

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION COMMISSION FOR
THE PURPOSE OF CONSIDERING:

ORIGINAL

APPLICATION OF DELAWARE ENERGY, LLC
TO REVOKE THE INJECTION AUTHORITY
GRANTED UNDER SWD-1680 FOR THE ALPHA
SWD NO. 1 WELL OPERATED BY ALPHA SWD
OPERATING, LLC, EDDY COUNTY, NEW MEXICO.

CASE NO. 15855
(De novo)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

July 20, 2018

Santa Fe, New Mexico

BEFORE: HEATHER RILEY, CHAIRWOMAN
ED MARTIN, COMMISSIONER
DR. ROBERT S. BALCH, COMMISSIONER
BILL BRANCARD, ESQ.

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This matter came on for hearing before the
New Mexico Oil Conservation Commission on Friday,
July 20, 2018, at the New Mexico Energy, Minerals and
Natural Resources Department, Wendell Chino Building,
1220 South St. Francis Drive, Porter Hall, Room 102,
Santa Fe, New Mexico.

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APPEARANCES

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1 (9:03 a.m.)

2 CHAIRWOMAN RILEY: Next case, Case Number
3 15855, de novo, continued from the May 22nd hearing,
4 application of Delaware Energy, LLC to revoke the
5 injection authority granted under SWD-1680 for the Alpha
6 SWD No. 1 well operated by Alpha SWD Operating, LLC,
7 Eddy County, New Mexico.

8 So we have here two parties. We have Alpha
9 and Delaware represented by -- Delaware by Mr. Feldewert
10 and Alpha by Mr. Larson; is that correct?

11 MR. LARSON: That's correct.

12 MR. FELDEWERT: Yes, ma'am.

13 CHAIRWOMAN RILEY: Mr. Feldewert, do you
14 want to go ahead?

15 MR. BRANCARD: I think they were the de
16 novo applicant, correct?

17 MR. LARSON: Alpha SWD is the applicant.

18 CHAIRWOMAN RILEY: Oh, okay. My apologies.
19 Would you like to start, Mr. Larson?

20 MR. LARSON: I certainly would.

21 As the Commission is well aware, this case
22 has taken an unusual course since Delaware Energy filed
23 application with the division to revoke the injection
24 authority granted to Alpha SWD Operating by division
25 Administrative Order SWD 1680, and we're now at the

1 stage of addressing the three issues that the Commission
2 scoped at the hearing on May 22nd.

3 My pre-hearing brief on behalf of Alpha SWD
4 addresses in detail the issues the Commission has scoped
5 for today's hearing, so I intend to hit the highlights
6 of Alpha SWD's position as stated in the brief. And
7 before I do, I'd like to step out of the trees and look
8 at the forest for a moment.

9 Mr. Brancard mentioned at the previous
10 hearing the issue of the Commission setting a precedent.
11 I think the broader focus leads me to the Commission's
12 ruling today may result in setting up two precedents:

13 First, the Commission's position to
14 determine whether a party with standing who challenges a
15 division administrative order must file an application
16 with the Commission for a de novo review of that order.
17 And associated to that is the question of whether a de
18 novo appeal is the exclusive remedy for such a
19 challenge.

20 And the second potential precedent concerns
21 the Commission's determinations of the legal effect of
22 the division violation of the 15-day waiting period in
23 19.15.26.8C, as in cat. More specifically, whether such
24 a violation should automatically result in the
25 revocation of the applicant's application.

1 And moving back into the trees, there is no
2 dispute that Delaware had actual knowledge of the
3 issuance of SWD-1680 within the 30-day period in which
4 to file a de novo appeal to the Commission and that
5 Delaware did not do so. Instead, Delaware asked the
6 division to rule on the validity of its own
7 administrative order.

8 And as stated in my brief, the Oil and Gas
9 Act sets forth a singular path for challenging a
10 division order, and that is a de novo appeal. I agree
11 with Mr. Feldewert that the statute speaks in terms of
12 the matter heard by the division examiner, but there is
13 no functional difference between a hearing order and an
14 administrative order issued after notice and an
15 opportunity to protest. Nevertheless, Delaware chose to
16 forego a de novo appeal and instead asked the division
17 to review its administrative order.

