

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

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

CASE NO. 13,482

IN THE MATTER OF THE PROPOSAL OF )  
THE OIL CONSERVATION COMMISSION, )  
ON ITS OWN MOTION, TO AMEND OIL )  
CONSERVATION DIVISION RULES 1201, )  
1203 THROUGH 1205, 1207, 1208, )  
1211, 1212, 1214 AND 1220 )

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN  
JAMI BAILEY, COMMISSIONER  
FRANK T. CHAVEZ, COMMISSIONER

2005 SEP 1 AM 7 36

August 18th, 2005

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, August 18th, 2005, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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DONALD A. NEEPER

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\* \* \*

(Continued...)

**ALSO PRESENT:**

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Commission Secretary

**ALAN ALEXANDER**  
Senior Land Advisor  
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**JOHN BARTLIT, PhD**  
New Mexico Citizens for Clean Air and Water

**JOHN BEMIS**  
Assistant Counsel  
New Mexico State Land Office

**THOMAS J. NANCE**  
Executive Director  
Independent Petroleum Association of New Mexico

**DONALD A. NEEPER, PhD**  
New Mexico Citizens for Clean Air and Water

\* \* \*

1           WHEREUPON, the following proceedings were had at  
2 9:22 a.m.:

3           CHAIRMAN FESMIRE: The next cause before the  
4 Commission is Case Number 13,482. It was continued from  
5 the July 7th, 2005, Commission meeting. It's in the matter  
6 of the proposal of the Oil Conservation Commission, on its  
7 own motion, to amend Oil Conservation Division Rules 1201,  
8 1203 through 1205, 1207, 1208, 1211, 1212, 1214 and 1220.

9           At this time we'll ask the attorneys for the  
10 Division to present their case, please.

11           MS. BADA: I'm Cheryl Bada with the Energy,  
12 Minerals and Natural Resources Department, and I'm here on  
13 behalf of the Oil Conservation Division this morning.

14           CHAIRMAN FESMIRE: And do you have any witnesses?

15           MS. BADA: I have one witness, and that's David  
16 Brooks.

17           CHAIRMAN FESMIRE: Mr. Brooks, would you stand to  
18 be sworn, please.

19           (Thereupon, the witness was sworn.)

20           CHAIRMAN FESMIRE: Ms. Bada, you may proceed.

21           MS. BADA: Okay, I have a couple of preliminary  
22 comments before David begins his testimony. I've been  
23 working with Sally Martinez trying to get this Rule in  
24 shape for State Records and Archives, and they had a couple  
25 of concerns.

1           One is that unless the Commission has a reason to  
2 want to use Sections 8 through 1201, they recommended just  
3 beginning 1201 as Section 8 and then renumbering the others  
4 consecutively. So if you don't have, you know, some plan  
5 for the other numbers in the future, you may want to  
6 consider that.

7           The other is, there's several cross-references  
8 that we'll have to put the full NMAC cite in, and that's in  
9 Section 1208.A and 1224. And right now, they just refer to  
10 either Subsection B or Subsection A. And so I just want to  
11 point that out to you.

12           And also in 1208.B, the reference to Subparagraph  
13 1 should be actually Paragraph 1.

14           Then also, I think there's an error in one of the  
15 sections, and so I want to point that out so they can be  
16 corrected. In Section 1211, Paragraph B, Subparagraph (2),  
17 in the first sentence where it says statement of intent, I  
18 believe that should be statement of extent.

19           And then also in 1203 it refers to the Division  
20 Director extending the timeline for comments, and given  
21 that the Commission is doing -- hearing the Rules, that may  
22 be better if it actually refers to the Commission Chairman.  
23 So that's just one suggestion.

24           CHAIRMAN FESMIRE: Okay.

25           MS. BADA: And then the final suggestion is, for

1 consistency, in some place -- normally we refer to Division  
2 Director, but there's a few places in the Rule that just  
3 refer to Director, and you may want to make those  
4 consistent. And that's in 1214.A, 1217, 1220 and 1224.C.

5 And at this time I'll turn it over to David, and  
6 we'll start his testimony.

7 CHAIRMAN FESMIRE: Okay.

8 DAVID K. BROOKS,

9 the witness herein, after having been first duly sworn upon  
10 his oath, was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BADA:

13 Q. David, could you explain how the rulemaking was  
14 initiated?

15 A. This rulemaking was initiated by -- formally  
16 initiated by an order of the Commission initiating  
17 rulemaking. Do you want me to go into the background of --

18 Q. Just briefly.

19 A. -- how it originated?

20 Okay. In, I think, November of 2004, the  
21 Commission appointed a committee consisting of attorneys,  
22 primarily, including the Commission secretary, myself, Gail  
23 MacQuesten, who's another attorney for the Division, Mr.  
24 Carr who is here present, and Mr. Kellahin who was here  
25 present but is not anymore. And the committee was directed

1 to study the existing procedural Rules of the Division and  
2 make recommendations for the -- for amendments thereto.

3 In the early part of 2005, the committee made its  
4 report, and the Commission requested that the committee  
5 consider some additional matters. The principal matters  
6 that the committee had not considered that the Commission  
7 recommended or requested the committee to consider was, who  
8 can represent parties before the Commission and who can be  
9 parties before the Commission?

10 The committee submitted some recommendations.  
11 The -- on those subjects, in addition to its previous  
12 recommendations.

13 Then the Commission entered an order instituting  
14 rulemaking to adopt most of the recommendations of the  
15 committee. The Commission was notified of some objections  
16 on behalf of various stakeholder groups, and as a result of  
17 that, the Commission on May the 2nd of this year directed  
18 me to conduct a public forum to give the Commission the  
19 benefit of public input on how the Rules should be amended,  
20 procedural Rules should be amended.

21 A number of suggestions emanated from that public  
22 meeting, and several more drafts were developed. The final  
23 draft of the Commission's proposal was published on July --  
24 on June the 8th of 2005. After that, it was set for  
25 hearing in July, and we received formal public comment.

1 Due to the failure of the newspaper to publish the notice  
2 of the July hearing within the time frames required by our  
3 Rules, it was necessary to continue that hearing until this  
4 meeting.

5 Q. Have you reviewed the file to see if the required  
6 notice has been given?

7 A. I have.

8 Q. And was it?

9 A. Yes, the notice was published in *The Albuquerque*  
10 *Journal* on July the 28th of 2005. Notice is required to be  
11 published 20 days prior to the meeting. If you add 20 to  
12 28, that would be that we would be able to go ahead with  
13 this on July the 48th --

14 (Laughter)

15 THE WITNESS: -- July the 48th is another name  
16 for August the 17th, which was yesterday.

17 Also, the draft of the proposed Rule was posted  
18 on the website of the New Mexico -- of the Oil Conservation  
19 Division on June the 8th, 2005, in anticipation of the July  
20 meeting. An announcement of the postponement of the July  
21 meeting was published on the website, I believe, the day  
22 prior to the day that the July meeting would have occurred,  
23 so that was well in advance of the 20-day deadline, which  
24 would have been July 29th.

25 In addition, a notice as required by statute of

1 proposed rulemaking was published in *The New Mexico*  
2 *Register* on May 31st. That notice -- of 2005. That notice  
3 stated that the hearing would be on July the 7th of 2005.  
4 Under our existing Rules, however, a hearing may be  
5 continued without the publication of new notice, and this  
6 hearing was duly continued on July the 7th until the August  
7 18th meeting.

8           Furthermore, on July the 28th, which was 21 days  
9 prior to this meeting, notice of this meeting was sent by  
10 e-mail to the list of persons contained on this list, this  
11 two-page list, which is the list that the Division has of  
12 people who have requested to receive notices of potential  
13 action by the Commission.

14           So in my opinion all of the notice requirements  
15 have been complied with.

16           MS. BADA: Thank you, David.

17           Would the Commission make the affidavits and the  
18 e-mail notification part of the record? In addition, I'd  
19 also like to ask that all the written comments that the  
20 Commission has received be made part of the record.

21           CHAIRMAN FESMIRE: Okay. Commission secretary,  
22 we have received three written comments on the --

23           MS. DAVIDSON: I believe it was four, was what we  
24 had yesterday.

25           CHAIRMAN FESMIRE: Four? Okay. Do we need to

1 number those as Exhibits 1 through 4 to the State -- to  
2 the --

3 MS. LEACH: You can, or we can just include it in  
4 the record.

5 CHAIRMAN FESMIRE: Okay, we'll include those four  
6 notices as part of -- those four comments as part of the  
7 record. The affidavits of notice will also be included as  
8 part of the record today.

9 MS. BADA: Okay, thank you. At this time I'd  
10 like to have David begin reviewing the substantive changes  
11 that have been made to the Rule. Basically what has been  
12 filed as a repeal and replace that would replace -- would  
13 repeal the old Rule and then replace it with this Rule.  
14 Much of the substance is the same, and so we won't go  
15 through that section by section. We'll just go through  
16 what is actually changed, and that's highlighted on the  
17 screen.

