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

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

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

Commission Case No. 21744
Division Case No. 21629
Division Order No. R-21575
Commission Order Nos. R-21679, R-21679-A & R-21679-B

CIMAREX ENERGY CO.'S REPLY TO COLGATE OPERATING, LLC'S RESPONSE TO CIMAREX'S MOTION TO INVALIDATE AND VACATE ORDER NO. R-21575

Cimarex Energy Co., and its affiliate Magnum Hunter Production Inc. (collectively "Cimarex"), submit to the Oil Conservation Commission ("Commission") its Reply to Colgate Operating, LLC's ("Colgate") Response to its Motion to Invalidate and Vacate Colgate's Order No. R-21575 ("Reply"). In support of its Reply, Cimarex states the following:

I. Summary of Argument.

1. The Division issued Order No. R-21575 based on its understandable reliance[1] on Colgate's misrepresentation that it fulfilled the primary statutory prerequisite mandated by 1978 NMSA §70-2-17(C) for being able to file a compulsory pooling application, *viz*., Colgate negotiated in good faith but was unable to reach a voluntary pooling agreement.

[1] The Division's reliance on Colgate's misrepresentation is understandable since it was presented as sworn testimony and the Division affords such testimony a presumption that the representations made under oath are true and accurate on which the Division should be able to rely. If an applicant is found to have violated this trust, proper consequences should ensue.

2. In its Motion to Invalidate, Cimarex argued that the Commission should not let the Division's compulsory pooling Order stand since Colgate's application was defective as filed, vitiating the basis for conducting a hearing in the first instance. Exercising its authority to invalidate Colgate's Division Order would allow the Commission to remand Cimarex's applications to the Division for hearing along with the re-submission of Colgate's applications; thus, Cimarex would be restored to its original position prior to the harm caused by Colgate, and Colgate would receive the benefit of a truly "new" hearing and "fresh" start by satisfying its statutory obligations at the Division-level, which Colgate should have done in the first instance.

3. In its Response, Colgate suggests that the Commission has already decided not to invalidate Order No. R-21575 since it granted Cimarex's Motion to Stay that Order and did not, *sua sponte*, invoke its inherent power to invalidate the Order. However, since Cimarex only requested a stay of the Order at that point in the proceedings and only recently requested that the Commission invalidate the Order, Colgate's argument in this regard lacks merit.

4. In addition, Colgate glosses over the fundamental and disturbing defect in its application that nullifies the legitimacy of Order No. R-21575. Colgate instead suggests that a *de novo* review will wash away its sins by allowing the Commission to try "anew" the issue of whether Colgate conducted good faith negotiations for a voluntary pooling agreement, ignoring the fact that the Commission has already offered its conclusions on Colgate's transgressions which, along with other conclusions, established grounds for denying Colgate's motion to dismiss the application for a hearing *de novo.* *See* Order No. R-21679, at §II.i. What remains is for Colgate to rectify and remediate the harm it caused at the Division-level, and this is best accomplished by Colgate's re-submitting its application to the Division where it can satisfy its statutory obligations.

5. Finally, Cimarex submits that it should receive the benefit of having its applications remanded to the Division for hearing, a benefit extended to other parties before the Commission, but remanded in a manner that is within the parameters of, and consistent with, the proper requirements of §70-2-13. In the present case, not only is there a proper procedure available for remanding Cimarex's cases by invalidating Colgate's Order, but as shown below, the invalidation of Colgate's Order is fully warranted and justified under the facts and findings. The decision to invalidate Colgate's Order would afford Cimarex the same benefit of remand to the Division allowed other parties, but under procedures that avoid risk of challenge or appeal.

II. The Commission's inherent power to invalidate and vacate Colgate's Order No. R-21575 was not diminished by its decision to grant Cimarex's application for a *de novo* hearing and should be exercised, and the Order invalidated, under its findings and conclusions.

