

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

**APPLICATION OF GOODNIGHT
MIDSTREAM PERMIAN, LLC FOR APPROVAL
OF A SALTWATER DISPOSAL WELL, LEA COUNTY,
NEW MEXICO**

CASE NO. 24123

**APPLICATIONS OF GOODNIGHT MIDSTREAM
PERMIAN, LLC FOR APPROVAL OF
SALTWATER DISPOSAL WELLS
LEA COUNTY, NEW MEXICO**

CASE NOS. 23614-23617

**APPLICATION OF GOODNIGHT MIDSTREAM
PERMIAN LLC TO AMEND ORDER NO. R-22026/SWD-2403
TO INCREASE THE APPROVED INJECTION RATE
IN ITS ANDRE DAWSON SWD #1,
LEA COUNTY, NEW MEXICO.**

CASE NO. 23775

**APPLICATIONS OF EMPIRE NEW MEXICO LLC
TO REVOKE INJECTION AUTHORITY,
LEA COUNTY, NEW MEXICO**

CASE NOS. 24018-24020, 24025

**EMPIRE NEW MEXICO LLC'S RESPONSE TO GOODNIGHT MIDSTREAM'S
MOTION TO EXCLUDE EMPIRE'S REBUTTAL WITNESS STATEMENTS**

Empire New Mexico LLC ("Empire") hereby submits its response to Goodnight Midstream Permian LLC's ("Goodnight") Motion to Exclude Improper Rebuttal Statements and Exhibits of Ryan M. Bailey & Stanley Scott Birkhead ("Motion to Exclude") dated February 13, 2025. For the reasons explained below, the Motion should be denied.

ARGUMENT

Goodnight argues that the rebuttal testimony of Empire witnesses Mr. Bailey and Mr. Birkhead should be excluded for four reasons: The opinions of Empire's rebuttal witnesses (1) offer opinions that should have been presented in Empire's direct case, Motion at 1, 6-7; (2) include "completely new analyses" that conflict with the direct testimony of Empire direct witnesses, Mr. McShane and Mr. Dillewyn, *id.* at 8-9; (3) are untimely, *id.* at 9-10; and (4) are prejudicial to

Goodnight because it has no opportunity to respond. *Id.* at 11-12. None of these arguments have merit.

1. The Motion Should Be Denied for the Same Reasons that Goodnight's Motion to Strike the Same Testimony Was Denied.

For the most part, Goodnight makes the same arguments previously raised in its Motion to Strike Empire's Rebuttal Disclosures ("Motion to Strike"). *See* Motion at 2, n.1 ("Goodnight fully incorporates its arguments and authority in that Motion [to Strike] and Reply as if fully referenced here."). One day after the filing of the instant Motion, the Commission denied Goodnight's Motion to Strike. *See* Order Denying Goodnight's Motion to Strike Empire's Rebuttal Disclosure (issued Feb. 14, 2025). The instant Motion should be denied for the same reasons. *See* Empire's Response to Goodnight's Motion to Strike Empire's Rebuttal Witness Disclosure (Jan. 22, 2024). Goodnight's attempts to reframe its arguments in the instant Motion likewise fail, as explained below.

2. The Subject Analyses Directly Rebut Specific Testimony of Goodnight's Witnesses and Do Not Conflict with Empire's Direct Testimony

As previously explained in Empire's Response to the Motion to Strike, the testimony of Mr. Bailey is offered to rebut the direct testimony of Goodnight witness Preston McGuire, and the testimony of Mr. Birkhead is offered to rebut the testimony of Dr. Jim Davidson. *Id.* at 2-3. As is readily evident in the filed rebuttal testimony of Mr. Bailey and Mr. Birkhead, each opinion is offered in direct response to specific testimony by Goodnight witnesses Mr. McGuire and Dr. Davidson, respectively. *See generally* Ex. K (filed Feb. 10, 2025), attached as Ex. C to Motion; Ex. L (filed Feb. 10, 2025), attached as Ex. D to Motion (prefacing each opinion with an opinion expressed by Goodnight's witnesses). This cannot be disputed.

Goodnight argues, however, that the “analyses of Mr. Bailey and Mr. Birkhead are apparently intended to supplant Empire’s previous direct testimony and indeed, will be in conflict with, Empire’s recently filed revised testimony.” Motion at 8. This is nonsense. Empire has every intention of presenting all of its direct testimony to the Commission at hearing and will show that the rebuttal evidence is not conflicting, but rather, in accord with the direct testimony of its witnesses and the science and practice of geology and petrophysics.

Notably, Goodnight provides only one example of “conflicting” testimony. Goodnight argues that a table, apparently created by Goodnight for the Motion, proves that the analyses by Mr. Bailey and Mr. Birkhead “conflict with and are substantially contradictory to Empire’s revised direct testimony.” *Id.* at 9. The difference between the oil saturation analyses by Empire’s direct witnesses and its rebuttal witnesses is that the rebuttal testimony addresses oil saturations as a range, while the direct testimony employed a methodology that produced a specific number. The analysis that produced a range was necessary to rebut the testimony of Goodnight’s direct witnesses and is therefore proper rebuttal testimony. Goodnight’s summary assertions to the contrary should be rejected.