18 The green shows materials that are new to the  
19 Rule. And there's also yellow highlighting, and that shows  
20 material that is in current practice but not in the Rule.

21 CHAIRMAN FESMIRE: Okay. Ms. Bada, can we go  
22 through the Division's proposals --

23 MS. BADA: Yes.

24 CHAIRMAN FESMIRE: -- and then come back and  
25 address any sections that are of concern to members of the

1 audience after we've gone through the complete proposal?

2 Is there any objection to that?

3 COMMISSIONER BAILEY: It would be better to  
4 have --

5 CHAIRMAN FESMIRE: Do it as we go.

6 COMMISSIONER BAILEY: -- discussion as we go, and  
7 that way we can -- it up as we go.

8 CHAIRMAN FESMIRE: Okay, then let's do it that  
9 way --

10 MS. BADA: Okay.

11 CHAIRMAN FESMIRE: -- let's just go through the  
12 whole proposal.

13 MS. BADA: Okay.

14 Q. (By Ms. Bada) David, could you begin with a -- I  
15 guess if anybody has any comments on 1 through 6, but if  
16 not, we'll start with 7.

17 A. Okay. Before I begin discussing the revisions, I  
18 would like to say something about the numbering of the  
19 Rules that Ms. Bada referred to.

20 I understand the desire of the Records and  
21 Archives Department to conform -- to require us to conform  
22 to their numbering system. We have long resisted doing  
23 that, both -- I know my predecessor Mr. Ross argued with  
24 them extensively about that. The reason is, we have a  
25 sequential numbering system of all of our Rules, which is

1 divided into parts to make it conform to substance, and it  
2 is a numbering system which everyone who deals with the Oil  
3 Conservation Division is accustomed to.

4 At some point we may want to depart completely  
5 from that numbering system and adopt the Records and  
6 Archives numbering system the way they want it done, all  
7 the way through. It will make our Rules much less easy to  
8 deal with, but we didn't initiate that.

9 However, it would be extremely awkward to have  
10 all of our Rules numbered according to our existing scheme  
11 and have one section of our Rules -- or one part of our  
12 Rules, the procedural Rules, that are numbered according to  
13 their scheme.

14 So I would recommend to the Commission that they  
15 direct the staff to make whatever efforts are possible to  
16 retain this numbering system for the time being,  
17 recognizing that may not be possible.

18 This is directly pertinent to Section 7 of the  
19 proposed new part, and let me explain just a little bit  
20 about the Records and Archives numbering system, for those  
21 who are not familiar with it, so we can understand the  
22 significance of Section 7.

23 When Records and Archives speaks of a Rule, they  
24 speak -- they are referring to a part. The entire part is  
25 one Rule. When the Oil Conservation Division and anybody

1 who works here or deals with us refers to a Rule, they're  
2 referring to a section, such as Section 1201. To Records  
3 and Archives, that's a section included within a rule, the  
4 Rule being 19.15.14.

5 Now, in the Records and Archives scheme, Section  
6 7 of each part -- that is, of each rule -- is the  
7 definition section. To this point, we have kept all of our  
8 definitions in 19.15.1.7, which is our Rule 7; but it is,  
9 by the Records and Archives nomenclature, Section 7 of Part  
10 1 of 19.15 NMAC.

11 If we adopt this Rule in its present form, which  
12 we may be required to do, because these terms are used only  
13 in this part, we will have a Section 7 of 19.15.14, which  
14 will have no numbering in our own system, and that's a  
15 little bit a awkward. I just wanted to point that out to  
16 the Commission in case it's of any concern to the  
17 Commission.

18 Now, looking at 19.15.14.7, it defines two terms.  
19 Those are "Commission clerk" and "Division Clerk". We  
20 define those terms in order to have an unambiguous  
21 reference as to how things are filed. There is a statutory  
22 office of Commission secretary, and -- but this Rule would  
23 not require necessarily that that person who is the  
24 Commission secretary would also be the Commission clerk.  
25 The Chairman could designate that person or some other

1 person to receive papers. Presumably, the same person  
2 would receive papers for the Commission or for the  
3 Division, but that would not necessarily be the case.

4 CHAIRMAN FESMIRE: Is there any way we can  
5 tighten up the --

6 MS. BADA: I'll try.

7 CHAIRMAN FESMIRE: I thought it was my glasses,  
8 but it's the same on or off.

9 MS. BADA: Well --

10 CHAIRMAN FESMIRE: There you go.

11 MS. BADA: Well, let's see, I don't -- If  
12 everybody's comfortable with not seeing the outside of the  
13 number, I think -- That's too far. Okay, let's see if  
14 there's a way to -- A little easier to see?

15 CHAIRMAN FESMIRE: It's a lot easier to see.

16 MS. BADA: Okay.

17 CHAIRMAN FESMIRE: Thank you.

18 I apologize for that, Mr. Brooks.

19 THE WITNESS: Okay, that's fine.

20 Proceeding, then, to Rule 1201, the first change  
21 is the provision authorizing the Commission to institute  
22 rulemaking by order. The previous Rule said that the  
23 Division, any operator, producer or any other person may  
24 initiate a rulemaking proceeding. That's the language  
25 appearing in the next sentence.

1           The Commission has assumed it had inherent  
2 authority to institute rulemaking, and indeed, that's the  
3 way this rulemaking proceeding was instituted. However,  
4 the Rules had no express reference to the Commission  
5 instituting rulemaking on its own motion. This first  
6 sentence would provide such an explicit reference.

7           The next change, that is in the next to the last  
8 line of the opening paragraph of 1201.A, states that the  
9 application [sic] "...shall specifically identify the rule  
10 the applicant seeks...to adopt, amend or repeal." That is  
11 just a clarification -- actually, that's just a new  
12 specific rule. Probably most people would put that in an  
13 application, but it has not heretofore been required in  
14 that form.

15           The same is true of the proposal for "a brief  
16 summary of the proposed rule" and "a proposed draft of  
17 the...rule or amendment", items (1) and (2) of 1201.

18           And item (4) has been amended to require an  
19 e-mail address or fax number. That will appear several  
20 times during the Rule, so I won't refer to it each time it  
21 appears. But the purpose of that is that our Rules require  
22 service of certain papers by e-mail or fax which, since  
23 e-mail and fax numbers are not presently required in the  
24 Rules sometimes requires attorneys to do research to find  
25 out what -- how to serve papers on opposing attorneys.

1           1201.B specifies the filing requirements. Those  
2 are actually in the present Rule, but these are new in the  
3 sense that the present Rule does not distinguish between  
4 rulemaking and adjudicatory proceedings, and rulemaking  
5 proceedings are proceedings before the Commission. The  
6 Commission's filing requirements are slightly different  
7 from those of the Division.

8           1201.C --

9           CHAIRMAN FESMIRE: Mr. Brooks, before we leave B,  
10 later on in other parts of this Rule, the Division has  
11 recommended that we change, to file six copies -- six  
12 copies, not one original and five copies of the  
13 Application. Would that be applicable here too?

14           THE WITNESS: I would think so, yes. I believe  
15 there's really no distinction between originals and copies  
16 for any purpose that we use them.

17           CHAIRMAN FESMIRE: Okay. So would we want to  
18 make that same change here?

19           THE WITNESS: I believe we would.

20           MS. BADA: Yeah, I just have one comment. The  
21 only reason you might not want to is if you want an  
22 original signature on your petition.

23           CHAIRMAN FESMIRE: Well, under our Rules we've  
24 pretty much done away with the idea of an original  
25 signature the rest of the way through. Do we want to --

1 MS. BADA: Well, those have to do with your  
2 exhibits, so most of those wouldn't be signed.

3 CHAIRMAN FESMIRE: Okay. So what's our proposal?

4 MS. BADA: I think that's strictly up to the  
5 Commission, how you feel about whether you want original  
6 signatures on your petition or not.

7 CHAIRMAN FESMIRE: Commissioner Bailey, would you  
8 have a preference?

9 COMMISSIONER BAILEY: It's immaterial to me.

10 COMMISSIONER CHAVEZ: Immaterial, should apply,  
11 the six.

12 CHAIRMAN FESMIRE: I think we'll go ahead and  
13 propose that same change here, then, too.

14 Counsel, would you --

15 MS. LEACH: You're just breaking with tradition  
16 left and right. It's okay.

17 (Laughter)

18 CHAIRMAN FESMIRE: Okay. Is there any comment  
19 from the -- Tom, would you have a preference?

20 Mr. Carr, would you?

21 MR. CARR: (Shakes head)

22 MS. LEACH: Mr. Chairman --

23 CHAIRMAN FESMIRE: Yes, ma'am.

24 MS. LEACH: -- this is not, you know, one that's  
25 going to engender much discussion, but if your plan as we

1 go through is to discuss the Rules as you go through, you  
2 may want to swear the other potential witnesses in so that  
3 -- what they provide us in the nature of testimony, and  
4 basically -- I mean, you set up a nice -- we're a small  
5 group, you set up a nice discussion so that people can kind  
6 of chime in when they want to, but they need to be under  
7 oath.

