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

APPLICATION OF COLGATE OPERATING, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.

CASE NO. 21744 (de novo)
Division Order No. R-21575
Division Case No. 21629

APPLICATIONS OF CIMAREX ENERGY CO. FOR HORIZONTAL SPACING AND PRORATION UNITS AND COMPULSORY POOLING EDDY COUNTY, NEW MEXICO.

CASE NO. 22018-22019

MOTION TO RECONSIDER ORDER NO. R-21679-D

Colgate Operating, LLC ("Colgate") (OGRID 371449), through undersigned counsel, respectfully moves the Commission to reconsider Order No. R-21679-D and its decision that Colgate's Case No. 21744 should be heard again as a "de novo" contested pooling case against Cimarex's Case Nos. 22018-22019. For the reasons stated below and outlined in the Procedural Background, attached as **Exhibit A**, the Commission's decision to enter Order No. R-21679-D and set a contested hearing on the parties' competing pooling applications is erroneous. Order No. R-21679-C was properly entered by the Commission and should be re-instated. Order No. R-21679-D should be vacated and Cimarex's competing cases should be dismissed. In support of this motion, Colgate states the following.

ARGUMENT

The Commission's decision to issue amended Order No. R-21679-D and to hear Cimarex's competing pooling applications in Case Nos. 22108-22109 is fundamentally flawed

and invalid under the law and facts. It should be reconsidered and Order No. R-21679-C should be reinstated.

Under New Mexico law, an adjudicatory body "has broad discretion in ruling upon a motion for reconsideration and will only be reversed for an abuse of that discretion." *GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997-NMSC-052, ¶ 28, 947 P.2d 143; *Tabet Lumber Co., Inc. v. Romero*, 1994-NMSC-033, ¶ 6, 872 P.2d 847 (district courts have "the inherent authority to reconsider its interlocutory orders, and it is not the duty of the [district court] to perpetuate error when it realizes it has mistakenly ruled.").

Cimarex sought de novo review of Division Order No. R-21575—that is the only "matter" that was presented at hearing before a Division Examiner and the only matter subject to de novo review before the Commission. *See* 19.15.4.23.A NMAC (limiting de novo review to matters subject to Division orders issued pursuant to a hearing before a Division Examiner). In its appeal, Cimarex attacked Order No. R-21575 on two grounds.

First, Cimarex argued it is a party of record for purposes of filing a de novo application to challenge Order No. R-21575. As outlined below and in Exhibit A, Cimarex failed to establish it is a party of record. Under the Commission's precedent and applicable case law following the *New Energy Economy v. Vanzi* analysis, Cimarex did not participate in Case No. 21629 in a "legally significant" manner. While re-affirming adoption of the in *New Energy Economy* analysis, the Commission re-stated its test for determining a party of record, but misstated and misapplied the facts. Even under the Commission's re-stated test, however, Cimarex was not a party of record and should not have been allowed to proceed with its de novo challenge. This error alone is sufficient basis to dismiss Cimarex's competing cases and re-instate Order No. R-21679-C.

Second, Cimarex argued Colgate did not meet the statutory requirements for compulsory pooling because it failed to negotiate in good faith with Cimarex and "effectively engaged in fraud by filing the original pooling application that contained material misrepresentations of fact." Order No. R-21679, ¶ I.n. This argument was the factual and legal basis for Cimarex's de novo application challenging Division Order No. R-21575. Citing Cimarex's "compelling" "accusations of misrepresentation by Colgate," however, the Commission allowed Cimarex's de novo challenge of Order No. R-21575 to go forward to determine whether to invalidate the Division Order if it found Colgate engaged in fraud and failed to negotiate in good faith. While Cimarex filed applications with the Division to compete with Colgate, those applications were never the subject of a Division order issued following a hearing before a Division Examiner. There is no legal basis for the Commission to consider those applications on "de novo" review in this proceeding. *See* 19.15.4.23.A NMAC.

Having heard the parties' testimony and evidence over a two-day hearing on the de novo matter, the Commission determined Colgate did not commit fraud, properly engaged Cimarex in good-faith negotiations, and "was within its rights to proceed with force pooling Cimarex." *See* Order No. R-21679-D. That decision and the determination of the underlying facts supporting it—which remain in place under Order No. R-21679-D—was the only matter before the Commission on de novo review. *See* 19.15.4.23.A NMAC. Having ruled against Cimarex on this matter, no issues remain for de novo review by the Commission. The Commission refused to invalidate Order No. R-21575 and refused to remand the case to the Division to be re-heard again. It conclusively determined Colgate had a right to force pool Cimarex. Order No. R-21679-D, ¶ 108. Under these facts, Order No. R-21679-D should be vacated and Order No. R-21679-C should be re-instated.

I. Cimarex was not a "Party of Record" under the Commission's *New Energy Economy* test or the Division's Rules.

Concerned about Cimarex's "compelling" "accusations" that "Colgate effectively engaged in fraud,"[1] the Commission erroneously determined Cimarex met the *New Energy Economy*[2] test for being a "party of record" for purposes of filing a de novo appeal challenging Division Order No. R-21575, ¶ I.n.

Under the Commission's precedent, parties subject to compulsory pooling proceedings must participate in a "legally significant" manner at a Division hearing to become a party of record to have the right to a de novo appeal before the Commission. *See* Commission Order No. R-14097-A, ¶¶ 13-15, attached as **Exhibit B**. Considering what is required under *New Energy Economy*, the Commission previously determined "that the term 'party of record' should [not] be given an overly broad meaning simply because the Commission proceeding will be de novo." *Id.* ¶ 16.

Under Commission Order No. R-14097-A (the "Amtex Case"), factors the Commission weighs to determine whether a party participated in a "legally significant" manner include whether a party:

1. Took action to become part of the record in the proceeding by submitting evidence or arguments in writing or at the hearing. *See id.*, at ¶ 15.

