

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

**IN THE MATTER OF PROPOSED
AMENDMENT TO THE COMMISSION'S
RULES TO ADDRESS CHEMICAL DISCLOSURE AND THE USE OF
PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES AND
IN OIL AND GAS EXTRACTION,
19.15.2, 19.15.7, 19.15.14, 19.15.16 AND 19.15.25 NMAC.**

WILDEARTH GUARDIANS,

PETITIONER.

CASE NO. 23580

**NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO NMOGA'S MOTION
TO STRIKE REBUTTAL TESTIMONY AND EXHIBITS OF KRISTEN HANSEN**

The New Mexico Oil & Gas Association (“NMOGA”) filed a Motion to Strike the Rebuttal Technical Testimony of Kristen Hansen, Ph.D. earlier today. In NMOGA’s Motion it makes two points:

First, NMOGA argues that the Hearing Officer has not yet ruled on NMOGA’s Motion in Limine to exclude Dr. Hansen’s Direct Testimony & Exhibits. Second, NMOGA argues that “pursuant to the June 3, 2024, Amended Procedural Order (“Procedural Order”), “technical rebuttal testimony may be permitted upon a finding by the Commission that the proffered testimony is offered solely for the purposes of rebuttal.” See Procedural Order, at pg. 2, ¶ 3. NMOGA’s Motion to Strike at 2.

New Energy Economy responds as follows:

1. Pursuant to 19.15.3.11 B (3) NMAC:

The commission may exclude any expert witnesses or technical exhibits not identified in or attached to the pre-hearing statement unless the testimony or exhibit is offered solely

for rebuttal or the person or entity offering the testimony or exhibits demonstrates good cause for omitting the witness or exhibit from its pre-hearing statement.

New Energy Economy's Rebuttal Testimony of Dr. Kristen Hansen is offered only to rebut the other parties' expert testimony and to rebut NMOGA's Motion in Limine on the ground that since Dr. Hansen is not an expert on the oil and gas industry, her testimony is irrelevant.

2. The Hearing Officer's Amended Procedural Order of 6/3/2024 at pg. 2, ¶ 3, states as follows regarding rebuttal testimony: "d) Pursuant to Rule 19.15.3.11(B)(3), technical rebuttal testimony may be permitted upon a finding by the Commission that the proffered testimony is offered solely for purposes of rebuttal."

3. New Energy Economy has properly proffered the Rebuttal Testimony of Dr. Kristen Hansen because it is evidence "which tends to explain, counteract, repel, or disprove evidence submitted by another party or by staff." See, 1.2.2.36 N (1) NMAC. Dr. Hansen is asked and she answers questions in her rebuttal testimony specifically about whether she agrees with the definition of PFAS offered by the Oil Conservation Division staff and NMOGA's two witnesses; Dr. Hansen explains and counteracts, with citation and evidence, why she believes those definitions are too narrow and insufficient to protect public health and the environment. Dr. Hansen also explains why she believes that she is a proper technical expert witness to opine about PFAS, even though she is not an expert about oil and gas operations. She is rebutting NMOGA's motion to exclude her testimony.

4. New Energy Economy offered the Rebuttal Testimony of Dr. Kristen Hansen in advance of the hearing so the Commission pursuant to its Rule and the Amended Procedural Order of 6/3/2024 has sufficient time to review the testimony and determine if it should be allowed.

5. Colorado law is instructive here, as it echoes its own administrative law definition of rebuttal evidence in a sister agency.

Consistent with these general discovery principles, we determine the proper scope of rebuttal expert disclosures, in part, by considering the scope of admissible rebuttal evidence. See *Williams v. Dist. Court*, 866 P.2d 908, 910-11 (Colo. 1993) (evaluating a Colorado Rule of Evidence to resolve a discovery dispute concerning the proper scope of interrogatories). Additionally, given the similarity between the federal and Colorado discovery rules governing expert disclosures, compare C.R.C.P. 26(a)(2)(C)(III), with Fed. R. Civ. P. 26(a)(2)(D)(ii), federal case law addressing expert rebuttal disclosures also informs our analysis. See *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 234-35 (Colo. 2002) (considering federal case law to interpret Rule 26).

In Colorado, rebuttal evidence "may take a variety of forms, including any competent evidence which explains, refutes, counteracts, or disproves the evidence put on by the other party, even if the rebuttal evidence also tends to support the party's case-in-chief." *People v. Welsh*, 80 P.3d 296, 304 (Colo. 2003) (citation and internal quotation marks omitted). The party offering rebuttal evidence "must demonstrate that the evidence is relevant to rebut a specific claim, theory, witness or other evidence of the adverse party." *Id.* Thus, Colorado evidentiary rules afford a party presenting rebuttal evidence significant leeway so long as the evidence rebuts some portion of an opposing party's claim. See *id.*

Warden v. Exempla, Inc., 2012 CO 74, 21-22.