8 CHAIRMAN FESMIRE: Okay.

9 MS. LEACH: And then we need to preserve the  
10 prospect of cross-examination as we go through the  
11 sections, because some may be a little more interesting to  
12 people than the one original and five copies --

13 CHAIRMAN FESMIRE: One and five copies.

14 MS. LEACH: -- versus six copies.

15 CHAIRMAN FESMIRE: Okay. At this time, then, I  
16 guess we'll ask -- no, I don't guess, I know we'll ask,  
17 anybody who intends to provide testimony as we go through  
18 the Rules to please stand and be sworn.

19 DR. BARTLIT: I don't plan to present direct  
20 testimony, but I might be available to answer questions or  
21 comment. I'm with New Mexico Citizens for Clean Air and  
22 Water. Should I be sworn in?

23 CHAIRMAN FESMIRE: I would recommend that you  
24 were, sir.

25 (Thereupon, other potential witnesses were

1 sworn.)

2 CHAIRMAN FESMIRE: Thank you all very much. Mr.  
3 Brooks, would you proceed?

4 THE WITNESS (MR. BROOKS): Okay, Rule 1201 C. is  
5 intended to provide a procedure for pre-screening  
6 applications for rulemaking. Generally, applications for  
7 rulemaking have been filed by the Division staff or by the  
8 Commission and have proceeded to hearing. However, our  
9 Rules now provide, and will continue to provide, that any  
10 person may file an application for rulemaking.

11 It is possible that people may file applications  
12 for rulemaking that the Commission will summarily decide  
13 they do not want to hear. Therefore, the first step in the  
14 procedure is that the applications be sent to each of the  
15 Commissioners, and if a Commissioner thinks that the  
16 application should be heard, it will be set for hearing.  
17 Otherwise it would not be set for hearing, unless the  
18 Commission determines that it should be set for hearing.

19 Rule 1202 --

20 COMMISSIONER CHAVEZ: Before we go on --

21 THE WITNESS: Yes, sir.

22 COMMISSIONER CHAVEZ: -- since we're discussing  
23 -- I'm sorry, I should have chimed in with -- Back to A, if  
24 I could, an application in writing. If a person is  
25 initiating an application in writing, could that be done

1 through fax and e-mail, along with a written page? Is that  
2 -- Could that be interpreted as e-mail and fax also?

3 THE WITNESS: I think not, because there's a  
4 specific Rule in here that says -- and I forget where it is  
5 in the new Rules, but there is a provision that you can  
6 file an application by fax or e-mail, but you must also, on  
7 the next business day, file a paper copy.

8 Now, I believe there will be some discussion  
9 here, because it's come up in some of the comments that we  
10 go to an electronic filing system. Personally, I think  
11 that's a good idea, but it would require some  
12 infrastructure changes that we have not yet made, and I'm  
13 not sure we're in a mode where we can actually do that  
14 right now.

15 COMMISSIONER CHAVEZ: Okay. To avoid ambiguity,  
16 then, between this section and the other section that  
17 requires paper within -- by the end of the next business  
18 day, shouldn't they be worded similarly, perhaps, to  
19 prevent that ambiguity?

20 MS. LEACH: Mr. Commissioner, the Rule that Mr.  
21 Brooks is testifying about is part of part B that says an  
22 applicant shall file the application by delivering that,  
23 and they can do it by mail or fax, so long as they deliver  
24 it the next day.

25 COMMISSIONER CHAVEZ: Oh, that's correct.

1 MS. LEACH: So I think that's all part of Rule  
2 1201, so I think it's already in -- I don't think you have  
3 a copy of --

4 COMMISSIONER CHAVEZ: I'm sorry.

5 MS. LEACH: -- this part, you have the  
6 explanation in this part.

7 COMMISSIONER CHAVEZ: Okay. So --

8 MS. LEACH: Mr. Chairman --

9 COMMISSIONER CHAVEZ: -- there's still some  
10 ambiguity, to me, understanding what "in writing" may be,  
11 since we follow it with B where it says "copies".

12 CHAIRMAN FESMIRE: Yes, ma'am?

13 MS. LEACH: You know, maybe it would be less  
14 ambiguous to just say the application -- and the applicant  
15 shall specify -- not even say in writing there, and then  
16 the next section basically says that.

17 It occurs to me, if we're going to start asking  
18 questions before the Commission starts asking questions,  
19 you might want to see if there's any comment from the other  
20 participants, as well, and -- we can get their comments,  
21 and that may help clarify or raise more discussion.

22 So you might want to ask for comments on all of  
23 Section 1201 at this point.

24 CHAIRMAN FESMIRE: Okay, I think that's a good  
25 idea. Does anybody have any comments on Section 1201

1 before we continue this discussion on 1201?

2 DR. NEEPER: You know, we would have problems  
3 with other sections where submission of paper and copies  
4 could get in the way of progress. But I think if one is  
5 applying for a rulemaking, you should be prepared to do  
6 that.

7 CHAIRMAN FESMIRE: Okay. Any other comments?

8 COMMISSIONER CHAVEZ: I have some questions on C,  
9 then.

10 Mr. Brooks, the process that's described there,  
11 it says if a Commissioner indicates to the Chairman or the  
12 Chairman concludes that a hearing is not necessary or  
13 appropriate, then it says "the commission shall determine  
14 within 60 days..." What is -- What do you envision that  
15 process to be? Would that decision be made during a public  
16 meeting, at the next Commission meeting, or what -- Is this  
17 something that the public and the applicant need to be  
18 involved in when the Commission determines whether or not  
19 to hear an application?

20 THE WITNESS: I would not assume that there would  
21 be a hearing, because it does not require a hearing, and it  
22 seems that it would be rather repetitious to hold a hearing  
23 on whether or not a hearing should be held.

24 I believe that the procedure would be that the  
25 Commissioner, since a Commissioner can act, as I

1 understand, *ex parte*, without the necessity of a public  
2 meeting, can make a recommendation. Then the actual  
3 determination by the Commission of whether or not to set it  
4 for hearing would have to be made at a meeting of the  
5 Commission.

6 Now, the Rule does not provide any -- does not  
7 include any provision for notice to the applicant of this,  
8 so -- but it would have to occur at a Commission meeting,  
9 and it would have to be on the docket for that Commission  
10 meeting, that the Commission would consider whether or not  
11 to hold a hearing at that meeting.

12 COMMISSIONER CHAVEZ: If one of the Commissioners  
13 recommended to the Chairman that there be discussion as to  
14 whether to hear an Application for the docket for hearing,  
15 would that be -- that communication be considered part of  
16 the public record that needs to be kept in some way about  
17 that application, or the public record -- you could say it  
18 wouldn't be a public-record issue unless it went to  
19 hearing?

20 THE WITNESS: Well, I think that the  
21 Commissioner's determination that it ought to be heard or  
22 ought not to be -- the individual Commissioner's decision -  
23 - or determination that it ought not to be heard, that  
24 invokes the necessity for the Commission to make that  
25 decision, should be placed in the file as an official

1 document.

2 Is that a response to your question?

3 COMMISSIONER CHAVEZ: Yes, it's a response to it.

4 THE WITNESS: Are we ready to go on to Section  
5 1202?

6 COMMISSIONER CHAVEZ: Yes.

7 THE WITNESS: The Division has requested -- in  
8 its comments, has requested a change in 1202.A to say the  
9 Commission shall publish notice, of any proposed  
10 rulemaking, in the name of the "State of New Mexico",  
11 signed by the Commission Chairman, instead of the present  
12 reading. We agree with that change.

13 COMMISSIONER BAILEY: I have a comment on that.

14 THE WITNESS: Yes, ma'am.

15 COMMISSIONER BAILEY: Does the Commission have a  
16 budget allocated to it for publication of notices?

17 THE WITNESS: Not that I know of.

18 COMMISSIONER BAILEY: Not that I know of either,  
19 so --

20 THE WITNESS: I have no participation in the  
21 budgeting process.

22 (Laughter)

23 COMMISSIONER BAILEY: Then any budget would come  
24 out of the Division for doing this. So the change here, I  
25 think, is -- creates the question of whether or not the

1 Commission pays for it or the Division pays for it. And if  
2 the Commission doesn't have any money, we have a problem.

3 THE WITNESS: I'm in no position to disagree with  
4 that observation.

5 COMMISSIONER BAILEY: So why don't we just leave  
6 it the way it is, to prevent that question from arising?

7 CHAIRMAN FESMIRE: Because the Division doesn't  
8 have much budget to do it either.

9 (Laughter)

10 COMMISSIONER BAILEY: It's better than zero.

11 CHAIRMAN FESMIRE: Counsel, you were sort of the  
12 champion of this change, weren't you? Did you have a  
13 comment on it?

