case in chief.” This assertion is contrary to New Mexico law. *See Int'l Mins. & Chem. Corp. v. N.M. Pub. Serv. Comm'n*, 1970-NMSC-032, ¶ 10, 81 N.M. 280, 466 P.2d 557 (“[C]ourts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof.”); *cf.* 19.15.4.17(A) NMAC (stating that the commission may use the rules of evidence applicable in a trial before a court as guidance in conducting adjudicatory hearings”). Goodnight's position on the burden of proof cannot be sustained and, therefore, provides no support for the Motion.

2. Empire's Rebuttal Witnesses Respond to Direct Testimony of Goodnight's Witnesses

Empire complied with the agreed-upon provisions of the Pre-Hearing Order, filed December 4, 2024 (“Pre-Hearing Order”), when it disclosed the additional witnesses that Empire would present on rebuttal. Paragraph 2 of the Pre-Hearing Order states that the parties “shall

disclose their *additional* witnesses for rebuttal, each rebuttal witness's particular area of expertise, and identify the subject matter of each rebuttal witness's anticipated testimony, by Monday, January 6, 2025." (emphasis added). Consequently, Empire disclosed the two additional witnesses, Ryan Bailey and Scott Birkhead, their areas of expertise, and the subject matter of their anticipated testimony. *See* Empire's Rebuttal Witness Disclosure (filed Jan. 6, 2025).

Nonetheless, in a show of good faith, Empire agreed to file a supplemental rebuttal disclosure, to include rebuttal witnesses that were previously disclosed as witnesses on direct and to identify in detail the Goodnight witness testimony that each of Empire's witnesses would rebut. *See* Empire's Supplemental Rebuttal Witness Disclosure, filed concurrently ("Supplemental Rebuttal Disclosure"). As is readily evident in the Supplemental Rebuttal Disclosure, the testimony of Mr. Bailey and Mr. Birkhead is offered to rebut direct testimony of Goodnight's witnesses. Mr. Bailey's testimony will rebut the following testimony presented by Goodnight's witnesses:

- Testimony of Goodnight witnesses regarding the existence and extent of a residual oil zone in the Upper and Lower San Andres
- Preston McGuire opinions, including but not limited to the following:
 - That formation tops should be picked using engineering data rather than geologic data
 - That there is a regional laterally continuous seal

Mr. Birkhead's testimony will rebut the following testimony presented by Goodnight's witnesses:

- James A. Davidson opinions, including but not limited to the following:
 - That intervals with less than 20% oil saturation should be excluded from the analysis of whether a residual oil zone ("ROZ") is economically recoverable
 - Relating to his log analyses

- William J. Knights opinions, including but not limited to his opinions regarding the depths of residual oil zones
- Preston McGuire opinions, including but not limited to his opinion that the San Andres does not meet the criteria for a residual oil zone
- Goodnight witness opinions regarding the amount of oil loss while recovering the core in the EMSU-679

See Exhibit 1, attached hereto. Empire's Supplemental Rebuttal Disclosure provides the same type of information that Goodnight included in its rebuttal disclosure, filed January 6, 2024. See Goodnight Midstream's Rebuttal Witness Disclosure, attached hereto as Exhibit 2.

Importantly, this disclosure is not the only information that will be provided regarding rebuttal witnesses prior to the evidentiary hearing. The agreed-upon Pre-Hearing Order requires that written rebuttal testimony and associated exhibits be filed two weeks before the start of the evidentiary hearing, at which point the full scope of the parties' rebuttal testimony can be reviewed by the respective parties. See Pre-Hearing Order ¶ 7. Further, upon request, the parties are required to provide copies of documents within their control, upon which each rebuttal witness relied and referenced in their testimony and exhibits. *Id.*

Finally, the agreed-upon Pre-Hearing Order provides an opportunity for objections to rebuttal testimony. *Id.* ¶ 8. Thus, the parties agreed and the Commission subsequently ordered a process to be followed with respect to rebuttal testimony. Goodnight's Motion to Strike is thus premature and contrary to the procedure with which it expressly agreed and requested the Commission to order. As a result, its arguments in the Motion are speculative and incomplete because Goodnight has not seen the written testimony and exhibits that are soon-to-be filed. This is clearly evident in the Motion where Goodnight jumps to the conflicting conclusions that Mr. Bailey and Mr. Birkhead's rebuttal testimony will be "nothing more than a reiteration of Empire's direct testimony" while, at the same time, different from Empire's direct testimony. Motion at 5.