2. Filed an entry of appearance prior to or at the hearing or appeared at the hearing, because the "decision not to take formal steps before [the agency] bears significant consequences." *See id.*, at ¶ 13, 15. A party subject to notice who merely files an entry of appearance "at any time" under 19.15.4.10.A NMAC, has not participated in a "legally sufficient" manner to become a party of record. *See id.* ¶ 12.

3. Provided a valid excuse for late filings. *See id.*

4. Requested that the record be re-opened. *See id.*

[1] *See* Order No. R-21679.
[2] *New Energy Economy. Inc, v. Vanzi*, 2012-NMSC-005.

5. Offered to submit new evidence. *See id.*

Under this analysis, Cimarex failed to establish it participated in a "legally significant" manner. Cimarex took no action to become part of the record in the Division proceeding. It submitted no arguments or evidence before the hearing or at the hearing. *See* Ex. A, ¶ 4. It did not file an entry of appearance before the hearing, nor did it appear at the hearing. While Cimarex filed an entry of appearance, contrary to Cimarex's suggestion, it did not file before the Division entered Order No. R-21575; it did so the same day and 20 days after the deadline under 19.15.4.10.C NMAC to present testimony and evidence. *See* Ex. A, ¶¶ 11, 19. When it filed its late entry of appearance, Cimarex did not present arguments or evidence. *Id.* ¶ 12. The Commission rejected Cimarex's excuses for its late entry of appearance. *See id.* Ex. A, ¶ 34.a. While Cimarex requested to re-open the record and offered new evidence, it did so after the information necessary under 19.15.4.12.A(1)(a)-(d) NMAC had been presented at hearing, 20 days after the Division issued Order No. R-21575, and several days after the evidentiary record was considered closed. *Id.* ¶ 13.

In its analysis, the Commission incorrectly re-stated the Commission's test under *New Energy Economy*. *See* Order No. R-21679, ¶ II.e(i)-(iv). But even under this re-framed approach, Cimarex does not meet the threshold to be a "party of record" because the facts relied on by the Commission were plainly misapprehended.

First, the Commission incorrectly found that Cimarex submitted evidence and argument in writing to the Division before it issued Order No. R-21575. *See* Order No. R-21679, ¶ II.f. In fact, Cimarex submitted nothing before the Division issued the Order. In the most positive light, Cimarex filed its entry of appearance the same day the Division issued the Order, but its entry of appearance provided no evidence and no argument.

Second, the Commission correctly determined that Cimarex did not examine witnesses at the Division hearing, but appeared to discount this factor because Colgate presented its testimony and evidence by affidavit. *See* Order No. R-21679, ¶ II.f. Colgate was following the Division's regulations governing unopposed compulsory pooling applications under 19.15.4.12.A(1)(a)-(d) NMAC because, based on its communications, Colgate understood Cimarex did not oppose the case. *See* Case No. 21744, March 10, 2023, Tr. 127:22-128:4. To examine witnesses, Cimarex would have had to object to the case proceeding to hearing by sworn statement under the Division's guidance on contested hearings, which has been in effect since April 2020. It did not take the formal steps necessary to participate in the Division proceeding and examine witnesses. The case instead proceeded to hearing unopposed under the procedure set out in 19.15.4.12.A(1)(a)-(d) NMAC. All elements necessary to approve the application were presented and accepted into the record at the hearing. *See* Ex. A, ¶ 9. The fact that Cimarex did not examine witnesses is its own fault and further weighs against finding it met the requirements to be a party of record. *See* Order No. R-14097-A, ¶ 13 ("This decision not to take formal steps to participate before [the agency] bears significant consequences." (emphasis added)).

Third, the Commission misapprehended the timing of Cimarex's entry of appearance relative to issuance of Order No. R-21575. *See* Order No. R-21679, ¶ II.h. Perhaps influenced by Cimarex's representations in its filings[3] and at oral argument,[4] the Commission found that "Cimarex entered its appearance prior to the entry of Division Order No. R-21575." *Id.* That finding is incorrect. The Commission subsequently corrected itself,[5] but nevertheless weighed

[3] Cimarex Application for Hearing De Novo, Case No. 21744 (stating Cimarex filed its entry of appearance on January 19, 2021, and that "[s]ubsequently, Order NO. R-21575 . . . was filed of record on January 20, 2021.").
[4] Ex. A, ¶ 29.
[5] Order No. R-21679-D, Finding ¶ 4 (stating that Cimarex filed its entry of appearance on the same day Order No. R-21575 was issued).

this factor in favor of finding Cimarex was a party of record. Under the Commission's precedent, failing to file an entry of appearance prior to or at the hearing and not appearing at the hearing has "significant consequences."[6] *See* Order No. R-14097-A, ¶¶ 12-15.

Fourth, Cimarex provided no valid excuse for its late filings. The Commission correctly determined that Cimarex's justifications for its late filings were not compelling. *See* Order No. R-21679, ¶ II.h.

Finally, the Commission found Cimarex moved to re-open Case No. 21629 after Order No. R-21575 was issued and did so on grounds that Colgate made "material misrepresentation[s]" and that the allegation was supported "with documentary evidence." *See* Order No. R-21679, ¶ II.i. However, the "documentary evidence" submitted with the motion to re-open was a short email chain between company representatives reflecting that Cimarex's landman reached out to inquire about Colgate's plans after receiving Colgate's well proposal. In response, Colgate's landman explained that Colgate believed it had operational efficiencies due to its activities directly north and would entertain discussions to reach voluntary agreement. *See* Cimarex Motion to Re-Open Case No. 21629.[7] Cimarex never followed up on Colgate's offer. *See* Case No. 21744, March 10, 2023, Tr. 127:22-128:4. Rather than supporting the contention that Colgate failed to negotiate in good faith, the email chain confirms Colgate attempted to reach voluntary agreement with Cimarex.

At best, Cimarex met two of the five factors the Commission established under Order No. R-14097-A by seeking to re-open Case No. 21629 and submitting additional evidence. However,

[6] It is worth noting that Cimarex knew on January 12, 2021, that Case No. 21629 went to hearing before the Division but waited a week before entering an appearance in the case. *See* Cimarex Application to Re-Open Case, Case No. 21629, ¶ 5 ("It was not until January 12, 2021, that Cimarex first realized that the hearing had already been held.").