14 MS. BADA: I'm trying to remember who suggested  
15 that. I don't see it as being an issue, since the Division  
16 supports the Commission. But if it's a concern that it  
17 could be interpreted that way, then that's strictly up to  
18 the Commission. We already provide staff and everything  
19 else through the Division budget, so I don't believe that's  
20 an issue, but...

21 CHAIRMAN FESMIRE: Well, legally, I think the  
22 recommendation is correct. Fiscally it is something we may  
23 have to address in a different form, like the budget. We  
24 may have to ask for a Commission budget if we're going to  
25 do it absolutely right. So...

1           COMMISSIONER BAILEY: But until that time, why  
2 don't we leave the Rule the way it is and change it, if you  
3 want to, after we have a budget?

4           CHAIRMAN FESMIRE: Okay. Is there any comment  
5 from --

6           MS. LEACH: I think they're trying to indicate  
7 that this is a Commission action, that it's the authority  
8 of the Commission, more than they're trying to assign the  
9 budget with this proposed change, so -- you're not going to  
10 do rulemaking -- you're not going to -- the Division can't  
11 set up a rulemaking hearing without the Commission  
12 authorizing it. So I think this is intended to reflect  
13 that, as opposed to assign budget, because the budget is  
14 all the same.

15           CHAIRMAN FESMIRE: Commissioner, would you like  
16 to make a motion?

17           COMMISSIONER BAILEY: I move that we leave it as  
18 the Division responsibility.

19           CHAIRMAN FESMIRE: Is there a second?

20           COMMISSIONER CHAVEZ: I second it.

21           CHAIRMAN FESMIRE: All those in favor?

22           COMMISSIONER BAILEY: Aye.

23           COMMISSIONER CHAVEZ: Aye.

24           CHAIRMAN FESMIRE: Let the record reflect that  
25 the recommended change in 1202 will not be adopted, and the

1 wording will remain "the division director".

2 MS. LEACH: Okay, I just recommend -- I mean,  
3 you've gone through and now you're voting on one. On some  
4 other changes, you didn't vote. I don't know, do you want  
5 to wait until the end or go back through on all the  
6 proposed changes --

7 CHAIRMAN FESMIRE: Well, I think --

8 MS. LEACH: -- or how you want to handle it. I  
9 just don't want us to lose track of what we've voted on and  
10 what we haven't voted on.

11 CHAIRMAN FESMIRE: Right. I think where there is  
12 a difference of opinion, that we ought to vote and make  
13 those changes. And then when we get done -- all the way  
14 through, adopt the new Rule with the changes voted on by  
15 the Commission. Would that be acceptable?

16 MS. LEACH: It's a little confusing when we do  
17 have deliberation, and then back to testimony, and then  
18 back to deliberation. So I really would suggest you avoid  
19 voting till the end.

20 CHAIRMAN FESMIRE: Okay. How would you suggest  
21 we keep track of issues like this where we --

22 MS. LEACH: You will make notes of it as we go.

23 (Laughter)

24 COMMISSIONER CHAVEZ: -- made a public comment  
25 too.

1 CHAIRMAN FESMIRE: I think we did ask for comment  
2 on 1202. Is there any additional comment? Okay.

3 COMMISSIONER CHAVEZ: I have a question for Mr.  
4 Brooks.

5 Now, at the -- in Part A, it says "any proposed  
6 rulemaking". And this is, again, presuming that the  
7 Commission -- an applicant whose -- for example, the  
8 Commission has rejected hearing their application under C  
9 above there, under 1201.C, they couldn't come in and say  
10 that by 1202 they made a proposal and therefore it has to  
11 be published and heard. They can't do that, can they?  
12 Would there be any conflict there?

13 THE WITNESS: Well, in a sense there is a  
14 conflict. It would seem to me that 1201 rather clearly  
15 pre-empts that provision. We could, however -- because  
16 Records and Archives requires such an awkward means of  
17 cross-referencing it, it would not, probably, be very good  
18 to say subject to Section 1201. But if there is a way to  
19 say, unless a determination is made not to hold a hearing  
20 the Division shall publish notice, that would be a way to  
21 do it.

22 MS. LEACH: What if you say the Division shall  
23 publish notice of any proposed rulemaking set for hearing?

24 COMMISSIONER CHAVEZ: That would do it.

25 THE WITNESS: Are we ready to go on to Subsection

1 B?

2 COMMISSIONER CHAVEZ: Well, let me ask one other  
3 part here. Under A.(4), "by posting on the division's  
4 website not less than 20 days..." that is -- that's  
5 something new, I think, for public notice, isn't it?

6 THE WITNESS: No, that was adopted by the  
7 Commission about a year and a half ago when the last  
8 revision of this series of Rules --

9 COMMISSIONER CHAVEZ: What I mean, over -- what  
10 I'm trying to get at is, that's -- to me seems like  
11 mandatory if the -- if the -- for whatever reason the  
12 poster on the website fails, then the notices are not  
13 complete, and we have to -- it's a mandatory -- appears to  
14 be a mandatory that the Commission has to --

15 (Off the record)

16 THE WITNESS: Yes, it is a mandatory.

17 COMMISSIONER CHAVEZ: Okay, I was just wondering  
18 if that might have been an issue where it might delay  
19 business for some technical reason, that the --

20 THE WITNESS: It could.

21 COMMISSIONER CHAVEZ: And therefore, if it was a  
22 -- more of an optional thing, may be posted, or will  
23 attempt to post within 20 days, but --

24 THE WITNESS: Yes, I would point out that there  
25 is a statute requiring that these notices be posted on the

1 website. However, the statute provides that the failure to  
2 post does not affect the validity of action taken. So if  
3 we did not also have a Rule, then it would not be a  
4 mandatory notice. Our having it in a Rule probably makes  
5 it a mandatory notice.

6 CHAIRMAN FESMIRE: Well, I understand the  
7 Commissioner's concern, but I'd -- you know, we're going to  
8 that type of notice, and I would think that making it  
9 mandatory would probably be preferable.

10 Carol?

11 MS. LEACH: We have a witness who'd like to  
12 comment.

13 CHAIRMAN FESMIRE: Doctor?

14 DR. BARTLIT: Yes, you asked for comment on --  
15 John Bartlit of New Mexico Citizens for Clean Air and  
16 Water.

17 In the list of how notice might be published, one  
18 that's missing from that was -- there's one you used for  
19 this meeting, which was your e-mail list of people who  
20 asked to be notified. Mr. Brooks, as one of your exhibits,  
21 was such a list. It would seem a very easy and cheap  
22 additional way to notify people, to use that list and to  
23 show it here.

24 THE WITNESS: I believe that is covered in  
25 1202.A.(2)

1 DR. BARTLIT: Okay, that makes it clear that it's  
2 the list of people who've asked to be notified?

3 CHAIRMAN FESMIRE: To all who've requested such  
4 notice.

5 DR. BARTLIT: Oh, okay.

6 CHAIRMAN FESMIRE: Okay?

7 THE WITNESS: That is the existing --  
8 substantially equivalent to the existing language, which is  
9 what we were interpreting when we prepared the notice to  
10 this meeting.

11 COMMISSIONER CHAVEZ: Mr. Brooks, on Section B,  
12 where --

13 THE WITNESS: Are we ready to move on to Section  
14 B, then, to Subsection B?

15 CHAIRMAN FESMIRE: I was a long time ago. Are  
16 we --

17 (Laughter)

18 COMMISSIONER CHAVEZ: I know this is taking time,  
19 but I just wanted to clear some things up for myself, I'm  
20 sorry.

21 The written order, the form of the written order  
22 under an emergency to shorten a time limit, especially if  
23 it was for purposes of efficiency, is that a different form  
24 than an ordinary order that the Division Director might  
25 issue? It doesn't appear that this would apply under the

1 emergency orders provision.

2 THE WITNESS: Well, no, this is really not an  
3 emergency order, it's an order to shorten the time for  
4 notice. The -- We have had an anomaly in our Rules prior  
5 to our 2003 revision that the statute -- the Oil and Gas  
6 Act provided that an emergency order could only remain in  
7 effect for 15 days, whereas notice periods longer than that  
8 were required for hearings. We adopted a Rule in the 2003  
9 revision which permitted the shortening of time.

10 This is a modification of that Rule, because that  
11 Rule, as it was originally adopted, did not provide how  
12 that was to be done. And that's why we added the language,  
13 "by written order", so that could be clarified.

14 When we have -- The only time we have done that,  
15 we've entered an order in the same form as a Division  
16 order, with the A, B, C numbering sequence as we would use  
17 it wherever it comes in the sequence for that particular  
18 proceeding, case number.

19 COMMISSIONER CHAVEZ: Okay, thank you.

20 CHAIRMAN FESMIRE: Any other comment? I think  
21 what we'll do is, we'll go ahead and take the testimony on  
22 a section, ask for comments on the section, have the  
23 Commission comments on the section, and proceed in that  
24 order, if there's no objection.