18 And I think, more importantly, there is no
19 provision whatsoever in the Oil and Gas Act or the
20 Commission's rules and Delaware has not cited to any
21 such provision that might authorize it to take the path
22 that it has taken. And apparently recognizing the
23 absence of any statutory or regulatory provision
24 authorizing the path it chose, Delaware asserts in its
25 pre-hearing brief that the final paragraph in

1 Administrative Order SWD-1680 regarding the Division's
2 retention of jurisdiction somehow authorizes Delaware to
3 challenge the order based on a violation of the 15-day
4 rule. The express language of the order limits the
5 Division's retention of jurisdiction to specific matters
6 pertaining to Alpha SWD's operation of its injection
7 well, and none of those matters could possibly -- Alpha
8 SWD to not drill the well.

9 Delaware's pre-hearing brief also attempts
10 to place the onus on the division director to choose the
11 proper form for Delaware's challenge to SWD-1680, and
12 that assertion is misplaced. It was Delaware, not the
13 division director, who elected to forego a timely de
14 novo appeal and seek relief from the division. And even
15 though it admittedly may be outside the scope of the
16 jurisdictional issue the Commission contemplated during
17 the May 22nd hearing, there is an alternative basis for
18 the Commission to determine that the division lacked
19 jurisdiction to hear the Delaware application and that
20 is Delaware's lack of standing.

21 The division records attached to Alpha's
22 SWD response to Delaware's motion for judgment based on
23 the division record indicate that Delaware's initial
24 submission for its release of SWD Well No. 1 and --
25 prior to SWD's application, which was filed on June

1 12th. And it's that canceled application that underlies
2 Delaware's assertion that Alpha SWD and the division
3 should have notified it of Alpha SWD's application and
4 is the only basis that Delaware offered to establish it
5 had standing to challenge Administrative Order SWD-1680.

6 And Delaware does not assert that it was an
7 affected person within a half-mile radius of Alpha SWD's
8 proposed injection well, which would infer [sic]
9 standing to Delaware to challenge the administrative
10 order. Absent that, Delaware had no standing, and,
11 therefore, the division lacked jurisdiction on that
12 basis.

13 And based on either of these grounds, the
14 Commission need not look beyond the absence of the
15 division jurisdiction to conclusively resolve this case.

16 Should the Commission also choose to
17 consider whether the division prematurely issued
18 SWD-1680, there is no dispute that the division's
19 records indicate that the order was issued less than 15
20 days after Alpha SWD's consultant submitted the
21 additional information requested by the division, and
22 it's the legal effect of the division's presumably
23 inadvertent issuance of the administrative order six
24 days early is what the Commission has to determine.

25 And in making that determination, I submit

1 that the remedy should be commensurate with the nature
2 of the violation. There is no question that Alpha SWD
3 is entirely without fault here. And it's also without
4 question that there are no issues regarding notice to
5 the affected parties as defined, in the Commission's
6 rules or any engineering issues such as an
7 incompatibility between the injected water and the water
8 in the formation.

9 And under these circumstances, I submit
10 that the appropriate remedy is a nunc pro tunc order
11 reinstating Alpha SWD's injection authority effective as
12 of July 5, 2017.

13 And should the Commission further be
14 inclined to determine that the division's violation of
15 the 15-day rule should result in revocation of Alpha
16 SWD's injection authority, I believe the Commission
17 should consider the potential ramifications of such a
18 ruling that Mr. Brancard pointed out during the May 22nd
19 hearing.

20 I've attached to my pre-hearing statement
21 three exhibits. I have copies if the Commissioners
22 would like them. They are documents taken from the
23 division's case file for Administrative Order 1625.
24 Those exhibits establish that the division requested
25 Delaware Energy to submit additional information, which

1 was submitted 13 days before the order was actually
2 issued. And I'm not providing these in any way, shape
3 or form to challenge Delaware Energy's authority under
4 SWD-1625. I am merely presenting them to the
5 Commission's attention to show the potential
6 ramifications of issuing a blanket ruling in violation
7 of the 15-day waiting rule must lead to the revocation
8 of injection authority.

9 And in sum, I would ask the Commission,
10 first, to rule that the division lacked jurisdiction to
11 entertain Delaware's application, and, secondly, if the
12 division -- or sorry -- the Commission does find that it
13 had jurisdiction to determine that a 15-day violation --
14 I'm sorry -- the violation of the 15-day rule should not
15 lead to the revocation of Alpha SWD's injection
16 authority.

17 And I would at this time move the admission
18 of Alpha SWD's Exhibits 1, 2 and 3.

19 CHAIRWOMAN RILEY: Mr. Feldewert?

20 MR. FELDEWERT: Those exhibits, I think,
21 are part of the division's administrative record for
22 that case, so the Commission certainly can take notice
23 of that if they choose to do so.