This makes no sense. Goodnight's attempts to circumvent the agree-upon process with its premature and unsupported Motion should be denied.

3. The Testimony of Empire's Rebuttal Witnesses Should Be Allowed

Goodnight argues that Empire's rebuttal witness disclosure is outside the scope of permissible rebuttal testimony. Motion at 5. Goodnight errs by conflating the Rules of Civil Procedure with the procedures that govern the proceedings before the Commission.

The case law cited in the Motion to Strike is neither binding nor persuasive in the current matter. The first authority cited by Goodnight, *State v. Manus*, 1979-NMSC-035, ¶¶ 39-40, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 653 P.2d 162, is a criminal case in which a party failed to disclose a rebuttal witness. *See id.* ¶ 40 (considering whether the other party was prejudiced by the failure to disclose the rebuttal witness). Thus, *Manus* provides no support for Goodnight under the circumstances here. Goodnight's reliance on *Wirth v. Commercial Resources, Inc.*, 1981-NMCA-057, 630 P.2d 292, is similarly flawed. *Id.* ¶ 20 (affirming the district court's exclusion of a witness that was not disclosed in the pretrial order). In contrast, here both Mr. Bailey and Mr. Birkhead were disclosed almost two months before the evidentiary hearing, in accordance with the parties' agreement and the Commission's Pre-Hearing Order. Thus, neither case cited by Goodnight is on point.

The Commission's regulations explicitly state that "rules of evidence applicable in a trial before a court without a jury shall not control."19.15.4.17(A) NMAC. This is particularly true when it comes to a question of excluding evidence. *See Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 21, 137 N.M. 161, 108 P.3d 1019 (recognizing that "[t]he rules of evidence are inapplicable or relaxed" in administrative proceedings and therefore "certain otherwise objectionable evidence may be admitted").

Goodnight speculates that the disclosure of Mr. Bailey and Mr. Birkhead as rebuttal witnesses “is likely to result in severe prejudice to Goodnight.” Motion at 6. In support of this speculation, Goodnight points to a revision made to the direct testimony of one of Empire’s witnesses. *Id.* (“Empire has already substantially revised its oil in place and petrophysical analyses—more than three months after the deadline to file direct testimony.”). However, Goodnight fails to acknowledge that this revision to Empire’s testimony did not prejudice Goodnight; rather, the revision was favorable to Goodnight, as Empire reduced its estimate of oil in place. Moreover, Goodnight omits the fact that it substantially revised the testimony of its direct witness only yesterday—almost five months after the deadline to file direct testimony. *See* Goodnight’s Notice of Revised Testimony for Bill Knight (Jan. 21, 2025); NSAI Revised Expert Report of William J. Knights Prepared for Goodnight (Jan. 21, 2025).

Goodnight’s desperate antics here should not be condoned. Goodnight’s direct testimony, filed in August 2024, is effectively rebuttal testimony to Empire’s direct testimony that was initially filed with the Division in Case Nos. 23614-23617 in October 2023. Thus, Goodnight spent 10 months working on its first rebuttal—to Empire’s direct testimony filed with the Division. Now Goodnight is preparing its second rebuttal to Empire’s direct testimony, which was filed with the Commission. To exclude Empire’s additional rebuttal witnesses would allow Goodnight two bites at the apple, while precluding Empire from its first bite. Such gamesmanship should not be allowed. *See* 19.15.4.17(A) NMAC (“[T]he commission shall afford full opportunity to the parties at an adjudicatory hearing before the commission . . . to present evidence and to cross-examine witnesses. . . . The commission . . . may admit relevant evidence, unless it is immaterial, repetitious or otherwise unreliable.”).

CONCLUSION

The Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following counsel of record by electronic mail on January 22, 2024.

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