[7] https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210208/21629_02_08_2021_01_47_35.pdf.

Cimarex took none of the other formal steps necessary to participate in the proceeding under the Division's rules (19.15.4.10.A(2) and 19.15.4.10.C NMAC),[8] Colgate had already satisfied the elements necessary to perfect compulsory pooling under 19.15.4.12.A(1)(a)-(d)[9] NMAC, and the "documentary evidence" submitted merely supported Colgate's efforts to reach voluntary agreement and confirmed Cimarex had "dropped the ball."

The Commission erroneously determined Cimarex was a party of record and mistakenly allowed its de novo application to go forward.

II. The Commission Found No Basis to Invalidate Division Order No. R-21575 Because Colgate Did Not Engage in Fraud, Negotiated with Cimarex in Good Faith, and Properly Pooled Cimarex at Hearing before the Division.

Concerned over Cimarex's serious allegations,[10] the Commission erroneously allowed Cimarex's de novo application challenging Division Order No. R-21575 to proceed, but correctly determined after a two-day hearing that Colgate had met the requirements to force pool Cimarex. Unfortunately, the Commission mistakenly amended Order No. R-21679-C to issue the legally and factually unsupported Order No. R-21679-D.

Because the matter for consideration on de novo appeal under 19.15.4.23.A NMAC was limited to Division Order No. R-2157—that was the only matter presented for hearing before a Division Examiner—the Commission correctly determined initially that its de novo review "hinges upon" whether Colgate undertook good-faith efforts to reach voluntary agreement with Cimarex. *See, e.g.*, Ex. A, ¶¶ 32, 38. In other words, the only matter for the Commission's determination under Order No. R-21575 was whether Colgate met its statutory obligation to

[8] *See* Ex. A, ¶ 20.
[9] Cimarex argued Colgate was required to submit a Form C-102 to perfect its application before the Division and that entry of Order No. R-21575 was premature until that was done; however, a Form C-102 is not required under 19.15.4.12.A(1)(a)-(d) NMAC. This procedure requires only a "map outlining the spacing unit to be pooled" and "the location and proposed depth of the well to be drilled on the pooled units"; this required information was submitted by Colgate at the hearing.
[10] Ex. A, ¶ 31.

negotiate in good faith and, if so, then the Commission correctly recognized it must confirm Cimarex was properly force pooled. If the Commission determined Colgate acted properly then the entire matter would be resolved; there would be no need to consider anything further because Cimarex would be forced pooled under Colgate's application. *See, e.g.*, Ex. A.¶¶ 39.

At the conclusion of the hearing and after deliberations, the Commission correctly ruled that Cimarex was properly pooled and that its competing applications should be denied. *See* Ex. A, ¶ 41. It unanimously entered Order No. R-21679-C correctly adjudicating the matter on de novo review. *See* Ex. A, ¶ 42. But following Cimarex's motion for rehearing, the Commission changed course, stating it did not intend to deny Cimarex's "de novo application for competing compulsory pooling." *See* Ex. A, ¶ 44 (emphasis added). The Commission stated it had meant to confirm only that Colgate met its good-faith obligations and the Commission would not remand Colgate's case to the Division to be heard again. *See id.* The Commission therefore amended Order No. R-21679-C by issuing Order No. R-21679-D, maintaining its determination that Colgate properly force pooled Cimarex at the Division, but deleting the order language denying Cimarex's competing pooling applications and affirming Division Order No. R-21575.

The Commission was operating on the misunderstanding it could hear Cimarex's competing pooling applications as part of the de novo hearing. This was Cimarex's argument. However, Cimarex's applications cannot be subject to de novo review by the Commission. They were not presented at hearing before a Division Examiner and were not addressed in a Division order. *See* Ex. A, ¶ 37, n.12. By statute and rule, Cimarex has a right to de novo review only of matters or proceedings referred to a Division Examiner and subject to a Division order. *See* 70-2-13; *see also* 19.15.4.23.A NMAC. Accordingly, there is no legal basis for the Commission to

consider within this de novo proceeding Cimarex's competing applications that were filed with the Division more than three months after its de novo application was filed.

Moreover, having determined Colgate properly provided Cimarex notice of the hearing and application in Case No. 21629 and that Colgate "was within its rights to proceed with force pooling Cimarex," there is no legal or factual basis to consider, let alone approve, Cimarex's competing pooling applications. There is also no legal or factual basis not to affirm Division Order No. R-21575. Aside from bare allegations, Cimarex has made no showing that waste will result or that correlative rights will be impaired if Division Order No. R-21575 is affirmed.

The Commission's decision to amend Order No. R-21679-C was legally and factually erroneous and should be reconsidered. Division Order No. R-21575 should be affirmed and Cimarex Case Nos. 22018 and 22019 should be denied.

CONCLUSION

As the Commission previously stated when considering late-filed objections to compulsory pooling applications, the "decision not to take formal steps to participate before [the agency] bears significant consequences." *See* Order No. R-14097-A, ¶ 13. Cimarex took no "legally significant" steps to participate in Case No. 21629. When it did, its excuses for being late were not compelling and properly rejected by the Division and the Commission. To avoid being barred from raising a challenge, Cimarex made serious allegations against Colgate that, upon full de novo review and consideration by the Commission, were determined to be unsupported. Even in its amended Order the Commission has maintained that Colgate was within its rights to force pool Cimarex. There is simply no basis to hold otherwise. Order No. R-21679-C should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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EXHIBIT A

STATE OF NEW MEXICO
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APPLICATION OF COLGATE OPERATING, LLC FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO.

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APPLICATIONS OF CIMAREX ENERGY CO. FOR HORIZONTAL SPACING AND PRORATION UNITS AND COMPULSORY POOLING EDDY COUNTY, NEW MEXICO.

CASE NO. 22018-22019

PROCEDURAL BACKRGROUND

1. On or about December 8, 2020, Colgate filed an application for compulsory pooling with the New Mexico Oil Conservation Division ("OCD" or "Division"), under Division Case No. 21629.