24 CHAIRWOMAN RILEY: Okay.

25 (Alpha SWD Operating, LLC Exhibit Numbers 1

1 through 3 are offered into evidence.)

2 MR. FELDEWERT: If I may approach, I have
3 three documents.

4 MR. BRANCARD: Are there any questions for
5 Mr. Larson?

6 CHAIRWOMAN RILEY: Are you finished?

7 MR. LARSON: I would like to do rebuttal.

8 MR. FELDEWERT: I'm going to hand you a
9 copy of the administrative order that was the subject of
10 Delaware's application to revoke injection authority
11 that was granted under this administrative order.

12 And secondly, I'm going to hand you a
13 timeline that was entered into the record at the
14 division hearing below just for purposes of providing
15 the forest, as Mr. Larson talked about, as we now can
16 get into the trees.

17 And then finally I'm going to hand you the
18 statutes that are referenced in our brief that
19 everyone -- no one disputes governs the de novo review
20 process, an opportunity that exists under both the
21 statute, on the first page of this handout, and then the
22 regulation, the second page of this handout, which I
23 will be referring to here today.

24 If you look at the timeline, Delaware had
25 filed an application for injection authority back in

1 October, same area, same zone. And what happened at
2 that time is there was an objection by some nearby
3 operators. And if you look at the second page of this
4 exhibit, this timeline, there is an email from the
5 individual handling the administrative application in
6 which he makes note of the objection that was filed by a
7 Randy Cate to Delaware's application. And in this
8 October 31st email, which is at the bottom of the second
9 page of what I handed out, what has been marked as
10 Exhibit 3 below, the employee there at the Division
11 suspended Delaware's application, suspended, pending an
12 effort by Delaware to reach an agreement or to resolve
13 the objections filed by Mr. Cate and his group.

14 Delaware notified -- on that same page,
15 you'll see at the top. Delaware notified the Division
16 that it had resolved the objections on June 27th, 2017.
17 This is the day before that administrative order that I
18 handed to you was issued. So during the period of time
19 in which Delaware was working to resolve the objection
20 on its suspended application, that is when Alpha went
21 out there, filed a competing application and got it
22 approved by the division under that administrative
23 order. Okay? Delaware never got notice, despite the
24 fact that it had an application on file that had been
25 suspended and despite the fact that it had told the

1 division the day before the order was issued that those
2 objections had been resolved.

3 So when Alpha called up Delaware after
4 having gotten that order and said, "Hey, you guys want
5 to buy it from us," we were a little bit surprised.
6 Okay? We were surprised. So what did we do? We looked
7 at the administrative order. And the administrative
8 order says, in the last paragraph, that the division
9 retains jurisdiction. Okay?

10 Now, they want to suggest, well, that
11 jurisdiction is only for a limited basis. You can draw
12 your own conclusions from the last particular of that
13 order, but it clearly states the division retains
14 jurisdiction. Nowhere in this administrative order does
15 it say that there is a de novo appeal right to any party
16 to this proceeding. Now, what proceeding is there? An
17 administrative proceeding. There is no hearing. There
18 is no referral to an examiner. This was done through
19 the administrative process. And all this order says is
20 "jurisdiction is retained by the division." It doesn't
21 say anything about a de novo appeal right.

22 When we were here last time, the Commission
23 asked for a briefing on why Delaware challenged this
24 order by an application with the division rather than
25 filing a de novo appeal to the Commission. Okay? Now,

1 the answer to that -- put this aside if you want to.
2 The answer to that is in the darn statutes and your
3 regulations -- okay? -- because the statute makes it
4 very clear. In Section 70-2-13, there are a couple of
5 things. It talks about hearings before examiners. It
6 talks about division promulgating rules and regulations
7 regarding the hearings before the examiners. And then
8 it says at the very bottom, "When a matter or proceeding
9 is referred to an examiner and a decision is rendered
10 thereon, a party in that proceeding has a right then to
11 ask that the matter be heard de novo before the
12 Commission." Okay? So under this statute, there is no
13 right to a de novo review of the Commission unless a
14 matter has been referred to an examiner for a hearing.