3. Admission of the Rebuttal Testimony Is Favored by Applicable Civil and Administrative Law

Rule 19.15.4.17(A) NMAC explicitly states that “rules of evidence applicable in a trial before a court without a jury shall not control.” This is particularly true when it comes to a question of excluding evidence. *See Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 21, 137 N.M. 161 (recognizing that “[t]he rules of evidence are inapplicable or relaxed” in administrative proceedings and therefore “certain otherwise objectionable evidence may be admitted”). Given that administrative agencies may consider evidence that would not be admissible under the rules of evidence, doubts regarding admissibility should be resolved in favor

of admission. The formal rules of evidence and procedure do not apply in an administrative hearing, and agencies are given broad discretion in conducting their hearings. *See, e.g., Gallagher v. Nat'l Transp. Safety Bd.*, 953 F.2d 1214, 1218 (10th Cir.1992); *cf. In re Louisiana Energy Servs., LP*, No. 28,663, 2010 WL 3969642 at *7 (Jan. 11, 2010) (unpublished op.) (stating that the Water Quality Control Commission was able to give due consideration to the appellant's position because the hearing officer allowed the appellant's expert "to testify at length, accepted [the appellant's] exhibits as part of the record, . . . and addressed the issues raised by [the appellant] at the hearing").

Moreover, the Commission's procedural rules favor inclusion of Empire's rebuttal witnesses as relevant rebuttal evidence. Subsection A of 19.15.4.17 NMAC provides, "The commission or division examiner *may admit relevant evidence*, unless it is immaterial, repetitious or otherwise unreliable." (emphasis added). Though not applicable, the federal and New Mexico Administrative Procedures Acts provide useful guidance. Notably, rules of evidence are inapplicable or relaxed under both acts, which allow certain relevant but otherwise objectionable evidence to be admitted. *See Gallagher*, 953 F.2d at 1218; *see also* NMSA 1978, § 12–8–11(A).

Commission rules do not define "relevant" evidence. Rule of Evidence 11-401 defines relevant evidence as evidence that tends to make a fact in issue more or less probable. In turn, Rule 11-402 NMRA provides that all relevant evidence is generally admissible unless provided otherwise by a constitution, statute, or rules. Otherwise, relevant evidence should be excluded only "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 11-403 NMRA. Under Rule 11-403, a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice." *Williams v. BNSF Ry. Co.*, 2015-NMCA-109, ¶ 25, 359 P.3d 158.

Notably, Goodnight does not address the probative value of the rebuttal opinions it seeks to exclude. *See generally* Motion. It should therefore be assumed that such opinions are of probative value. As discussed below, Goodnight fails to establish that the probative value of the evidence it seeks to exclude is substantially outweighed by a danger of unfair prejudice. *Supra* at 6-7. Consequently, the Commission should follow longstanding New Mexico law that leaves credibility determinations and weighing of the evidence to the trier of fact. *Sanchez v. Homestake Mining Co.*, 1985-NMCA-022, ¶ 102 N.M. 473 (“It is for the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistent statements of the witnesses, and determine where the truth lies.”), *superseded by statute on other grounds as stated in Tallman v. ABF (Arkansas Best Freight)*, 1988-NMCA-091, 108 N.M. 124; *see Lee v. Martinez*, 2004–NMSC–027, ¶ 48, 96 P.3d 291 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” (internal quotations and citation omitted)).

When it comes to technical or scientific evidence, the presumption of admissibility is even greater. The general rule is that any doubt regarding admissibility of expert testimony should be resolved in favor of admissions. *See Lee*, 2004-NMSC-027, ¶ 16 (“Given the capabilities of jurors and the liberal thrust of the rules of evidence, we believe any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion.”); *accord Conception & Rosario Acosta v. Shell W. Expl. & Prod., Inc.*, 2016-NMSC-012, ¶ 28, 370 P.3d 761; *Loper v. JMAR*, 2013-NMCA-098, ¶ 18, 311 P.3d 1184.

Goodnight argues again, just as in its denied Motion to Strike Empire’s Rebuttal Disclosures, that Empire’s rebuttal witnesses are outside the scope of permissible rebuttal

testimony. Motion to Exclude at 6. Goodnight once again errs by conflating the Rules of Civil Procedure with the procedures that govern the proceedings before the Commission.

