

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

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

CASE NO. 22626

**RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE LATE EXHIBITS
AND TESTIMONY AND GOODNIGHT MIDSTREAM'S OBJECTIONS TO EMPIRE
EXHIBITS B, D, AND E THROUGH H**

Goodnight Midstream Permian, LLC (“Goodnight Midstream”) provides this response in opposition to Empire New Mexico, LLC’s (“Empire”) motion for leave to file late testimony and exhibits to exclude late-filed evidence and testimony. And pursuant to the Pre-Hearing Order entered in this case, Goodnight Midstream also objects to the admission of certain exhibits on evidentiary grounds. In support of this motion, Goodnight Midstream states the following:

BACKGROUND

1. On June 17, 2022, the New Mexico Oil Conservation Division (“Division”) issued a Pre-Hearing Order governing the prehearing procedures and deadlines in this matter.
2. Pursuant to paragraph four of the Pre-Hearing Order, the parties were directed to file by 5 p.m. no later than September 8, 2022, a pre-hearing statement and “a full narrative of the direct testimony and exhibits for each witness.”
3. On September 8, 2022, Goodnight Midstream filed its Pre-Hearing Statement, along with the direct testimony of its two witnesses and accompanying exhibits.
3. On September 8, 2022, Empire filed a Pre-Hearing Statement.

4. On September 12, 2022, four days after the deadline, Empire filed the direct testimony of its witness, Eugene Sweeney, and exhibits (Empire Exhibits A through H).

ARGUMENT

5. Goodnight Midstream complied with the Division's Pre-Hearing Order directives and timely filed a Pre-Hearing Statement, the direct testimony of its two witnesses, and their accompanying exhibits, which were fully incorporated and reviewed in the related testimony.

6. Empire, on the other hand, did not. Rather, Empire filed only a Pre-Hearing Statement by the deadline.

7. Four days late, Empire filed its testimony and exhibits despite having months to prepare its testimony and exhibits. Included in Empire's late filing were the Self-Affirmed Statement of Eugene Sweeney and eight exhibits, three of which had not previously been produced as required by the Division's Order on July 26, 2022—a move prejudicial to Goodnight Midstream. *See* Goodnight Midstream's Motion in Limine to Exclude Evidence and Testimony. Not only were the exhibits and testimony tardy, but Empire also failed to comply with the substantive requirements of the Pre-Hearing Order.

8. Contrary to the requirement of the Pre-Hearing Order, the testimony fails to provide "a full narrative" of the exhibits, as required. A simple review of these documents is disorienting because Mr. Sweeney's testimony provides no narrative or explanation to connect his testimony to the content of the exhibits. This puts Goodnight Midstream at a disadvantage just days before the contested hearing as it tries to make sense of the exhibits, unsupported by any testimony, but also disadvantages the Division

in the same way. In fact, it's anyone's guess how to piece together Empire's testimony with the exhibits.

9. In addition, because Mr. Sweeney's testimony fails to provide a full narrative addressing each exhibit, he offers no foundation for their admission into the record or why they should not be excluded as inadmissible hearsay. Empire Exhibits A through H are offered as technically pertinent documents relevant to the case, but the accompanying testimony provides no description of what each exhibit is, who created it, or how it relates to the testimony. This is particularly true with respect to Empire Exhibits B, D, and E through H.

10. The admission of those documents, which constitute the opinions of non-testifying experts, would violate the rule against hearsay in NMRA 11-802 and is not permissible under NMRA 11-703, which allows experts to offer opinion testimony based on "facts or data" that are otherwise inadmissible. *See O'Kelly v. State*, 1980-NMSC-023, ¶ 20, 607 P.2d 612 (holding that Rule 11-703 allows experts to offer their opinion testimony based on "facts or data" that are otherwise inadmissible; it does not permit experts to offer opinion testimony based on the opinions of non-testifying experts); *see also Sewell v. Wilson*, 1984-NMCA-022, ¶ 8, 684 P.2d 1151. Here, Mr. Sweeney's testimony simply offers Empire Exhibits B, D, and E through H essentially to serve as testimony in place of his own, which is impermissible under any rule.

11. Empire's late-filed evidence and testimony fall short of the procedural and substantive requirements in the Pre-Hearing Order. They were days late and failed to meet the requirement to provide a full narrative. They also should be excluded as

constituting impermissible hearsay. To allow their admission would be unfair to both Goodnight Midstream and the Division.

CONCLUSION

For the foregoing reasons, Goodnight Midstream respectfully requests this Motion be granted.

Respectfully submitted,

HOLLAND & HART LLP



Michael H. Feldewert
Adam G. Rankin
Julia Broggi
Paula M. Vance
Post Office Box 2208
Santa Fe, New Mexico 87504-2208
(505) 988-4421
(505) 983-6043 Facsimile
mfeldewert@hollandhart.com
agrarkin@hollandhart.com
jbroggi@hollandhart.com
pmvance@hollandhart.com

**ATTORNEYS FOR GOODNIGHT MIDSTREAM
PERMIAN, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2022, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

Ernest L. Padilla
Padilla Law Firm, P.A.
Post Office Box 2523
Santa Fe, New Mexico 87504
(505) 988-7577
padillalawnm@outlook.com

Attorney for Empire New Mexico, LLC



Adam G. Rankin