15 If you look at the regulation that was
16 issued and consistent with this very statute -- that's
17 the second page of this statutory handout that I handed
18 to you -- it talks about de novo applications. And it
19 says, "When the division enters an order pursuant to a
20 hearing that a division examiner heard, a party of
21 record whom the order adversely affects has a right to
22 have the matter heard de novo before the Commission."
23 Again, there is no right to go directly to the
24 Commission on de novo appeal unless there has been a
25 matter referred to an examiner, a hearing held and

1 parties have become of record in that proceeding. That
2 did not happen with this administrative order. It did
3 not happen.

4 So when you look at the statute, look at
5 the regulation, it limits your right to a de novo review
6 to parties to an examiner hearing. That's the only
7 option. That's the only opportunity to go de novo
8 before the Commission.

9 So when Delaware got this surprising call
10 from Alpha saying, "Hey, do you want to buy our permit
11 that we just got that you-all didn't know about,"
12 Delaware's only option was to challenge that order with
13 an application for a hearing filed with the division.
14 You file an application with the division's clerk. The
15 division director then determines whether that hearing
16 is going to go before an examiner or whether it's going
17 to go before the Commission. It's discretionary for the
18 director of the division. Delaware has no say. They
19 filed the application, the only relief available to
20 them. And then the division director determines whether
21 it goes to an examiner hearing or whether it goes to a
22 commission hearing.

23 So that's what Delaware did here. They
24 filed its application. The division director moved the
25 matter to an examiner hearing. The examiner examined

1 the evidence, examined the timelines, examined the
2 administrative record, which is separate and apart from
3 the division hearing record. This has its own record.
4 It's an independent proceeding. It's an independent
5 administrative proceeding. The division examiner looked
6 at that proceeding and determined that the procedural
7 requirements for the issuance of an administrative
8 order, which is an order without a hearing, that those
9 procedural requirements had been violated. And so they
10 issued the order that Alpha has now appealed de novo to
11 you because we had a hearing. They've appealed the
12 decision by the division that the procedural rules had
13 been violated.

14 So now we're here before you. There is no
15 dispute that the procedural rules for the issuance of an
16 administrative order have been violated. Okay? There
17 should also be no dispute that Delaware acted properly
18 in filing its application before the division clerk --
19 or with the division clerk to have this reviewed because
20 that was its only option. It had no de novo appeal
21 rights arising out of this administrative order.

22 So we have an undisputed violation on the
23 procedural rules governing the issuance of this order,
24 and the division correctly concluded it is, therefore,
25 void. And that's what you should likewise conclude,

1 that this administrative order (indicating) is void.
2 They've admitted that the procedural rules had been
3 violated in the issuance of this order.

4 Was it harmful? Well, I already told you
5 that we had informed the division that the objection to
6 our suspended application had been resolved a day before
7 this was issued. Maybe if they had waited the 15-day
8 period, somebody would have remembered there is
9 competing disposal applications here and this never
10 would have happened. But it happened and the
11 circumstance where we had a competing application
12 pending before the Division same area, same zone.

13 So since we've had this administrative
14 order incorrectly issued and since we have competing
15 applications pending before the agency for disposal
16 well, same area, same zone, either the division or the
17 Commission -- you can decide -- should conduct an
18 evidentiary hearing on these competing applications and
19 decide which one should move forward.

20 But on the issue here today, about whether
21 this matter was properly brought initially before the
22 division examiner, I don't see any debate on that,
23 because clearly we did not have a de novo appeal right
24 arising out of this administrative order.

25 CHAIRWOMAN RILEY: Do you have a question?

1 MR. BRANCARD: I do.

2 COMMISSIONER BALCH: Do we have rebuttal
3 first?

4 MR. BRANCARD: Whatever we want to do.
5 Yes, we can do rebuttal first and then ask questions.

6 MR. LARSON: Commissioners, I'd like to
7 point a couple of items out with regard to the handouts
8 that Mr. Feldewert gave you. I think it's kind of
9 ironic that he's arguing the merits of the case when he
10 has tried to subvert Alpha SWD's right to a de novo
11 appeal by seeking a judgment based on the record.

12 The first thing I'd point out is the
13 timeline and if you look at the date of May 2017. The
14 undisputed testimony at the division hearing was that
15 Alpha was never informed of Delaware's application, and
16 that's coming from both Alpha SWD's witnesses and
17 Delaware's witnesses.

18 The second thing is this is the exhibit I
19 attached to the response in opposition to
20 Mr. Feldewert's motion for judgment on the division
21 records. And on page 5, it shows application number
22 P-M-A-M 1630053276 as canceled. Now, out in the right
23 margin, it also says "suspended," but in my book
24 "cancel" trumps "suspended" every time.