25 COMMISSIONER CHAVEZ: No, that's fine.

1 THE WITNESS: Okay.

2 CHAIRMAN FESMIRE: Mr. Brooks, we're at 1202.B, I  
3 believe.

4 THE WITNESS: Okay, I believe I've commented on  
5 1202.B, unless there are any further questions on 1202.B.

6 CHAIRMAN FESMIRE: Any comments? From the  
7 Commission?

8 COMMISSIONER BAILEY: No.

9 CHAIRMAN FESMIRE: Okay. Mr. Brooks, the next --

10 THE WITNESS: 1203 provides what we have not had  
11 in our Rules heretofore, a provision for written comments  
12 on rulemaking. Contrary to the procedure used in the  
13 Federal Administrative Procedure Act, state law in New  
14 Mexico does not provide a right to written comments -- to  
15 submit written comments, unless such a right is provided by  
16 the applicable statute or rule.

17 We have not had a rule providing for written  
18 comments in the past, though we have authorized them by  
19 order in most of our major rulemakings recently. This Rule  
20 would provide a right by rule for members of the public to  
21 submit written comments, would set a deadline for  
22 submission of such comments, which would be one week before  
23 the Commission meeting at which the public hearing is to be  
24 held. The Commission could vary that deadline.

25 CHAIRMAN FESMIRE: Any comment? Public comment?

1 DR. NEEPER: We have specifically suggested  
2 explicitly allowing electronic submission. Although this  
3 certainly doesn't deny it, when it says "written" it's not  
4 entirely clear that that includes electronic. That  
5 certainly is Division policy at the present.

6 CHAIRMAN FESMIRE: It has been Division policy in  
7 the past.

8 Any other comment? Commissioner?

9 COMMISSIONER BAILEY: Should we insert "written  
10 or electronic comments"?

11 CHAIRMAN FESMIRE: Commissioner? I wouldn't be  
12 opposed to it.

13 COMMISSIONER CHAVEZ: I wouldn't be opposed to it  
14 either. Myself -- that's the way we run our lives anymore.

15 CHAIRMAN FESMIRE: Okay. Any other comment?  
16 Commission?

17 COMMISSIONER BAILEY: No.

18 COMMISSIONER CHAVEZ: No.

19 CHAIRMAN FESMIRE: Mr. Brooks, proceed.

20 THE WITNESS: Okay, there is a bunch of stuff in  
21 Rule 1204. Do you want me to go all the way through Rule  
22 1204 or break it down into segments?

23 CHAIRMAN FESMIRE: Why don't we try to get all  
24 the way through it, if we can?

25 THE WITNESS: Okay. Rule 1204 is a new Rule,

1 although it imports a number of things that are in -- that  
2 have been existing practice.

3 In 1204.A.(1), state that "Any person may testify  
4 or make an unsworn statement at [a] rulemaking hearing."  
5 The present Rule about unsworn statements is confusing and  
6 very unclear. It says something about all testimony will  
7 be under oath, but relevant unsworn statements can be made  
8 part of the record if the Commissioner or the Examiner  
9 chooses to do so, or something like that, or will be noted  
10 for whatever purpose they serve, I'm not sure exactly what  
11 it says.

12 But anyway, this makes it clear that a person may  
13 appear -- may make unsworn statements in rulemaking  
14 proceedings. That has been the practice. The reason for  
15 it is that people may want to appear and express an opinion  
16 rather than give testimony. They may not wish to be put  
17 under oath. And of course the Supreme Court of the United  
18 States has said that there's no such thing as a false  
19 opinion, so a person could not be held to pains and  
20 penalties of perjury for their opinion.

21 1201.A.(2) deals with exhibits. Again, it says  
22 an original and five copies. The Division, I believe, has  
23 recommended that that be changed to simply six copies.

24 The Rule provides that a person not offering  
25 technical testimony can present exhibits at the time of the

1 hearing, and I'm unsure at this moment -- I know that  
2 somewhere in this Rule -- in this proposal, what we're  
3 requiring on exhibits is that a person who has filed a  
4 prehearing statement and expressed an intention to submit  
5 technical testimony in hearings before the Commission,  
6 which includes rulemaking hearings, must submit their  
7 exhibits with the prehearing statement. And anyone else  
8 who is submitting nontechnical exhibits can do so at the  
9 hearing.

10 Similarly, persons who -- under 1204.A.(3),  
11 persons who are presenting nontechnical testimony the only  
12 prerequisite to being allowed to present testimony is that  
13 they sign in on the sign-in sheet at the time of the  
14 hearing.

15 1204.B deals with technical testimony, and this  
16 is where the provisions about the prehearing statement  
17 appear. A person who intends to present technical  
18 testimony at a rulemaking hearing must file the prehearing  
19 statement 10 days prior to the scheduled hearing.

20 Now under New Mexico law, which is included in a  
21 subsequent section of this proposed Rule, 10 days means 10  
22 business days, which is two weeks, or longer, possibly, if  
23 there's a holiday intervening.

24 The Rule expressly permits -- 1204.B.(1)  
25 expressly permits corporations and other collective

1 entities, including unincorporated associations, to appear  
2 either through counsel or through a duly authorized officer  
3 or member. There are requirements that the duly authorized  
4 officer be named and that proof of authority be provided in  
5 the case of an entity that is presenting technical  
6 testimony. That appears in 1204.B.(2).

7 1204.B.(3) provides a sanction in that it permits  
8 the exclusion of witnesses and exhibits that are not  
9 identified in or attached to the prehearing statement.  
10 That is, witnesses that are not identified or exhibits that  
11 are not attached; it's not required that the witnesses be  
12 attached to the prehearing statement.

13 1204.B.(4) provides that copies of prehearing  
14 statements shall be posted on the Division website and also  
15 shall be available from the Commission clerk.

16 1204.B.(5) provides that the Commission clerk  
17 shall deliver copies of the prehearing statements and  
18 exhibits to the Commissioners.

19 1204.C deals with modifications -- proposed  
20 modifications of a proposed rule that are submitted by  
21 persons other than the applicant. If a person other than  
22 the applicant wishes the Commission to consider a modified  
23 version of the rule that has been proposed, then that  
24 person must submit that proposal at least 10 days prior to  
25 the scheduled hearing. And there are provisions of what

1 they have to have: a text, an explanation and a reasoning  
2 for the modification. And the Commission clerk will then  
3 deliver those modifications to the Commissioners.

4 All of this is new as far as a rule. I believe  
5 there's probably nothing in here that is expressly covered  
6 in the Rules. The prehearing statements that we have do  
7 not apply to rulemaking, although we have sometimes  
8 required prehearing statements in rulemaking proceedings by  
9 order.

10 That concludes my comments on 1204.

11 CHAIRMAN FESMIRE: Are there any public comments  
12 on 1204?

13 MR. ALEXANDER: Yes, Alan Alexander with  
14 Burlington. My understanding is that 1204.A and a  
15 participation by the general public, all of that refers to  
16 nontechnical testimony. Is that my understanding? If  
17 that's true, could that be made more clear?

18 CHAIRMAN FESMIRE: Mr. Alexander, the heading,  
19 "Participation by [the] General Public", and then in B,  
20 "Technical testimony", I think sets it out. Do you think  
21 it needs --

22 MR. ALEXANDER: That's clear enough, right.

23 CHAIRMAN FESMIRE: Well, to me it was, but I'm a  
24 little more --

25 THE WITNESS: I think your understanding -- I'm

1 sorry. I think your understanding, Mr. Alexander, of the  
2 intent is correct. I will let other people comment on  
3 whether it's clear, because I was probably too close to the  
4 drafting process to know whether it would be clear to  
5 someone else or not.

6 CHAIRMAN FESMIRE: Any other comments on that?

7 DR. NEEPER: In Part B, Mr. Brooks spoke that  
8 prehearing statement is required at 10 days. The  
9 Division's latest proposal is five days. That wasn't  
10 mentioned.

11 THE WITNESS: Yes, I did not have that marked on  
12 my text here. Ms. Bada, is that correct --

13 MS. BADA: That's correct.

14 THE WITNESS: -- that is the Division's proposal?  
15 Okay, I stand corrected. We would have no objection -- I  
16 would have no objection to -- in fact, I think that's  
17 probably a more workable time frame.

18 CHAIRMAN FESMIRE: Five days?

19 MS. LEACH: If we change that to five days, what  
20 does that do about the other deadlines?

21 CHAIRMAN FESMIRE: The nine-day --

22 MS. LEACH: Well, as your counsel I would have to  
23 tell you that I'm a little concerned about B.(5) and C.(3),  
24 which basically are sort of internal deadlines for getting  
25 things to the Commissioners. And while I think that's an

1 excellent thing to do in practice, I'm not sure you want to  
2 lock that into rule so that if you don't get it you may not  
3 be able to go forward with the hearing in a timely manner.