2. In its application, Colgate sought to pool all uncommitted mineral owners in a 320-acre standard horizontal well spacing unit in the Bone Spring formation comprised of the N/2 N/2 of Section 3 and the N/2 N/2 of Section 2, all in Township 20 South, Range 29 East, NMPM, Eddy County, New Mexico, and to be designated operator of the spacing unit and the proposed initial well.

3. Case No. 21629 went to hearing on January 7, 2021. At hearing, Colgate presented testimony and evidence through sworn witness statements.

4. Prosperity Bank f/k/a American State Bank, Trustee of the J.M. Welborn Trust filed an entry of appearance in the case in advance of the hearing and appeared at the hearing. No other parties appeared at the hearing and no other parties presented testimony or evidence. No party opposed the application or objected to its presentation through sworn statements.

5. Though not required by statute or regulation, Division guidance requires applicants in compulsory pooling cases to present Form C-102s with the hearing exhibit packet to provide details on the proposed initial wells, including the pool name and pool code, surface and bottom-hole locations, and first and last take points. Colgate did not have a complete draft C-102 at the time of the hearing but provided in its place a spacing unit plat map outlining the spacing unit to be pooled and identifying the locations and footages of the proposed initial well. *See* Exhibit A at 17 of 40. The information included in the spacing unit plat map was also included in Colgate's Compulsory Pooling Checklist, which was provided as Exhibit A in its hearing packet. *See* Exhibit A at 6 of 40.

6. Counsel for Colgate noted at the hearing that Colgate had not provided a C-102 in its hearing packet and that it would supplement the record after the hearing. Case No. 21629, 1/7/21, Tr. 6:22-7:3; 8:13-19. The Division hearing examiner kept the evidentiary record open for the purpose of accepting the supplemental exhibit into the record. *Id.* Tr. 9:11-18.

7. Colgate submitted a draft form C-102 as a supplemental exhibit on January 27, 2021. *See* **Exhibit B**. The information on the C-102 was materially identical to the plat map and information included in the Compulsory Pooling Checklist that Colgate submitted at the hearing.

8. Compulsory pooling applications submitted by affidavit at hearing for approval require the applicant to make a specific record. *See* 19.15.4.12.A(1)(a)-(d) NMAC. Under this procedure, the information submitted with the application at hearing "shall constitute the record in the case, and the division shall issue an order based on the record." 19.15.4.12.A(1)(d) NMAC; *see also* Order No. R-21679-C & -D, ¶ 101 (citing to rule).

9. The information Colgate submitted at the hearing, including the plat map outlining the spacing unit, substantially complied with the requirements under 19.15.4.12.A(1)(a)-(d) NMAC.

10. After the hearing, the Division entered Order No. R-21575 on January 19, 2021, approving Colgate's application.

11. On January 19, 2021, the same day the Division issued Order No. R-21575, counsel for Cimarex filed an entry of appearance.

12. In its entry of appearance, Cimarex stated it objected to the "proceedings, and consequently, will be submitting: (1) a motion to stay the issuance of the pooling order; (2) an application to reopen; and (3) a competing pooling application."[1]

13. None of the submissions Cimarex stated it intended to file were filed before the Division issued Order No. R-21575 on January 19, 2021. No evidence or affidavits were submitted at that time. Nor were any of the submissions filed that Cimarex stated it intended to submit before January 27, 2021, when Colgate submitted the C-102 as a supplemental exhibit completing the evidentiary record.

14. Ten days after Order No. R-21575 was issued and two days after the evidentiary record was closed, Cimarex filed a motion to stay Order No. R-21575 on January 29, 2021. Recognizing that the evidentiary record was closed, Cimarex included a proposed application to re-open Case No. 21629 as an attachment.[2] Cimarex's motion included specific allegations that Colgate "misrepresented" key facts, that Colgate's landman "falsely testified" to the Division, and included an email between Colgate and Cimarex as an exhibit.[3]

[1] https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210119/21629_01_19_2021_10_12_34.pdf.
[2] https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210129/21629_01_29_2021_03_11_48.pdf.
[3] *See id.*

15. Twenty days after Division Order No. R-21575 was issued, Cimarex filed an application to re-open Case No. R-21629 on February 8, 2021.[4]

16. The Division considered Cimarex's application to re-open and determined it had been filed as a "third party . . . after a final order has already been issued" and denied it. *See* Order No. R-21575-A (emphasis added).[5]

17. Under the Division's rules governing adjudications, "parties" to an adjudicatory proceeding include "a person to whom statute, rule or order requires notice," and "who has entered an appearance in the case[.]" *See* 19.15.4.10.A(2) NMAC (emphasis added).

18. Under these same rules, "a person entitled to notice may enter an appearance at any time by filing a written notice of appearance with the division or the commission clerk, as applicable, or, subject to the provisions in Subsection C of 19.15.4.10 NMAC, by oral appearance on the record at the hearing." 19.15.4.10.B NMAC.

19. To present technical evidence, such as evidence opposing compulsory pooling or in support of a competing compulsory pooling application, parties must file their entry of appearance at least one day prior to the deadline to file a prehearing statement. *See* 19.15.4.10.C NMAC. Under this requirement, Cimarex should have filed its entry of appearance on or before December 30, 2020, and a prehearing statement laying out the basis for its objections on or before December 31, 2020. Cimarex filed its entry of appearance 20 days late and did not file a prehearing statement before the Division issued Order No. R-21575.

20. While Cimarex filed an entry of appearance in Case No. 21629, it did so on the same day the Division issued Order No. R-21575. It took none of the other steps necessary under

[4] https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210208/21629_02_08_2021_01_47_35.pdf.
[5] https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210208/21629_02_08_2021_01_48_02.pdf.

the Division's rules required to be a party in the case or become part of the record by presenting technical testimony.

21. In Order No. R-14097-A, the Commission previously addressed what is necessary for parties in Division hearings to preserve a right to de novo appeal as a "party of record." The rules, regulations, and case law the Commission relied on remain unchanged.