25 In terms of the procedural path taken,

1 there is nothing in the Commission's rules that allows a
2 party challenging administrative order to apply to the
3 division. Mr. Feldewert could have filed a de novo
4 appeal, at which point the Commission could have said,
5 "No, you go back and ask a division examiner to look at
6 this." But it clearly elected not to file for a de novo
7 appeal.

8 And in terms of the assertion about
9 competing applications, I think Madam Chair pointed out
10 at the last hearing that the administrative order is
11 issued without prejudice to Alpha SWD's right to file a
12 new application. So there is no Alpha SWD application
13 pending before the division.

14 CHAIRWOMAN RILEY: I still say this is a
15 who's-on-first case, and I'm still not sure who's on
16 first.

17 Do you want to start with questioning,
18 Bill?

19 MR. BRANCARD: Sure. I mean, I think this
20 is a pretty big issue of what the proper process is
21 under the Oil and Gas Act. And my concern with the
22 Commission is that, you know, we have a decision from
23 the New Mexico Supreme Court in the Marbob case which
24 says, "The Oil and Gas Act means what it says," and the
25 Oil and Gas Act doesn't mean what it doesn't say. Okay?

1 In other words, if it's silent, we can't just sort of
2 create things under the Oil and Gas Act. There has to
3 be explicit authority.

4 So in the Marbob case, the Commission
5 enacted rules to create the civil penalty procedure, and
6 the Court looked at that and said, "The Oil and Gas Act
7 doesn't explicitly authorize this. You don't have the
8 authority to do this."

9 So what we have here is basically a
10 rehearing of an initial approval by the division. Okay?
11 There is a whole series of issues under the Oil and Gas
12 Act here, but let's just focus on the one that's raised,
13 which is if you have a decision by the division, how do
14 you get a remedy to that decision? There is nothing
15 explicitly -- and Mr. Feldewert is not pointing to
16 anything in the Oil and Gas Act -- that says there is a
17 right to a rehearing.

18 Now, if the Commission issues an order, the
19 Oil and Gas Act explicitly says there is a right to
20 request a rehearing. There is a time frame and
21 everything in the Oil and Gas Act. There is nothing in
22 the Oil and Gas Act about requesting a rehearing of a
23 division proceeding. Okay?

24 My question to Mr. Feldewert would be --
25 assuming you're correct that the de novo appeal

1 provision does not apply to a decision by the division
2 rendered without a hearing -- okay? I'm not going to
3 call it an order even though it is an order. Okay?
4 Because the Oil and Gas Act also says the division
5 cannot issue an order without a hearing. The division
6 regularly issues orders without hearings. In this case,
7 if you look at the injection rule, what the division did
8 is it issued a permit to allow injection, clearly a
9 final decision of the division on a permit.

10 With a final decision of an agency,
11 Mr. Feldewert, what is the proper remedy of a party that
12 is aggrieved by that decision?

13 MR. FELDEWERT: I think the only thing I
14 can go by is two things: What the -- what the -- what
15 you'll call a permit, the administrative order says,
16 which clearly was issued without -- this is not a
17 rehearing. There was no hearing, this one. "Permit" is
18 probably a good term. It says, "Jurisdiction is
19 retained by the division for the entry of such further
20 orders as may be necessary for the prevention of waste
21 or protection of correlative rights or upon," and it
22 goes on. Okay? Correlative rights. We have a
23 competing application pending before the Division, same
24 area, same zone, that was prior filed that they knew
25 about. To me that's a correlative-rights issue.

1 But if you want to ignore that last
2 paragraph, if I go to the division's rules for
3 adjudicatory hearings, I can file an application and ask
4 the Division to examine any issue, whether it involves a
5 regulation, an order, a permit or any other matter that
6 falls within the jurisdiction of the Oil Conservation
7 Division. And the way you do that is you go to your
8 adjudicatory regulations and it says you file your
9 application before the division clerk -- or with the
10 division clerk. And I'm at 19.15.4.8. And then the
11 division director determines whether that hearing goes
12 to an examiner or to the Commission.

13 So as a party who has been aggrieved by the
14 issuance of a permit for an area where they had a
15 prior-filed application, the only option is to seek
16 action before the agency that issued the permit by way
17 of -- by way of an application for hearing, and that's
18 what we did here.