4 So I frankly would suggest taking out B.(5) and  
5 C.(3) and use that as a practice, but not lock it into a  
6 rule. And then I don't think you have a problem changing  
7 the 10 to five.

8 CHAIRMAN FESMIRE: Any public comment?

9 Mr. Carr?

10 MR. CARR: Mr. Chairman, I don't know who I  
11 represent.

12 (Laughter)

13 MS. LEACH: Are you a witness?

14 MR. CARR: I'm appearing today for Burlington  
15 Resources. I'm also here for the New Mexico Oil and Gas  
16 Association Regulatory Practices Committee; I'm a member of  
17 the Committee. And I'm also personally here. So take your  
18 choice, but when you talk about --

19 CHAIRMAN FESMIRE: Well, Mr. Carr, the way we  
20 used to do it is, whoever we were billing, we represented.

21 MR. CARR: Then I guess I have to leave you for  
22 that --

23 (Laughter)

24 MR. CARR: I think a five-day prehearing  
25 statement time frame is more workable, and I would suggest

1 that since a number of people, as you're expanding the  
2 Rules, may not be attorneys, that it would be wise to say  
3 five business days.

4 CHAIRMAN FESMIRE: Any other public comment on  
5 that?

6 DR. NEEPER: We will give direct testimony on  
7 this --

8 CHAIRMAN FESMIRE: Okay.

9 DR. NEEPER: -- section.

10 CHAIRMAN FESMIRE: Would you feel comfortable  
11 doing that now?

12 DR. NEEPER: I'd rather put it together in one  
13 story than go section by section, if that's permissible to  
14 the Commission.

15 CHAIRMAN FESMIRE: You mean direct testimony on  
16 the entire --

17 DR. NEEPER: Yes.

18 CHAIRMAN FESMIRE: Okay.

19 DR. NEEPER: I have prepared it section by  
20 section, and I saw that I would bore you to tears doing  
21 that, going through what you've already gone through. So I  
22 think it's better I give you the one coherent story in  
23 direct testimony.

24 CHAIRMAN FESMIRE: Okay, I don't have a problem  
25 with that, Commissioner.

1 MS. BADA: No.

2 COMMISSIONER CHAVEZ: No.

3 CHAIRMAN FESMIRE: Commissioner, do you have any  
4 comments on the B.(5) change -- B.(1) change to five days,  
5 removing B.(5) or C.(3)?

6 COMMISSIONER BAILEY: I sure like it, but I can  
7 see where it doesn't have to be a rule, so that's okay.

8 I do have a comment on A. We could change that  
9 from "Participation by General Public" to "Nontechnical  
10 Participation by General Public", and that would create --  
11 that would help the question that was raised.

12 CHAIRMAN FESMIRE: Commissioner Chavez?

13 COMMISSIONER CHAVEZ: I agree with that  
14 recommendation. That way it keeps the section titles a  
15 little more in line.

16 Mr. Brooks, do you envision nontechnical  
17 testimony -- Say for example, if a witness or a person  
18 wanted to present testimony that they thought was  
19 nontechnical, if the Commission or the Chairman determined  
20 that it was getting to be technical, if they would ask them  
21 -- what would you see happening then, at that point?

22 THE WITNESS: Well, I believe that that would  
23 invoke the provisions of B.(3), which would permit the  
24 Commission in its discretion to exclude that testimony for  
25 failure to file a prehearing statement.

1           COMMISSIONER CHAVEZ: Okay, and the determination  
2 whether testimony was nontechnical or technical would be at  
3 the discretion of the Commission --

4           THE WITNESS: I believe it would have to be.

5           COMMISSIONER CHAVEZ: Okay. Now, I looked at the  
6 sign-in sheet previous to the commencement of this meeting,  
7 and apparently there will have to be some provisions made,  
8 or revisions, to the title, "sign-in sheet" -- is that  
9 correct? -- in order so that a person who's coming in could  
10 see on the sign-in sheet that that's where they have to --  
11 say they're going to -- write in that they're going to  
12 present nontechnical testimony as required under A.(3)?

13           THE WITNESS: That may be true. I am not totally  
14 familiar with the form of sign-in sheet that was used this  
15 morning. There is no prescribed form.

16           COMMISSIONER CHAVEZ: Okay, but -- And the  
17 process would probably be, then, that a person who wanted  
18 to do that would have to sign in when they came in and --

19           THE WITNESS: Right.

20           COMMISSIONER CHAVEZ: -- and then how would we  
21 have access to that? Maybe the Commission secretary or  
22 clerk would, during the meeting --

23           THE WITNESS: I would assume that would be the  
24 procedure. I think, because there might be people who  
25 would not be extremely familiar with the Rules that might

1 want to appear, that it would be advisable for the Chair to  
2 admonish everyone of that upon calling the meeting to  
3 order, and giving -- so as to give those who wish to speak,  
4 who had not signed in, an opportunity to do so.

5 COMMISSIONER CHAVEZ: Okay, that's all the  
6 comments I have.

7 CHAIRMAN FESMIRE: Mr. Brooks, are you prepared  
8 to go to 1205?

9 THE WITNESS: I am. 1205 deals with the conduct  
10 of the hearing -- of rulemaking hearings. In the main, it  
11 is a reiteration of existing practice, although most of  
12 these provisions are not expressly included in the present  
13 Rules. However, A.(1) is a change. The present Rules,  
14 which deal with both rulemaking and adjudicatory  
15 proceedings, provide that the Rules of Civil Procedure will  
16 be followed, with some provision for exceptions, rather  
17 vague provision for exceptions.

18 This provision would provide that the Rules of  
19 Civil Procedure and the Rules of Evidence will not apply.  
20 That, I believe, is the way rulemaking proceedings are  
21 customarily handled in most administrative agencies.

22 1205.A.(2) is a long list of various procedural  
23 rules that are designed to set forth the manner in which  
24 the proceedings shall be conducted in rulemaking  
25 proceedings. These generally -- (a) through (g) generally

1 conform to the way that the procedure has been followed in  
2 the past, although it's not now set out in rule.

3 12045.A.(2).(h) is a new provision, and it is a  
4 new provision that is adopted because -- that is proposed  
5 because Rule 1213 in the proposed rules, which I believe is  
6 verbatim Rule 1209 of the present Rules, with the exception  
7 that it's changed to apply only to adjudicatory proceedings  
8 -- that provision presently applies to all proceedings and  
9 permits continuance at any time by announcement at the  
10 hearing.

11 The comments that the Commission has received,  
12 both in the public meeting and written comments, have  
13 indicated that various stakeholder groups oppose allowing  
14 continuance with no notice other than announcement at the  
15 hearing in rulemaking proceedings. However, if we didn't  
16 have some kind of provision for continuance by announcement  
17 at the hearings, it would require the Commission to  
18 complete any hearing in one day, which is sometimes not  
19 feasible. Therefore, 1205.A.(2).(h) is proposed to permit  
20 a continuance of the hearing if it is not completed within  
21 one day. And it gives the Commission flexibility; it's not  
22 required to continue it to the next day but can continue it  
23 to a subsequent occasion.

24 1205.B deals with testimony and cross-  
25 examination. Again, it reiterates the ability of a person

1 to make an unsworn position statement. It provides that  
2 any person who testifies as a witness will be subject to  
3 cross-examination and that any person who appears may  
4 cross-examine, however, the Commission has discretion to  
5 limit or restrict cross-examination to avoid harassment,  
6 intimidation, needless expenditure of time or undue  
7 repetition.

8 1205.D [sic] deals with exhibits. Once again,  
9 the Division has recommended that original plus five be  
10 changed to simply six copies.

11 1205.D provides for a verbatim transcript of the  
12 hearing, which is required by statute anyway, and provides  
13 that a person may obtain a copy of the transcript upon  
14 request and paying the cost of the copy.

15 1205.E deals with deliberation and decision by  
16 the Commission, and basically it authorizes the Commission  
17 either to deliberate on the date of the hearing, provided  
18 that they have given notice according to the Open Meetings  
19 Rule that they will do so, or to provide for deliberation  
20 at a subsequent time.

21 And then F provides for filing with the State  
22 Records Center and Archives to publish the Rule, which  
23 again is required by statute anyway.

24 I believe that is a general discussion of a  
25 fairly detailed rule. I would be happy to respond to any

1 questions.

2 Q. (By Ms. Bada) I have on quick clarification.

3 A. Sure.

4 Q. I believe you stated that the Rules is that  
5 anyone that testifies may cross-examine. Does it actually  
6 state that?

7 A. No, I don't believe -- It says anyone who  
8 testifies is subject to cross-examination. I believe that  
9 it does not provide specifically -- I stand to be  
10 corrected, because I was a little bit unclear about this,  
11 but I believe that it does not have any specific provision  
12 as to who may cross-examine in rulemaking proceedings.  
13 There is such a provision in adjudicatory, but I believe  
14 there is not in rulemaking proceedings.