6. Pursuant to 19.15.3.12 B (2) NMAC the standard for testimony is: "The commission *shall* admit relevant evidence,¹ unless the commission determines that the evidence is incompetent or unduly repetitious." (Emphasis supplied.) Dr. Hansen's Rebuttal Testimony is relevant evidence and will aid the Commission in its decision-making (just like her Direct Testimony).

¹ See *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135 ("It is widely accepted that when construing statutes, 'shall' indicates that the provision is mandatory[.]")

7. New Energy Economy properly filed the Rebuttal Testimony of Dr. Kristen Hansen in advance of hearing and the pre hearing conference to give parties and the Commission ample ability to review her testimony and make a determination as to its admissibility.

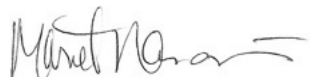
8. If NMOGA is able to demonstrate that Dr. Hansen's rebuttal testimony in any way introduces new facts or opinion, unrelated to NMOGA's testimony, NEE would have no objection to NMOGA filing a motion to supplement the record, provided that NMOGA can explain how anything Dr. Hansen has included in her Rebuttal comes as a legitimate surprise to NMOGA.

9. This proceeding concerns a matter of great public importance, including long-term public health, the prospect of long-term environmental degradation and many related matters. NEE respectfully submits that the Commission should consider all available, relevant evidence that will assist it in reaching its decision, NEE further respectfully suggests that Dr. Hansen's testimony is just such evidence. Rather than try to exclude it, NMOGA should bring credible, science-based evidence to rebut it, if it is able to.

WHEREFORE, because Dr. Hansen's testimony is proper rebuttal testimony it should be allowed and NMOGA's Motion to Strike be denied.

Respectfully submitted this 4th day of November 2024,

NEW ENERGY ECONOMY



Mariel Nanasi, Esq.
300 East Marcy St.
Santa Fe, NM 87501
(505) 469-4060
mariel@seedsbeneaththesnow.com

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

IN THE MATTER OF PROPOSED
AMENDMENT TO THE COMMISSION'S
RULES TO ADDRESS CHEMICAL DISCLOSURE AND
THE USE OF PERFLUOROALKYL AND
POLYFLUOROALKYL SUBSTANCES AND
IN OIL AND GAS EXTRACTION,
19.15.2, 19.15.7, 19.15.14, 19.15.16 AND 19.15.25 NMAC.

WILDEARTH GUARDIANS,

Petitioner.

CASE NO. 23580

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2024, a copy of the foregoing:

**NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO NMOGA'S MOTION
TO STRIKE REBUTTAL TESTIMONY AND EXHIBITS OF KRISTEN HANSEN**

was emailed to the persons listed below:

NM Oil Conservation Commission

Hearings:

occ.hearings@state.nm.us

Oil Conservation Commission Clerk Sheila

Apodaca:

sheila.apodaca@emnrd.nm.gov

Daniel Rubin

Assistant Attorney General

NM Dept. of Justice

408 Galisteo St.

Santa Fe, NM 87501

(505) 537-4477

drubin@nmag.gov

*Attorney for New Mexico Oil Conservation
Commission*

Jesse Tremaine

Chris Moander

Assistant General Counsel

New Mexico Energy Minerals and

Natural Resources Department

1220 S. St. Francis Drive

Santa Fe, NM 87505

jessek.tremaine@emnrd.nm.gov

chris.moander@emnrd.nm.gov

*Attorneys for New Mexico Oil Conservation
Division*

Michael H. Feldewert
Adam G. Rankin
Julia Broggi
Paula M. Vance
Holland & Hart, LLP
Post Office Box 2208
Santa Fe, New Mexico 87504
(505) 988-4421
mfeldewert@hollandhart.com
agrarkin@hollandhart.com
jbroggi@hollandhart.com
pmvance@hollandhart.com
camulcahy@hollandhart.com
Attorneys for NMOGA

Deana M. Bennett
Chandler R. Farnworth
Jordan L. Kessler
Modrall, Sperling, Roehl, Harris & Sisk,
P.A.
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
(505) 848-1800
Deana.bennett@modrall.com
cfarnworth@modrall.com
Jordan_Kessler@EOGResources.com
Attorneys for EOG Resources, Inc.

Tim Davis
Samantha Ruscavage_Barz
WildEarth Guardians
301 N. Guadalupe St., Ste. 201
Santa Fe, New Mexico 87501
(205) 913-6425
tdavis@wildearthguardians.org
sruscavagebarz@wildearthguardians.org
Attorney for WildEarth Guardians

Nicholas Maxwell
P.O. Box 1064
Hobbs, New Mexico 88241
(575) 441-3560
inspector@sunshineaudit.com

Respectfully,

/s/ Mariel Nanasi

Mariel Nanasi, Esq.

Attorney for New Energy Economy

300 East Marcy St.

Santa Fe, NM 87501

(505) 469-4060

mariel@seedsbeneaththesnow.com