Goodnight relies on the same cases cited in its Motion to Strike. As Empire previously explained, none of these cases provide support for Goodnight's position because they are inapposite. *See* Response to Motion to Strike at 5-6. *State v. Manus* is a criminal case in which the court considers whether one party was improperly prejudiced by the other's failure to disclose a rebuttal witness. 1979-NMSC-035, ¶¶ 39-40, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 653 P.2d 162. In *Wirth v. Commercial Resources, Inc.*, the court affirmed the exclusion of a witness that was not disclosed in a pretrial order. 1981-NMCA-057, ¶20, 630 P.2d 292; *see Martinez v. Rio Rancho Estates, Inc.*, 1979-NMCA-086, ¶ 3, 598 P.2d 649 (considering whether a rebuttal witness should be allowed to testify when the witness had not previously been disclosed). In contrast here, both Mr. Bailey and Mr. Birkhead were disclosed almost two months before the evidentiary hearing, in accordance with the parties' agreement and the Commission's Pre-Hearing Order.

4. Goodnight Is Not Unfairly Prejudiced

Goodnight argues that it is prejudiced because it "has no opportunity to depose" the rebuttal witnesses, "supplement its expert reports or otherwise file a sur-rebuttal." Motion at 11-12. Here again, Goodnight relies on inapposite case law that provides no guidance under the circumstances. *See supra* (discussing *Manus*, 1979-NMSC-035); *see also Campanile v. Daimler N. Am. Corp.*, Case No. 3:18-cv-01716-YY, 2023 WL 11970430 at *1 (Aug. 16, 2023) (concluding that the report was properly characterized as rebuttal, and the witness as a rebuttal expert). Indeed, Goodnight's argument suggests an endless loop of discovery. As explained above, in Empire's response to Goodnight's previously filed Motion to Strike, and as starkly evident in their submissions,

Empire's rebuttal witnesses are testifying directly in response to opinions presented by Goodnight's direct witnesses. *See* Exs. C & D to Motion; Response to Motion to Strike at 2-3; *supra* at 2-3. The applicable rules of evidence and rights of parties in administrative hearings are not analogous to the laws or issues presented in the criminal cases and out of state case law presented by Goodnight in its Motion. *See* Motion at 11-12. Despite Goodnight's insistence that it has a right to depose these rebuttal witnesses, there is no absolute constitutional right to pre-trial discovery in administrative hearings. *See, e.g., Archuleta*, 2005-NMSC-006, ¶ 31. Goodnight will still have the opportunity to cross-examine these rebuttal witnesses, and the Commission as a fact-finder with its own specialized expertise will have the opportunity to ask questions and give the evidence of the witnesses its due weight. *See* 19.15.4.17(A) NMAC ("The commission or division examiner may admit relevant evidence, unless it is immaterial, repetitious or otherwise unreliable"). Goodnight fails to establish that the probative value of Mr. Bailey and Mr. Birkhead's opinions is substantially outweighed by a danger of unfair prejudice to Goodnight. Its general assertions are insufficient to demonstrate a prejudice that would warrant exclusion of the subject testimony. *See Nat'l Educ. Ass'n of N.M. v. Santa Fe Pub. Sch.*, 2016-NMCA-009, ¶ 15, 365 P.3d 1 ("General assertions of prejudice are insufficient to demonstrate prejudice."); *accord, In re Castellano*, 1995-NMSC-007, ¶ 15, 889 P.2d 175 (holding that an assertion of prejudice is not a showing of prejudice).

Assuming, for purposes of argument only, that some part of Goodnight's prejudice claim had merit, such prejudice would be minor and could not overcome the benefit of allowing Empire to present its relevant evidence to the Commission for consideration. *See Dente v. State Tax'n & Rev. Dep't, Motor Vehicle Div.*, 1997-NMCA-099, ¶ 8, 946 P.2d 1104 (concluding that petitioner's due process right was not violated when he alleged no specific evidence of actual prejudice from

the lack of an opportunity to take depositions prior to an administrative hearing), *overruled on other grounds by State Tax'n & Rev. Dep't, Motor Vehicle Div. v. Bargas*, 2000-NMCA-103, 14 P.3d 538. Goodnight fails to provide sufficient evidence to meet its burden of showing that the inclusion of Mr. Bailey and Mr. Birkhead's entire testimony will be unfairly prejudicial. The Commission's ability to draw inferences and weigh evidence is unique from a jury or judge. In considering expert testimony, special weight and credence is given to the experience, technical competence, and specialized knowledge of the Commission, which supports admission of the evidence to allow the Commission the opportunity to weighing the evidence for itself as the ultimate trier of fact. *See Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 1975-NMSC-006, ¶ 20, 532 P.2d 582.

CONCLUSION

New Mexico law favors the inclusion, not exclusion, of relevant evidence. Empire's rebuttal witnesses present testimony that directly rebuts the opinions of Goodnight's direct witnesses. Goodnight fails to present sufficient evidence to demonstrate that the opinions of Empire's rebuttal witnesses will cause unfair prejudice. For the reasons stated above, the Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following counsel of record by electronic mail on February 18, 2025.

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