15 CHAIRMAN FESMIRE: Okay. Comments from the  
16 public? Mr. Alexander, do you --

17 MR. ALEXANDER: No, sir.

18 CHAIRMAN FESMIRE: You're reserving your  
19 presentation till --

20 DR. NEEPER: Well, I will somewhat reverse that,  
21 if I may, for particular issues. We have some difficulty  
22 -- I'm Don Neeper for New Mexico Citizens for Clean Air and  
23 Water -- we have some difficulty with it not being explicit  
24 who may do cross-examination. It does not say clearly in  
25 here who may or who may not. There is an implication that

1 perhaps by filing a prehearing statement you may cross-  
2 examine.

3 CHAIRMAN FESMIRE: Commissioner?

4 COMMISSIONER BAILEY: I agree with Dr. Neeper. I  
5 think we should be explicit, who is allowed to cross-  
6 examine.

7 COMMISSIONER CHAVEZ: I agree.

8 DR. NEEPER: Regarding the question of  
9 continuing, certainly we would have no question but what  
10 the Commission should be able to continue a hearing when  
11 you can't complete it. But likewise, there's no  
12 requirement that you even open the hearing.

13 And so this Rule specifically allows you to have  
14 the practice of continuing the hearing without ever opening  
15 it, and without notice. And that has happened repeatedly  
16 here, and I don't think it should happen. It's not fair to  
17 the industry and it's not fair to other people. It's not  
18 fair to the public.

19 CHAIRMAN FESMIRE: I can think of one real recent  
20 example, and that's these Rules, the hearing that happened  
21 last time. That would cost a delay -- I mean, we would  
22 have had to renote the whole thing and not been able to  
23 use that notice. Notice is an expense.

24 THE WITNESS: Mr. Chairman, two responsive  
25 comments to Dr. Neeper, if it is an appropriate time to do

1 that.

2 CHAIRMAN FESMIRE: Please.

3 THE WITNESS: First, in regard to cross-  
4 examination, I believe I am going to have to contradict  
5 myself a second time here, and I apologize for not being  
6 prepared on this particular issue. It is not perhaps where  
7 it should be in the Rule, but 1204.B states, "Any person,  
8 including the division, who intends to present technical  
9 testimony or cross-examine witnesses at the hearing  
10 shall..." et cetera, "...file a...pre-hearing statement..."

11 I tend to agree with Dr. Neeper's suggestion that  
12 that is somewhat ambiguous, but I believe it certainly  
13 could be read to state that only persons filing a  
14 prehearing statement can cross-examine. I really do not  
15 remember the discussions that went on in the formulation of  
16 this Rule well enough to be certain whether or not that was  
17 a deliberately adopted provision with that intent or not.  
18 But I certainly believe it's subject to that reading and  
19 would probably, indeed, be the preferable reading -- the  
20 preferred reading, in the sense of just interpreting the  
21 text.

22 In regard to Dr. Neeper's second comment, I do  
23 remember the discussions in formulating 1205.A.(2).(h), and  
24 it was actually by using the expression, if the hearing was  
25 not completed, the intent of 120- -- of the drafters, the

1 drafting committee, in 1205.2:(h) was to make a continuance  
2 provision that would only be applicable if the hearing had  
3 been started but was not completed.

4 This was responsive to -- an attempt to be  
5 responsive to the public comments received at the workshop  
6 in that respect.

7 CHAIRMAN FESMIRE: Any other comments from the  
8 public?

9 Commissioner Bailey, do you have any comments on  
10 1205?

11 COMMISSIONER BAILEY: I'm thinking -- and this is  
12 going to open up a can of worms, because B.(3) language was  
13 ambiguous to some people, I'm trying to find a way to  
14 insert clarification. And it could say any person -- or  
15 any party, scratch "person", any party who testifies at the  
16 hearing is subject to -- Okay, any person who testifies at  
17 the hearing is subject to cross-examination by other  
18 parties to the case on the subject matter of his direct  
19 testimony.

20 Because that's going to open up a can of worms on  
21 who's a party to the proceeding.

22 MS. LEACH: I'd suggest instead of using the term  
23 "party", because you haven't really been using that, that  
24 you do reference back to the concept in 1204.B, basically  
25 saying any person filing a prehearing statement.

1 COMMISSIONER BAILEY: That's fine with me.

2 THE WITNESS: I would note that the drafting  
3 committee deliberately avoided using the term "party" in  
4 reference to a rulemaking proceeding because there was no  
5 definition who are the parties to a rulemaking proceeding.

6 COMMISSIONER BAILEY: Right, and we'll take that  
7 up later on today, I'm sure.

8 CHAIRMAN FESMIRE: Okay. Is that all you --

9 COMMISSIONER BAILEY: Uh-huh.

10 CHAIRMAN FESMIRE: Commissioner Chavez?

11 COMMISSIONER CHAVEZ: Yes, under 1205.A.(2).(b),  
12 that is -- might be a bit limiting, and I'd like to include  
13 some language that would allow the Chairman to use any  
14 other factors that would allow for an efficient hearing  
15 process, leave it a little more flexible for the conduct of  
16 the hearing.

17 DR. BARTLIT: If I may make a suggestion in that  
18 regard, it's very common in other hearings to say all those  
19 who are supporting the proposal, generally supporting the  
20 proposal, sort of go together, and all those who are  
21 generally opposing the proposal, sort of together. So that  
22 would be another factor that you could include and help  
23 make a more orderly hearing.

24 COMMISSIONER CHAVEZ: Also, prior to that, under  
25 A.2.(a), there's a requirement there explaining the

1 procedures to be followed. We do that as a matter of  
2 practice, but if there were some written procedures ahead  
3 of time, could that be done by reference to some written  
4 procedures, so we don't have a lengthy explanation of what  
5 procedures?

6 Let's just say explain procedures to be followed  
7 or referencing predetermined written procedures. Would  
8 there be a problem with that, Mr. Brooks?

9 THE WITNESS: Well, where would those -- what  
10 written procedures would they be referring to? It would  
11 be --

12 COMMISSIONER CHAVEZ: If --

13 THE WITNESS: -- referring to procedures adopted  
14 for that specific meeting?

15 COMMISSIONER CHAVEZ: Yes.

16 THE WITNESS: Well, as long as the wording made  
17 that clear, I would not see a problem.

18 COMMISSIONER CHAVEZ: Okay.

19 MS. LEACH: Basically what you're contemplating  
20 is sort of a -- almost like a prehearing directive from the  
21 Commission Chairman serving in his capacity as the hearing  
22 officer until the Commission meets, and then --

23 COMMISSIONER CHAVEZ: Well, is --

24 MS. LEACH: -- and I think it's broad enough that  
25 explaining the procedures -- he could explain procedures --

1 that have already been incorporated in such an order or  
2 distributed to anyone who's planning to participate.

3 COMMISSIONER CHAVEZ: Okay, thank you.

4 Under (h), we're again talking about the  
5 continuance of the hearing. Mr. Brooks, if the Commission  
6 anticipated a longer hearing schedule, would it be  
7 effective enough, in your opinion, to perhaps put that in  
8 the notice of hearing? Because of different schedule  
9 issues that come up, couldn't the Commission say if this --  
10 if this particular hearing or case were not finished on the  
11 first day, it would be continued on the second day, or this  
12 can -- something to the effect that if this hearing is not  
13 finished this first date, it will be continued to a later  
14 date due to previous schedules and planning that the  
15 Commissioners and the rest of the participants have to  
16 make?

17 THE WITNESS: Yes, the Commission could put that  
18 in a notice, regardless of whether this Rule existed or  
19 not. This Rule would give the Commission the flexibility  
20 to set the date for completion of the hearing as it saw  
21 fit, but the Commission is certainly free to put whatever  
22 it wants to in its notices.

23 COMMISSIONER CHAVEZ: There are times -- I'm  
24 looking at C.(2) -- there have been times that I have seen  
25 exhibits that were lettered sequentially, not numbered

1 sequentially, that have been presented. Would that be  
2 acceptable also, or is this going to be strictly numbered,  
3 or what is -- The way it's proposed is, if a person  
4 presented exhibits that were lettered sequentially, they  
5 would not be usable.

6 THE WITNESS: Well, I'm not sure that the term  
7 "numbered" necessarily is that literally intended, but it  
8 is helpful in keeping track of exhibits if a defined  
9 sequence is used. And I don't know that this is really  
10 specific enough to do that, actually. I think that --  
11 Well...

12 COMMISSIONER CHAVEZ: It still allows  
13 flexibility, you think, for the Commissioner to accept  
14 exhibits that have been --

15 THE WITNESS: I believe that it does. I think  
16 it's basically admonitory, really, I don't -- Because the  
17 exhibits -- the designation of the exhibits can be changed  
18 by marking on them at the time of the hearing to conform to  
19 whatever the numbering scheme is.

