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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION 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
Order No. R-21575
Commission Order Nos. 21679, R-21679-A & R-21679-B

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

For its Response to Cimarex Energy Co.'s Motion to Invalidate and Vacate Colgate Operating, LLC's Order No. R-21575, Colgate Operating, LLC ("Colgate") states:

A. Introduction.

Cimarex Energy Co.'s ("Cimarex") motion is a rehash of issues raised in its prior pleadings before the Commission. In denying Colgate's motion to dismiss Cimarex's application for de novo hearing, the Commission granted Cimarex a de novo hearing. In its Order No. R-21679-A the Commission granted Cimarex's motion to stay the Division's Order R-21575. The Commission did not go so far as to dismiss the Order, which by its inherent power may have done so. Inherent in Order R-21679-A is that Order R-21575 remains in effect until after the de novo hearing is heard by the Commission, either affirming Order R-21575 or adopting a new order.

B. NMSA 1978, § 78-2-13 is clear that a de novo hearing is a new proceeding.

Colgate has cited Section 70-2-13 numerous times during these proceeding and does so again to emphasis its clear meaning. In this case the Commission found that Cimarex was an adversely affected party and had timely filed an entry of appearance before Order R-21575 was entered. Section 70-2-13 states in part:

> …When any matter or proceeding is referred to an examiner and a decision is rendered thereon, 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. (emphasis added).

Clearly, the Commission will start from the beginning as though the case (i.e. "matter') had not been heard before the Division. The language of the statute does not state that the underlying application will be dismissed.

Black's Law Dictionary, 738 (8th ed. 2004) defines "hearing de novo" as "[a] new hearing of a matter, conducted as if the original hearing had not taken place." This definition does not say that an original filing (in this case Colgate's application for compulsory pooling) will be nullified or dismissed.

In Doe v. United States, 821 F.2d 694, 697-98 (D.C. Cir. 1987) the Court explained "[d]e novo means here, as it ordinarily does, a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion." By the same token, the Commission will review this matter from a fresh and independent standpoint.

The New Mexico Supreme Court in Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031 ¶ 20, 89 NM 307, 312, 551 P.2d 1354, 1359, citing Southern Union Gas Company v. Taylor, 82 N.M. 670, 486, defined a de novo hearing as [a] hearing 'de novo' means a hearing anew, or all over again.

C. *Implicit in a de novo hearing is that Cimarex's competing applications will be heard by the Commission.*

Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc., 148 N.M.516, 524, 238 P.3d 885, 893, 2010-NMCA-065 ¶ 22, a dispute between oil and gas interests and potash mining interests before the Oil Conservation Commission, held that an order of the Oil Conservation Division had "no precedential effect on the OCC" and that a staying order issued by the OCD allowed review by the OCC in a de novo hearing. It further noted that "[p]ursuant to Section 70-2-3, Mosaic timely applied to have the matters reheard de novo before the OCC, and the APDs were consolidated and heard together, at which time, all parties were permitted to call witnesses, present exhibits, and cross-examine witnesses." In this case the parties will be permitted to do the same. Id. at 148 N.M.521, 238 P.3d 890, 2010-NMCA-065 ¶ 8. Thus, it is unnecessary for the Commission to determine whether the Division's order has any preclusive or precedential effect.

Colgate does not have a quarrel with the Commission considering the Cimarex competing applications in the de novo hearing, except to the extent as that expressed in its Motion to Dismiss Cimarex Applications to the effect that the competing applications do not meet Potash Area requirements of the Bureau of Land Management and Oil Conservation Commission. For different reasons, Colgate asserts that the requirements are pre-conditions to Cimarex's competing applications. The competing applications are within the meaning of "matter" under Section 70-2-13, but subject to challenge for failure of the pre-conditions. The Colgate motion to dismiss the Cimarex applications presupposes that the competing applications will be heard in conjunction with the original Colgate applications.

Colgate agrees that it is unnecessary to remand the case back to the Division level.

Conclusion.

The only conclusion that can be reached is that the applications of Colgate and the competing Cimarex applications for compulsory pooling will be heard de novo subject to the pending motions.

Dismissal or invalidation of Order R-21575 undermines Section 70-2-13 because the Order is within the scope of "matter." Whether or not Colgate did not conduct good faith negotiations has to be tried anew before the Commission. By staying Order R-21575, the Commission already ruled on whether to stay, invalidate or dismiss the Order.

Accordingly, Cimarex's motion should be denied.

Respectfully submitted,

PADILLA LAW FIRM, P.A.

/s/ Ernest L. Padilla
Ernest L. Padilla
Attorney for Colgate Operating, LLC
PO Box 2523
Santa Fe, New Mexico 87504
505-988-7577
padillalawnm@outlook.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served on counsel of record by electronic mail on June 16, 2021:

Darin C. Savage	darin@abadieschill.com
William E. Zimsky	bill@abadieschill.com
Andrew D. Schill	andrew@abadieschill.com
Brent McDonald	Brent.mcdonald@prosperitybankusa.com

/s/ Ernest L. Padilla
Ernest L. Padilla