22. Cimarex filed an Application for Hearing De Novo on February 17, 2023.[6] Cimarex attached its application to re-open Case No. 21629 and Order No. R-21575-A as exhibits.

23. In support of its de novo application, Cimarex made the following representations to the Commission:

a. Colgate "made material misrepresentations to the Division falsely claiming that it had met [its statutory] obligations" to seek voluntary agreement with Cimarex[7] and its landman "falsely testified that its case 'involves a request for an order from the Division for compulsory pooling of interest owners who have refused to voluntarily pool their interests[.]"[8] (emphasis in original);

b. Colgate's "misrepresentations" "introduced a number of irregularities" that "undermined and invalidated the merits of the proceedings";[9] and

c. Cimarex filed an entry of appearance in Case No. 21629 on January 19, 2021, and that "[s]ubsequently, Order No. R-21575 . . . was filed of record on January 20, 2021." (emphasis added).

[6] https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20210218/21744_02_18_2021_07_48_08.pdf.
[7] *See* Cimarex's Closing Brief at 2, filed on April 5, 2021.
[8] *See* Cimarex's Application for Hearing De Novo, Attachment A Application to Re-Open Case No. 21629, ¶ 5.
[9] *See* Cimarex's Application for Hearing De Novo at 1.

24. Colgate filed a motion to dismiss Cimarex's de novo application on several grounds, including that Cimarex was not a party of record and had no standing to file a de novo appeal.[10]

25. During oral argument on the motion to dismiss Cimarex's de novo application, Cimarex counsel argued the Commission should decide the issue "on the very narrow fact that Colgate failed to fulfill its statutory mandate of 70-2-13" to engage in good-faith negotiations to reach voluntary agreement. *See* Case No. 21744, 4/15/21 Tr. 5:21-23.

26. In support, Cimarex counsel argued that "good faith was not engaged in" by Colgate; that Colgate made "misrepresentations" to its own counsel and to the Division; that Colgate's testimony contained "a misrepresentation asserting false claims that . . . the e-mails and the correspondence of record did not reflect;" and that Colgate's "behavior and actions" are a "template" for a "practice[] and strateg[y] before the Division and the Commission" whereby operators send out many well proposals and "lay low" to "try to avoid . . . communicating and e-mailing" with parties they seek to pool until they are "home free and can avoid both the letter and the spirit of the Oil & Gas Act." *See* Case No. 21744, 4/15/21 Tr. 25:3-27:13.

27. According to Cimarex's counsel: "There is opportunity at this point in some of the proceedings if the parties choose in bad faith to pursue these opportunities. And I think that this particular case represents facts and circumstances where it seems clear that Colgate has abused the process. And the Division would never have known because they take the testimony as being true and accurate . . . But once that has been exposed as not being accurate or factual or a misrepresentation or false claims, and once it has been exposed that the applicant has not met the statutory criteria, I think there needs to be some kind of mechanism in which the Division or the

[10] https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210304/21629_03_04_2021_01_12_10.pdf.

Commission can address those concerns or the disclosure of those facts." *See* Case No. 21744, 4/15/21 Tr. 34:9-23; *see also id.* Tr. 17:13-18 (stating that Cimarex "submitted the basis and new evidence of the wrongdoing that Colgate committed against – its malfeasance against Cimarex[,]" and that Colgate did not rebut that evidence).

28. Separately, Cimarex counsel also argued the Commission should accept Cimarex's de novo appeal for a second reason: Because Cimarex satisfied the Commission's "party-of-record" test under Order No. R-14097-A and the guidance provided by *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, 274 P.3d 53, and, therefore, has a right to de novo appeal before the Commission.

29. During oral argument, Cimarex counsel stated that Cimarex "made a written appearance in the case on January 19, and this was prior to the entry of the judgment. So under the basic definition of proceedings, Cimarex became a party to the proceeding under the regulations." *See* Case No. 21744, 4/15/21 Tr. 14:20-25 (emphasis added); *see also id.* Tr. 17:6-24 (arguing Cimarex meets "all four" of the threshold factors under the *New Energy Economy* test to be a party of record necessary to file an appeal).

30. In response to questioning by the two Commissioners present, counsel for Colgate asserted that Colgate believed it had engaged in good-faith negotiations to obtain voluntary agreement from Cimarex and that it was incumbent on Cimarex to raise its concerns at the Division hearing which it did not do. *See* Case No. 21744, 4/15/21 Tr. 11:8-10; 12:6-16; 20:17-8; 21:9-4; 24:1-20.

31. The two Commissioners present expressed grave concerns over Cimarex's allegations that Colgate had made misrepresentations to the Division and that there appeared to be factual concerns about whether Colgate had perfected its statutory obligations necessary to obtain

a pooling order. *See e.g.*, Case No. 21744, 4/15/21 Tr. 11: 1-7, 21:9-22 (Commissioner Sandoval asking whether Colgate engaged in good-faith negotiations); 20:17-16 (Commissioner Bloom raising concerns that Colgate did not meet statutory obligations to attempt good-faith negotiations), 23:5-25 (Commissioner Bloom citing allegations that Colgate's landman "falsely testified"); 31:6-10 (Commissioner Sandoval raising concerns that Colgate misrepresented information to the Division); 31:16-32:11 (Commissioner Sandoval raising concerns about whether the information Colgate presented at hearing was accurate).

32. At the conclusion of the arguments, Commissioner Sandoval determined that the issue "hinges upon really the good-faith effort of, and the obligation to seek voluntary agreement with working interest owners as is required by 70-2-17C." Case No. 21744, 4/15/21 Tr. 35: 5-9. The related concern whether Colgate "present[ed] factual and accurate information" at the hearing was substantial enough that "there is enough potential that the Division order should not have been executed, that it is worth rehearing under a de novo appeal[.]" *Id.* Tr. 35:13-23 (emphasis added). Commissioner Bloom agreed and stated that Division hearings should not be "used unfairly to get a compulsory pooling ruling." *Id.* Tr. 35:24-36:13.