6. In its Response, Colgate suggests that because the Commission has the inherent power to dismiss Order No. R-21575, but only issued a stay of that Order, that the Commission determined that Order R-21575 should not be dismissed. *See* Colgate's Response at p.1 (Section A, Introduction). The fact that the Commission did not, *sua sponte*, exercise its inherent authority to invalidate a Division order does not mean that it should never consider the issue and certainly does not bar a party from specifically requesting that the Commission actually make such a determination.

7. After the final motion hearing on April 15, 2021, the Commission denied Colgate's motion to dismiss Cimarex's application for a hearing *de novo*. *See* Order No. R-21679, §III. Since the only motion before the Commission at the time was Colgate's motion to dismiss the *de novo* application, the Commission rightly denied the motion in accordance with its findings and conclusions.

8. However, the findings and conclusions, once determined, raised other issues, which were not available for consideration by the Commission prior to the issuance of Order No. R-21679, and contrary to Colgate's assertions, the Commission's decision to deny Colgate's motion to dismiss does not strip the Commission of its authority to rule on subsequent issues that arise from the Order. Thus, Cimarex properly raised the remaining issues in its Motion to Invalidate, and the Commission clearly has the authority and jurisdiction to grant Cimarex's request.

9. Among the remaining issues is whether Colgate deserves to have its order maintained as valid and to qualify for the privilege of defending it in a *de novo* hearing. Given the gravity of Colgate's false representations before the Division, Cimarex urges that Colgate has not earned such privilege and should not be allowed to retain possession of an order that, under New Mexico case law, should be deemed invalid in light of the new evidence received by the Commission. *See Property Tax Department v. Molycorp, Inc.,* 1976-NMSC-072 ¶ 11, 89 N.M. 603 (holding that an administrative agency has inherent power to cancel and revoke an order that *is found to be issued* in conflict with the statutes governing and limiting the issuance thereof) (emphasis added).

10. The Commission discovered, upon the presentation of evidence not available to the Division, that the Division issued Order R-21575 in conflict with the governing statutes rendering the Order invalid. *See id.* at ¶ 12 (holding that if an agency issues an order in violation of its rules, such an order is "unauthorized and *ultra vires*.") If the validity of Colgate's Order is maintained, the harm to the judicial process caused by Colgate's false representations remains un-remediated and would infiltrate the remainder of the proceedings.

III. Colgate cannot invoke the nature of a *de novo* hearing to absolve it of its past misdeeds committed before the Division when new evidence highlighting such deeds is now of record before the Commission.

11. Colgate cleverly, but wrongly, urges that the history of Colgate's misdeeds before the Division has no consequence and should be erased and the case tried anew before the Commission, apparently based on its misplaced belief in the cleansing powers of a *de novo* hearing. *See* Colgate's Response, at its Conclusion, ¶ 2.

12. Colgate cites *Doe v. United States,* 821 F.2d 694 (D.C. Cir. 1987) in an attempt to show that the Commission should include Colgate's order in the *de novo* hearing and review it "from a fresh and independent standpoint." *See* Colgate's Response, Section B, at ¶ 3. However, the *Doe* court did not determine that a *de novo* hearing should automatically be a *tabula rasa* proceeding, but first looked to the nature of the *de novo* hearing -- the specific meaning of *de novo* -- contemplated by the statute. *See Doe v. United States*, 821 F.2d at 697. There are various forms of *de novo* hearings, some which consider findings of prior proceedings and others which do not. "To pare this controversy down to its core," asserted the *Doe* court, "we address first the question whether the term *'de novo'* in the [statute] means something less than what that expression generally signals." *Id*. Similarly, Cimarex respectfully submits that the Commission should review and make a determination of the meaning of *"de novo"* in §70-2-13.