19 If I look at a permit and it says the
20 division retains jurisdiction, that's where I go. Where
21 else am I going to go?

22 MR. BRANCARD: Why did you not file an
23 appeal -- a writ of certiorari with the district court
24 under Rule 75?

25 MR. FELDEWERT: Because I have to exhaust

1 my administrative remedies.

2 MR. BRANCARD: You have a final order from
3 the division.

4 MR. FELDEWERT: I have a permit issued from
5 the division. I do not have a final order from the
6 division in terms of an examiner hearing with appeal
7 rights. I don't have a final order from the agency. I
8 have an initial permit. If I have a problem with that
9 permit, my next step is to ask for a hearing before an
10 examiner or where a record can be made, and the division
11 has an opportunity to examine the problems with the
12 permit that it issued. Then once you have an examiner
13 hearing, you have an opportunity to go de novo before
14 the Commission, which I submit, before I go to district
15 court in order to exhaust my administrative remedies, I
16 better do. Then I can go to district court.

17 But if I went to district court,
18 Mr. Brancard, it would get bounced back here on the
19 grounds we did not exhaust our administrative remedies
20 and we did not give the division an opportunity to cure
21 the defect in the issuance of its permit.

22 MR. BRANCARD: I guess I would ask
23 Mr. Larson the same question.

24 MR. LARSON: Assuming that the permit, the
25 administrative order, however you want to term it, is

1 final, the administrative remedy would have been a de
2 novo appeal. If Alpha SWD -- I'm sorry. If Delaware
3 lost the de novo appeal, filed for rehearing and then it
4 was denied, it would be situated to file a Rule 75
5 appeal.

6 In terms of correlative rights,
7 Mr. Feldewert has not argued that his client was
8 entitled to notice as an affected person within the
9 half-mile radius of the well proposed by Alpha SWD, so
10 none of these specified items on the retention of
11 jurisdiction in SWD-1680 could possibly apply in this
12 case.

13 And lastly, there is nothing -- as
14 Mr. Brancard has pointed out, there is nothing in the
15 statute, nothing in the division rules that authorized
16 the path that Delaware Energy has taken.

17 MR. BRANCARD: If the Commission wants, it
18 can go into executive session to discuss this.

19 COMMISSIONER MARTIN: Probably good idea.

20 COMMISSIONER BALCH: I move we go into
21 executive session.

22 COMMISSIONER MARTIN: I second.

23 CHAIRWOMAN RILEY: So moved.

24 (Executive session, 9:36 a.m. to 10:10
25 a.m.)

1 COMMISSIONER BALCH: I would move to leave
2 executive session.

3 COMMISSIONER MARTIN: So seconded.

4 CHAIRWOMAN RILEY: So moved.

5 We are back on the record.

6 MR. BRANCARD: And the statement that the
7 only matters discussed in executive session were
8 deliberation on this administrative adjudicatory matter,
9 Case 15855.

10 CHAIRWOMAN RILEY: As he said.

11 So we did discuss this, and I'm going to --
12 because of the legal nature of this, I'm going to turn
13 it over to Mr. Brancard to explain the conclusions we
14 came to, if that's all right, Mr. Brancard.

15 MR. BRANCARD: Okay. I'll start with
16 saying that the Commission wants to make it clear it is
17 concerned -- quite concerned that the record contains
18 evidence of a number of missteps by the division in this
19 process all along, and I think we may elaborate that a
20 little bit more in the order.

21 But the Commission is also concerned that
22 allowing the division unlimited authority to revisit its
23 final decisions to correct procedural flaw (A) creates
24 great uncertainty for the holders of division permits,
25 and (B) is not based on any authority under the Oil and

1 Gas Act nor does the narrow retention of authority,
2 jurisdiction by the division in the order apply.

3 Remedies to challenge an incorrect order by
4 the division can either be by de novo appeal under
5 70-2-13 or a petition for writ of certiorari with the
6 district court under Rule 75. That's available to any
7 aggrieved party.

8 There was a standing issue addressed in
9 this case -- raised in this case, but the Commission is
10 not going to address that issue given its previous
11 conclusion here.

12 So the Commission then finds that it
13 lacks -- that the division lacked jurisdiction to hear
14 Case 15855, and, therefore, the Commission is reversing
15 the OCD, and Order R-14484-A is vacated.