33. The Commission issued Order No. R-21679 on April 30, 2021, affirming its previous holding in Order No. 14097-A that the *New Energy Economy* test for a "party of record" is applicable.

34. It also made the following findings and conclusions:

a. Cimarex entered its appearance in Case No. Case No. 21629 on January 19, 2021. Order No. R-21575, ¶ I.e.

b. Ciamrex's "several excuses for its delayed entry of appearance" were not "compelling" because it "is a sophisticated oil and gas company that routinely

participates in Division and Commission meetings and hearings." Order No. R-21575, ¶ II.h.

c. The Division issued Order No. R-21575 on January 20, 2021. Order No. R-21575, ¶ I.f. (emphasis added).

d. Cimarex met the "four prongs" test of the *New Energy Economy* case by (1) entering "its appearance prior to the entry of Division order No. R-21575"; (2) submitting evidence and argument in writing both prior to and after the Division issued Order No. R-21575, in particular by presenting new evidence through its Motion to Stay Order No. R-21575 and its Application to Re-Open; and (3) Cimarex moved to re-open Case No. 21629. Order No. R-21575, ¶ II.e., f., h., j., k.

e. In addition, the Commission determined that Cimarex's "accusations of material misrepresentation by Colgate" were "not only compelling but also concerning" and that "Cimarex supported its misrepresentation allegation with documentary evidence." Order No. R-21575, ¶ II.i.

35. Given its substantial concerns, the Commission issued Order R-21679-A on April 30, 2021, staying Division Order R-21575 until resolution of Cimarex's de novo appeal.

36. At a status conference on April 14, 2021, the parties discussed with the Commission alternatives for how to proceed with the de novo review. Cimarex counsel urged the Commission to summarily invalidate Division Order R-21575 based on its initial finding that Cimarex's "accusations of material misrepresentation by Colgate" were "not only compelling but also concerning" and that "Cimarex supported its misrepresentation allegation with documentary evidence." *See* May 13, 2021, Tr. 5:19-6:1. In the alternative, Cimarex counsel acknowledged that the de novo application would proceed to hearing before the Commission. *Id.* Tr. 6:7-9.

37. Ignoring Cimarex's request to summarily invalidate Order R-21575, the Commission proceeded to schedule motions briefing, arguments, and a de novo hearing.[11] At the status conference, Cimarex counsel sought Commission direction on whether to file Cimarex's competing pooling applications for consideration by the Commission. *See* May 11, 2021, Tr. 11:20-24. Commission Chair Sandoval responded that the fate of Cimarex's competing applications is "going to hinge on what we do with [a proposed] motions hearing[.]" *Id.* Tr. 11:25-12:2. Cimarex counsel responded, acknowledging that "if we need to dismiss it we will dismiss it, but if we go forward we go forward." *Id.* Tr. 12:2-5. Accordingly, without ruling on whether Cimarex had a right to proceed with its competing pooling applications to hearing, the Commission included a deadline of June 3, 2021, for Cimarex to file its competing pooling applications[12] and scheduled briefing on motions, a motions hearing, and a date for a de novo hearing. *See* Tr. 13:2-16; Order No. R-21679-B.

38. At the motions hearing on July 8, 2021, Cimarex counsel again requested the Commission summarily invalidate Division Order No. R-21575 and remand Colgate's case to the Division for it to re-start its compulsory pooing hearing based on its filings without any testimony or evidence. *See* July 8, 2021, Tr. 14:17-17:6. Commission Chair Sandoval noted that "the Commission, in granting the de novo hearing . . . did have concerns about whether or not the requirements, the good faith effort . . . was followed, but . . . we haven't . . . considered . . . a lot of evidence or testimony or any of those components in that." *See* July 8, 2021, Tr. 19:6-21. Commission Chair Sandoval determined there was not sufficient evidence to invalidate the order

[11]

[12] Cimarex filed its competing pooling applications with the Division on June 1, 2021. They were assigned Case Nos. 22018 and 22019, but were never heard by the Division and no order was ever entered adjudicating them.

and a de novo hearing was required before deciding whether the Division Order was appropriate. Tr. 28:19-29:15.

39. Summarizing the path forward, Commission Counsel Moander explained that "an evidentiary hearing . . . on the issue of whether or not . . . Colgate met the requirements of conference before filing its original application at the Division level would be appropriate, because . . . the parties would have the opportunity to demonstrate either the deficiency or lack of deficiency in the original Division's application, and it would be consistent with 19.5.4.16.C to have that resolved prior to a merits hearing, because it is . . . possible that at this point that a merits hearing be determined as being not necessary." July 8, 2021, Tr. 38:6-19 (emphasis added). Commission counsel further explained that Cimarex's first argument is that Colgate failed to negotiate and that is "clearly the focal point of [Cimarex's] application, and to resolve whether it actually happened or not would determine the future of this case as a de novo matter." Tr. 39:3-7 (emphasis added). Commissioner Chair Sandoval agreed, stating that "depending upon the outcome of the [evidentiary] hearing would dictate whether or not we move forward with the September [merits] hearing." Tr. 40:2-4 (emphasis added). Commission counsel agreed. *Id.* 40:5-8.

40. The Commission then held an evidentiary hearing on Cimarex's de novo application on February 22, 2022, continuing to March 10, 2022. After deliberating over the two days of testimony and evidence, the Commission determined that "Colgate did enter into a good faith effort" to reach voluntary agreement with Cimarex and that "Colgate was in their rights to move forward and force pool Cimarex." *See* March 10, 2022, Tr. 194:12-195:1 (emphasis added); *see also* Order No. R-21679-C. The Commission also considered a motion by Cimarex to include an additional procedural option for managing the competing pooling applications and denied it as

"moot based on the evidence that was presented and ultimate consideration by the Commission." Tr. 195:15-18.