13. Such review should consider the following factors: first, a *de novo* hearing before the Commission can, and often does, include the record of the Division, upon a party's request to include the Division's record in the Commission's appellate proceedings, and upon its admission, the Division's record becomes part of the "whole record" before the Commission. Second, review of the legislative history of §70-2-13 clearly shows that the original drafters

intended that the record of the Division be considered along with additional evidence, including new evidence, presented at the *de novo* hearing. *See* Commission Case No. 903, at p. 24.[2] Third, the new evidence in this case provided by Cimarex, showing that Colgate's Order is invalid under the criteria of *Molycorp,* is already of record before the Commission for proper determination of the Order's final status, and this evidence cannot be eradicated from the record by erasure pursuant to a hearing *de novo* before the Commission.[3]

14. Therefore, the Commission can, and should, conclude based on the facts and evidence in the existing record that Colgate's original Order is invalid. Such ruling would be proper and consistent with legal precedent; it would be a decision supported by review of the whole record; and it is necessary for remediating the harm caused by Colgate to the adjudicatory process and Cimarex's rights under the New Mexico Oil and Gas Act. Colgate's Response advocates for Colgate to enter the *de novo* hearing with black marks against it, the existing evidence that Colgate did not conduct good faith negotiations. *See* Colgate's Response, at its Conclusion, ¶ 2. The Commission should not proceed with a hearing under such clouds of

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[2] *See also* additional discussion in Commission Case No. 903, at p. 24-25, showing agreement among the drafters that the proper form of *de novo* hearing in §70-2-13 would consider the Division's record but allow for new evidence:
GOVERNOR SIMMS: I think Bill is interpretating it as really *de novo* and not *de novo* on the record [*de novo* on the record meaning limited just to the record of the Division].
MR. KITTS: I feel that way. Is that the way you feel about it?
MR. KELLAHIN: Yes. I think you ought to consider the record before the [Division] Examiner.
MR. KITTS: Then we are in agreement.

[3] *See Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.,* 2010-NMCA-065, a case relied heavily upon by Colgate, shows that the Commission should make its decision to invalidate Colgate's Division Order upon the whole record before it, which includes new evidence of Colgate's misrepresentations provided by Cimarex: "For purposes of reviewing administrative decisions, the substantial evidence rule is modified to include whole record review." *Mosaic,* 2010-NMCA-065, ¶ 28 (emphasis added). "Under whole record review, evidence is viewed in a light most favorable to upholding the agency's determination, but favorable evidence is not viewed in a vacuum that disregards contravening evidence." *Id.* (*citing Santa Fe Exploration Co. v. Oil Conservation Comm'n of N.M.,* 114 N.M. 103, 114, 835 P.2d 819, 830 (1992)). "The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Id.*

misconduct but should require Colgate to re-submit its application to the Division in order to clear its tarnished record.

15. Finally, by ruling the Order invalid, the Commission would allow the Division to fully review Cimarex's development plan, now docketed by the Division as Case Nos. 22018 and 22019, on equal footing with Colgate's development plan in a manner that adheres to procedural requirements regarding the proper forum for review. The importance of following the correct procedural path cannot be overstated. As the New Mexico Supreme Court has long recognized:

> The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty.

Uhden v. New Mexico Oil Conservation Com'n, 112 N.M. 528, 530-531, 817 P.2d 721, 723-724 (N.M. 1991).

IV. Conclusion:

For the foregoing reasons, Cimarex respectfully maintains its request that the Commission invalidate and vacate Division Order No. R-21575 on grounds that, as demonstrated by new evidence, Colgate failed to meet its statutory obligation under §70-2-17(C) and consequently caused harm to both the judicial process and Cimarex which warrants a proper response. Therefore, in light of the new evidence of record, and legal precedent established by *Molycorp*, Cimarex requests that Colgate's Order be ruled an invalid order.

Respectfully Submitted,

ABADIE & SCHILL, PC

/s/ Darin C. Savage

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the New Mexico Oil Conservation Commission and was served on counsel of record, or on the party of record, if no counsel was provided, via electronic mail on June 29, 2021:

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