16 And I can work with Mr. Larson to draft an
17 order.

18 MR. LARSON: Would you like me to do the
19 first draft?

20 MR. BRANCARD: Sure.

21 MR. FELDEWERT: Madam Chair, members of the
22 Commission, in light of the Commission's decision here,
23 which comes as a great surprise to me given the history
24 that I've had before this division and Commission, I
25 would ask for a stay of the order so that Alpha doesn't

1 go out and drill their well over top of our existing --
2 or our prior-filed permit so that I can visit with my
3 client about having this matter reviewed by the district
4 court.

5 COMMISSIONER BALCH: I'm quite all right
6 with that.

7 CHAIRWOMAN RILEY: Yeah.

8 COMMISSIONER MARTIN: I'm okay.

9 COMMISSIONER BALCH: How long of a stay? I
10 don't know how a stay works.

11 MR. FELDEWERT: We would ask for a stay
12 pending a decision by the district court on the appeal,
13 although I recognize that, you know, I need to visit
14 with my client. So at this point, I would ask for a
15 30-day stay to decide -- allow my client time to decide
16 what they want to do. And then in the event that they
17 decide to pursue an appeal, that the stay remain in
18 effect for a time frame necessary for the appellate
19 courts to review the decision.

20 COMMISSIONER BALCH: You can write a stay
21 that way, right?

22 MR. BRANCARD: Sure.

23 How about if we give him 32 days, which
24 would take us to the next Commission meeting?

25 MR. FELDEWERT: That's fine. Then we --

1 that's fine.

2 MR. BRANCARD: Let's do that.

3 I think we need a motion on that.

4 COMMISSIONER MARTIN: So moved.

5 COMMISSIONER BALCH: And seconded.

6 MR. LARSON: Mr. Brancard, does that mean
7 this case will be on the next docket to hear a motion
8 for further stay, if I understand correctly?

9 MR. BRANCARD: I think it would be up to
10 Delaware to decide if they want to extend the stay or
11 what at that point. There would need to be a motion at
12 that point, a written motion. The Commission can do
13 this verbally right now, but to go further than that,
14 there would need to be some sort of written motion.

15 MR. FELDEWERT: Well, is there -- I mean,
16 the stay that I understood was requested and granted
17 would be a stay that would -- if there is an appeal,
18 that would extend throughout the time necessary to
19 address the appeal.

20 MR. BRANCARD: We don't have an appeal. We
21 don't know what your appeal is. So I think we're
22 granting it to the next meeting, and you can request to
23 renew that based on whatever your client decides between
24 now and then.

25 COMMISSIONER BALCH: At least for myself,

1 I'm favorable for a longer stay if it becomes necessary.

2 CHAIRWOMAN RILEY: Uh-huh.

3 COMMISSIONER MARTIN: (Indicating.)

4 MR. FELDEWERT: Okay. Thank you.

5 CHAIRWOMAN RILEY: Thank you.

6 MR. LARSON: Just so I'm clear, the stay is
7 in effect until the next Commission hearing?

8 MR. BRANCARD: Yes.

9 MR. FELDEWERT: When do you expect an
10 order?

11 MR. BRANCARD: I would assume we'd have it
12 on the agenda for the next meeting.

13 MR. FELDEWERT: Okay. I will submit to the
14 court reporter copies of what we presented to the
15 Commission today.

16 CHAIRWOMAN RILEY: Mr. Larson, you good
17 with that?

18 MR. BRANCARD: There hasn't been a motion
19 to admit this timeline. And I guess I'm just a little
20 concerned with this timeline because I think it
21 references conversations, communications that are not
22 part of the Commission's records, just as a caveat.
23 That's my only concern with it.

24 MR. LARSON: I agree with Mr. Brancard, the
25 specific point that I made earlier about the May 2017

1 date regarding alleged conversations that are
2 contemplated by the hearing testimony at the division
3 level.

4 CHAIRWOMAN RILEY: Is that timeline an
5 attachment to a previous document that you've submitted
6 in this case?

7 MR. FELDEWERT: To the Commission?

8 CHAIRWOMAN RILEY: Yes.

9 MR. FELDEWERT: No.

10 COMMISSIONER BALCH: To the division?

11 MR. FELDEWERT: To the division, yes.

12 COMMISSIONER BALCH: So there is a record
13 of it?

14 MR. FELDEWERT: Yeah. My assumption would
15 be that on appeal, the record from this matter would
16 include the division record, as well from the order.