41. Commission counsel circulated a draft proposed Order No. R-21679-C in advance of the April 14, 2022, Commission meeting. It corrected the finding that Cimarex filed its entry of appearance before the Division entered Order No. R-21575 to find that Cimarex's entry of appearance was filed the same day the order was issued.[13] It also concluded Colgate did engage in a good faith effort to secure voluntary agreement with Cimarex, that Cimarex did not voluntarily elect within 30-day timeframe, and that Colgate "was within its rights to proceed with force pooling Cimarex."[14] It proposed to dismiss Cimarex's competing pooling applications and rule that the underlying Division order should stand.[15]

42. Cimarex counsel nevertheless argued it should have an opportunity to proceed with its competing pooling applications and to present a contested case against Colgate before the Commission as a de novo "merits" hearing. *See* April 14, 2022, Tr. 6:13-7:18. Apparently rejecting Cimarex's arguments, the Commission unanimously voted to adopt the proposed order and entered Order No. R-21679-C. *Id.*, Tr. 9:9-25.

43. Recognizing the impact Order No. R-21679-C had on its competing applications, Cimarex filed for a rehearing on May 3, 2022, contending the two-day hearing before the Commission was not the de novo hearing it claims it has a statutory right to, only an evidentiary hearing on the proper forum for a de novo hearing on the parties' competing pooling applications. *See* Case No. 21744, Cimarex Mot. for Rehearing, filed May 3, 2022.

[13] *See* Order No. R-21575, Finding ¶ 4.
[14] *See id.*, Conclusions ¶¶ 102-108.
[15] *See id.*, Order ¶¶ 111-112.

44. After considering the parties' briefing on Order No. R-21679-C, the Commission stated that its intent was not to "deny the de novo application for competing compulsory pooling," but "to say that we are not rehearing [Colgate's] case again. It has been decided. It is not being remanded back to the Division." June 9, 2022, Tr. 19:19-24. Order No. R-21679-C "was not intended to decide the de novo case for competing compulsory pooling applications." *Id.* Tr. 21:5-7.

45. The Commission voted to amend Order No. R-21679-C to provide that "the Notice and good faith issue has been decided, that the matter will proceed to a hearing on the competing applications" and to delete the provision stating that the Division order stands "because that has yet to be determined." *Id.* Tr. 22:2-6. The Commission subsequently issued Order No. R-21679-D adopting those changes.

46. Holland & Hart LLP substituted as counsel for Colgate in this matter on March 22, 2023.

47. The "de novo" hearing on the contested pooling applications has been set for a status conference on November 9, 2023. *See* Unopposed Mot. for a Continuance, filed Aug. 22, 2023.

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EXHIBIT B

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

APPLICATION OF MATADOR PRODUCTON COMPANY FOR A NON-STANDARD OIL SPACING AND PRORATION UNIT, COMPULSORY POOLING, AND NON-STANDARD LOCATION, LEA COUNTY, NEW MEXICO.

CASE NO. 15366 (De Novo)
ORDER NO. R-14097-A

ORDER OF THE COMMISSION

This matter came before the New Mexico Oil Conservation Commission ("Commission") for hearing on February 11, 2016, at Santa Fe, New Mexico, to consider the motion of Matador Production Company ("Matador") to dismiss the appeal filed by Amtex Energy, Inc. ("Amtex") of Order No. R-14097. The Commission, having considered the Motion, the briefs and arguments of counsel, and being otherwise fully advised, enters the following findings of fact, conclusions of law and orders.

THE COMMISSION FINDS THAT:

(1) This matter concerns the definition of a "party of record" under the New Mexico Oil and Gas Act ("Act"), Sections 70-2-1 et seq., and, therefore, who has the right to apply for a de novo hearing before the Commission after a decision on an adjudicatory matter is rendered by the Oil Conservation Division of the Energy, Minerals and Natural Resources Department ("Division"). Section 70-2-13 NMSA 1978.

(2) On August 3, 2015, Matador filed an application ("Application") with the Division seeking approval of a non-standard 160-acre, more or less, oil spacing and proration unit (project area) in the Bone Spring formation, Quail Ridge, Bone Spring Pool (pool code 50460) comprised of the W/2 E/2 of Section 16, Township 19 South, Range 34 East, NMPM, Lea County, New Mexico (the "Unit"). The Application sought an order pooling all uncommitted interests in the Unit and approval of a non-standard location for the well. Order R-14097 Findings 2, 4.

(3) Matador owns or controls 100% of the interest in north half of the Unit and Amtex owns approximately 92.8% working interest in the south half of the Unit. Notice of the Application was provided to all uncommitted mineral interest owners, including Amtex. Order R-14097 Findings 6, 12.

(4) An evidentiary hearing was held on the Application by the Division on September 3, 2015, which was presided over by a technical hearing examiner, Phillip Goetze, and a legal hearing examiner, Gabriel Wade. Matador appeared at the Division hearing and presented evidence in support of the Application. Prior to the hearing, no other person filed a written entry of appearance. No other party appeared at the hearing, or otherwise opposed the granting of the application. Order R-14097 Finding 7.

(5) On September 25, 2015, 22 days after the Division hearing was held, an Entry of Appearance was filed by Amtex Energy, Inc. and William Savage stating they opposed the application. The entry of appearance did not assert the basis for opposing the application, nor did it request that the record be reopened for further evidence. Matador filed a Motion to Quash Entry of Appearance. Order R-14097 Findings 8, 9.

(6) On December 14, 2015, the Division entered Order No. R-14097 granting the Application and ordering that the "Entry of Appearance filed by Amtex Energy, Inc. on September 25, 2015 for this case is untimely and no further testimony will be accepted." Order R-14097, ¶20.

(7) On January 7, 2016, Amtex filed a De Novo Hearing Application with the Commission regarding Division Order No. R-14097 to request that the case be heard de novo before the Commission pursuant to NMSA 1978 §70-2-13 and Rule 19.15.4.23(A) NMAC.

(8) On January 26, 2016, Matador filed a Motion to Dismiss Amtex's Appeal. On February 2, 2016, Amtex filed its Response to the Motion and on February 10, 2016, Matador filed its Reply. On February 11, 2016 the Commission held a hearing on the Motion to Dismiss and heard oral arguments from counsel for Matador and Amtex.