17 MR. BRANCARD: The record in this matter
18 would be whatever you have given the Commission.

19 MR. FELDEWERT: Well, I would ask --

20 MR. BRANCARD: If you'd like to make a
21 motion to supplement that, we can deal with that I guess
22 at the next meeting. I don't know what that would all
23 be, but -- I guess the transcript? I mean, it's a de
24 novo hearing. I mean, I made this point before. It's
25 de novo, so we don't get the record from the division.

1 MR. FELDEWERT: That's fine. But you just
2 made a decision that the division did not have
3 jurisdiction, and it seems to me that the division
4 record would have to be part of this record for any
5 appellate court, then, to be able to review that
6 particular issue.

7 COMMISSIONER BALCH: So quite often we are
8 asked to accept in toto the division record, and usually
9 we say no. But in this case, maybe we could accept the
10 division record as --

11 MR. BRANCARD: Well, there was an initial
12 attempt to have the Commission decide this without a
13 record. The Commission requested that the parties
14 provide documentation to allow the Commission to make
15 the decision. The parties did provide documentation
16 from the proceeding below, and then additional
17 documentation has been presented as attached to various
18 filings here. So we certainly have a record.

19 MR. FELDEWERT: If I may, what was provided
20 at the Commission's request was the documents necessary
21 to make an expedited decision based on a single legal
22 issue whether they had violated the 15-day period under
23 the procedural rules. Okay?

24 In light of the Commission's determination
25 here today, it seems to me that if an appellate court is

1 going to adequately understand the nature of what
2 occurred here with respect, first, with the new issuance
3 of the administrative order, then with the issuance of
4 the division order, which you have now vacated, that
5 they need to have that as part of the record in this
6 matter. And I would move for the inclusion of the
7 administrative record from Order SWD-1680, as well as
8 the hearing record from Division Order R-14484-A, which
9 has now been vacated, that it be made part of the record
10 in this proceeding for purpose of the appeal.

11 MR. BRANCARD: I'll offer this as a
12 solution. When we issue the order after the next
13 meeting, there is a period of time to allow a request
14 for a rehearing of the Commission's decision. I think
15 if there is, at that point, any additional evidence that
16 was before the division that would somehow be relevant
17 to that decision or request for a rehearing, a request
18 can be made at that point. Okay? I don't think this is
19 necessarily -- we don't even know what's in that record.
20 So I think if Delaware's going to continue on pursuing
21 this matter, they would need to have an application for
22 a rehearing, and so they can use that as an opportunity
23 to provide us with that information and how it affects
24 the decision.

25 COMMISSIONER BALCH: Because irregardless,

1 the examiner hearing record already exists.

2 MR. BRANCARD: It exists, but the
3 Commission has only made a decision based on the
4 documentation provided here. Now, much of the
5 Commission's decision is based on an interpretation of
6 the Oil and Gas Act and requires very few factual
7 findings in it, so I'm comfortable with the Commission's
8 decision as it is.

9 But if you do request a rehearing, one
10 option for rehearing is if there are documents that were
11 considered by the division or evidence before the
12 division that you think would be relevant to a
13 rehearing, you can request that that be made part of the
14 record at that point. And I think that would be the
15 best way, because then we would have a response from
16 Alpha, and the Commission can consider it.

17 CHAIRWOMAN RILEY: Is there anything else
18 on this?

19 MR. FELDEWERT: No.

20 MR. LARSON: No.

21 CHAIRWOMAN RILEY: Okay. That concludes
22 this matter.

23 (Case Number 15855 concludes, 10:24 a.m.)

24

25

1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

3
4 CERTIFICATE OF COURT REPORTER

5 I, MARY C. HANKINS, Certified Court
6 Reporter, New Mexico Certified Court Reporter No. 20,
7 and Registered Professional Reporter, do hereby certify
8 that I reported the foregoing proceedings in
9 stenographic shorthand and that the foregoing pages are
10 a true and correct transcript of those proceedings that
11 were reduced to printed form by me to the best of my
12 ability.

13 I FURTHER CERTIFY that the Reporter's
14 Record of the proceedings truly and accurately reflects
15 the exhibits, if any, offered by the respective parties.

16 I FURTHER CERTIFY that I am neither
17 employed by nor related to any of the parties or
18 attorneys in this case and that I have no interest in
19 the final disposition of this case.

20 DATED THIS 28th day of August 2018.

21 

22 MARY C. HANKINS, CCR, RPR
23 Certified Court Reporter
24 New Mexico CCR No. 20
25 Date of CCR Expiration: 12/31/2018
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