(9) The Act provides that after a matter is referred to a Division hearing examiner and a decision is then rendered by the Division, "any party of record adversely affected shall have the right to have the matter heard de novo before the commission upon application filed with the division within thirty days from the time any such decision is rendered." Section 70-2-13 NMSA 1978. (emphasis added). There is no claim that Amtex is "adversely affected" by the Division Order. The only issue is whether Amtex is a "party of record".

(10) The Act does not define "party of record". The term does appear several other times in the Act to determine who may request a rehearing of, or appeal, a decision of the Commission.

> Any party of record to the proceeding before the commission or any person adversely affected by a rule adopted under the Oil and Gas Act may appeal to the court of appeals within thirty days after filing of the rule under the State Rules Act.
> Section 70-2-12.2(C).

> Within twenty days after entry of an order or decision of the commission, a party of record adversely affected may file with the commission an application for rehearing in respect of any matter determined by the order or decision...
> Section 70-2-25(A)
>
> A party of record to the rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.
> Section 70-2-25(B).

(11) The Division's rules regarding adjudicatory hearings do not define "party of record" but do define who is, or who may become, a "party" in an adjudicatory proceeding before either the Division or the Commission. Rule 19.15.4.10 NMAC reads in part:

> A. The parties to an adjudicatory proceeding shall include:
> 1. the applicant;
> 2. a person to whom statute, rule or order requires notice (not including those persons to whom 19.15.4.9 NMAC requires distribution of hearing notices, who are not otherwise entitled to notice of the particular application), who has entered an appearance in the case; and
> 3. a person who properly intervenes in the case.
> B. A person entitled to notice may enter an appearance at any time by filing a written notice of appearance with the division or the commission clerk, as applicable, or, subject to the provisions in Subsection C of 19.15.4.10 NMAC, by oral appearance on the record at the hearing.
> C. A party who has not entered an appearance at least one business day prior to the pre-hearing statement filing date provided in Paragraph (1) of Subsection B of 19.15.4.13 NMAC shall not be allowed to present technical evidence at the hearing unless the commission chairman or the division examiner, for good cause, otherwise directs.

(12) Amtex argues that it only needed to qualify as a "party" in the Division proceeding in order to be a "party of record" and therefore have the right to a de novo Commission hearing. As a person who was entitled to notice, Amtex therefore only needed to file an entry of appearance to be a "party" under 19.15.4.10(A), and that entry of appearance could be filed "at any time" under 19.15.4.10(B). At oral argument, Amtex argued that the entry of appearance could be filed at the same time an application for a de novo hearing is filed up to 30 days after the Division order is issued, 19.15.4.23(A) NMAC. Amtex further argued that participation in the Division hearing is unnecessary since the Commission hearing will be de novo. Matador argued that given the limitations in 19.15.4.10(B) and (C), a person must file an entry of appearance prior to the hearing in order to be a party.

(13) In New Energy Economy, Inc. v. Vanzi, the New Mexico Supreme Court considered which participants in several administrative proceedings below had the right to intervene in an appeal to the Court of Appeals. 2012-NMSC-005. The Court found that those who had participated "in a legally significant manner" had the right to intervene. Vanzi, ¶ 47. These included entities that had been petitioners below or who had presented technical evidence at a hearing. However, the Court rejected the right to intervene of an entity that did appear and speak at an adjudicatory proceeding but did not file any entry of appearance or request to intervene prior to the hearing. "This decision not to take formal steps to participate before [the agency] bears significant consequences." Vanzi, ¶ 53

(14) The Supreme Court chose to adopt the "legally significant" participation standard rather than rely on whether someone was classified as a "party" by the agency below. "We recognize, however, that if we were to allow all parties or other participants in an underlying rule-making proceeding automatically to be made parties to an appeal, then serious unintended consequences could arise." Vanzi, ¶ 48. "[W]e recognize that the administrative definition of a "party" to a rule-making proceeding is something of a moving target. As discussed earlier, administrative rules may be changed to define a party more broadly or narrowly, such that "party" may not always mean the same thing." Vanzi, ¶ 49

(15) The Commission finds that Amtex did not take the necessary actions to become a "party of record" in the Division proceeding and therefore have the right to a de novo Commission proceeding. Amtex did not take any actions to become part of the record in the proceeding either by submitting any evidence or arguments in writing or at the hearing, or by filing an entry of appearance prior to, or at, the hearing, or by appearing at the hearing. Amtex filed an entry of appearance well after the record was closed and the case was under advisement by the Division. Even then, Amtex offered no excuses for its late filing and did not request the record be reopened or offer to submit any new evidence.

(16) The Commission does not agree that the term "party of record" should be given an overly broad meaning simply because the Commission proceeding will be de novo. First, "party of record" is used in the Act to determine who has the right to appeal both Division and Commission decisions, and Commission decisions are subject to record review proceedings in the district court and the Court of Appeals. Sections 70-2-12.2 and 70-2-25 NMSA 1978. Second, the Act and the Commission rules intend for a full and fair proceeding before the Division hearing examiners and the Division Director, including notice to all affected parties, in the hopes that the issues will be fully developed and addressed by the Division. Finally, if a person wants the Commission to hear the case initially, they can request that the Division Director assert his authority under the Act to hold the hearing before the Commission. "In addition, any hearing on any matter may be held before the commission if the division director, in his discretion, determines that the commission shall hear the matter." Section 70-2-6(B) NMSA 1978.

THE COMMISSION CONCLUDES THAT:

(1) The Commission has jurisdiction over the parties and the subject matter of this case.

(2) Amtex is not a "party of record" in Case 15366 and therefore does not have the right to a de novo Commission hearing.

IT IS THEREFORE ORDERED THAT:

(1) The Motion to Dismiss Amtex's Appeal filed by Matador is granted. Case 15366 (De Novo) is hereby dismissed.

DONE at Santa Fe, New Mexico this 10th day of March, 2016.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ROBERT BALCH, Member

PATRICK PADILLA, Member

David R. Catanach

DAVID R, CATANACH, Chair

S E A L