20 COMMISSIONER CHAVEZ: Okay. Then under letter  
21 (f) -- this is an internal issue, as was brought up before  
22 -- does this need to be part of the Rule, or is it a  
23 procedural issue that --

24 THE WITNESS: In my opinion, it does not need to  
25 be part of the Rule, however there were others in the legal

1 department who felt otherwise. So I will defer to other  
2 people's opinions on that. I don't know that it -- I don't  
3 see that it does any harm to have it in the Rule.

4 COMMISSIONER CHAVEZ: Okay, thank you. That's  
5 all I have.

6 CHAIRMAN FESMIRE: Okay. Mr. Brooks, A.(h) --

7 THE WITNESS: Yes.

8 CHAIRMAN FESMIRE: -- should we include the  
9 phrase "without further notice" at the end of that  
10 sentence?

11 THE WITNESS: I think that would be a helpful  
12 clarification.

13 CHAIRMAN FESMIRE: A.(2).(h), right?

14 THE WITNESS: Correct.

15 CHAIRMAN FESMIRE: And on E.(2), (2).E.(2)  
16 [sic] --

17 THE WITNESS: Yes.

18 CHAIRMAN FESMIRE: -- reopen the hearing for  
19 additional evidence, should we require notice there, or  
20 should we specifically state without further notice?

21 THE WITNESS: Well, it presently says subject to  
22 the requirements of due process --

23 CHAIRMAN FESMIRE: Right.

24 THE WITNESS: -- and that is, of course, vague,  
25 because due process undoubtedly requires some character of

1 notice, but I could not give you any specific advice as to  
2 what, so you -- I don't -- I don't think we would want to  
3 say without further notice, because that would tend to  
4 contradict the subject to due process, but I don't know  
5 just what due process requirements are.

6 CHAIRMAN FESMIRE: Okay.

7 THE WITNESS: Clearly, if you've told the -- if  
8 there's been an announcement or statement that the  
9 testimony is closed and a bunch of people have left, and  
10 one side is still there, and then you reopen it and allow  
11 them to put on additional testimony, there would be some  
12 appearance of unfairness in that.

13 CHAIRMAN FESMIRE: Okay, that's all of my  
14 comments. Why don't we take a 10-minute break before we  
15 start on 1206?

16 DR. NEEPER: Mr. Chairman, may we continue on  
17 1205 for just a couple issues?

18 CHAIRMAN FESMIRE: Why don't we do that when we  
19 get back from the break, then?

20 DR. NEEPER: All right.

21 CHAIRMAN FESMIRE: Okay?

22 (Thereupon, a recess was taken at 10:42 a.m.)

23 (The following proceedings had at 10:52 a.m.)

24 CHAIRMAN FESMIRE: Doctor, you had some further  
25 comments on 1205?

1 DR. NEEPER: It was just unclear where we left  
2 the discussion on the continuance. It was brought up that,  
3 gee, it would be a lot of trouble if you had to renote a  
4 hearing, but I'm not sure there was ever a suggestion.

5 I would then make a suggestion that we insert  
6 some words to the effect that the hearing must be started  
7 and testimony initiated. I'm trying to get at this point  
8 of never starting a hearing, which is permitted in the  
9 current wording.

10 CHAIRMAN FESMIRE: Okay, one of the things that  
11 we're going to do is, I'm making a list of each one of  
12 these points, and we'll come back and vote on them after we  
13 get done discussing it. So if there's more you want to say  
14 about it, like I said, I plan at the end to let you do your  
15 presentation the way you had it outlined. But if there's  
16 more you want to say, now's the time to say it.

17 DR. NEEPER: Yeah, I think I should do point by  
18 point as we go, and try to reduce the general presentation.

19 CHAIRMAN FESMIRE: Okay, so did you want to  
20 address 1205 before we move on to 1206?

21 DR. NEEPER: That was one point of 1205, was it  
22 not, was the continuance --

23 CHAIRMAN FESMIRE: Right, whether or not notice  
24 is required, formal notice is required for a continuance.

25 MS. LEACH: I think he's raising a little

1 different point, which is basically -- he's not talking  
2 about like, gee, you ran on all day on hearing and you  
3 still need to go to the next day, but nobody can meet the  
4 next day so you're going to meet Tuesday of next week or  
5 something. I don't think that's what -- I think that's  
6 what (h) addresses.

7 I think what Dr. Neeper is asking about is that  
8 he's asking about not starting a hearing on the day that it  
9 was originally noticed, and --

10 DR. NEEPER: Without notifying it.

11 MS. LEACH: Yeah, and basically just continuing  
12 it the day of the hearing, which happens a great deal in  
13 our adjudicatory hearings. Doesn't happen so much in  
14 rulemaking hearing, but it did kind of happen this time  
15 because of the publication problems.

16 CHAIRMAN FESMIRE: Right.

17 DR. NEEPER: It happened in the pit hearing.

18 CHAIRMAN FESMIRE: I've got that referenced as  
19 1205.A.(2).(h), a question only if hearing was started, to  
20 be voted on and discussed among the Commissioners.

21 DR. NEEPER: There was a second point of  
22 reopening a hearing. I remember an experience with that in  
23 a rulemaking hearing, not in this agency, another agency  
24 where the hearing did have to be reopened, and what -- our  
25 wording here is -- currently was, with due-process

1 requirements. That's E.(2). As Mr. Brooks said, he wasn't  
2 himself clear on what due process would mean there.

3 What we would like to assure is that if a hearing  
4 is reopened, all participants are noticed. That's what's  
5 crucial, because otherwise you lose the opportunity for  
6 rebuttal. And that was followed in that hearing, and there  
7 was much rebuttal and much argument that went on, but it's  
8 very necessary that people knew that the hearing was  
9 reopened and process was carefully followed.

10 CHAIRMAN FESMIRE: Okay.

11 DR. NEEPER: So I think we should spell out what  
12 the process is, if it's not absolutely clear.

13 CHAIRMAN FESMIRE: Okay. Commissioners, do you  
14 have any comments on that?

15 COMMISSIONER BAILEY: I have no problem with that  
16 suggestion.

17 COMMISSIONER CHAVEZ: I don't either.

18 MS. LEACH: I think basically what you really  
19 want to do is just reference back to the rulemaking, you  
20 know, so that there is -- if you reference back to 1202,  
21 the rulemaking notice, I think you're going to need to do  
22 the same notice to reopen and take additional testimony.

23 THE WITNESS: I don't really disagree with that  
24 suggestion. However, I would notice -- note that in some  
25 contexts it could be a little -- it could be a bit awkward.

1           For instance, if you had a rulemaking proceeding  
2 in which -- which dealt with the section of the Rules that  
3 say only the Division staff and New Mexico Oil and Gas  
4 Association were concerned with, and the Division had  
5 presented their case and NMOGA had presented their case and  
6 the matter had been closed, and then it was determined that  
7 -- the Commission determined that there was no evidence on  
8 a crucial point, both attorneys for both parties were still  
9 present, would it be necessary to go back and give new  
10 notices and schedule another hearing to reopen?

11           That, I think, is what we had in mind when we  
12 attempted to write this Rule. I agree, it's not very  
13 specific as written.

14           CHAIRMAN FESMIRE: Okay.

15           MS. BELIN: Mr. Chairman, might I just clarify  
16 something, because I'm still confused about that A.(2).(h)  
17 and Dr. Neeper's comments. I think that Dr. Neeper  
18 understands that that provision is just applying to the  
19 hearing that already began. I think he's asking that  
20 somewhere in the Rules there be a provision to deal with  
21 the other situation. I just wanted to clarify that.

22           CHAIRMAN FESMIRE: Yeah, that's what we intend  
23 to --

24           MS. BELIN: Okay, sorry.

25           CHAIRMAN FESMIRE: -- take up in deliberation.

1           Okay, Mr. Brooks, would you proceed to 1206?

2           THE WITNESS: Yes, Mr. Chairman. We're now going  
3 into the portion of the proposal that deals with  
4 adjudicatory hearings.

5           Rule 1206 is identical to the present Rule on  
6 initiating a hearing, with the exceptions that, one, it is  
7 limited to adjudicatory hearings, two, it includes a  
8 provision for striking an application due to the lack of,  
9 as presently phrased, a substantial interest in the subject  
10 matter on the part of the applicant. There is no such  
11 provision in the present Rule. Third, it requires e-mail  
12 address or fax numbers in the application.

13           With regard to the first and third, I think no  
14 additional comments are necessary.

15           With regard to the language, "substantial  
16 interest in the subject matter", the Division has suggested  
17 that we change that to "standing". I agree with that.  
18 Basically, there is no body of law to which we can refer to  
19 determine what would constitute a substantial interest in  
20 the subject matter, and that would have to be evolved by  
21 the Division on a case-by-case basis.

22           With regard to standing there are not absolutely  
23 definite parameters, but there is a body of case law  
24 defining standing, and one of the things that it does  
25 provide -- It is fairly inclusive. For instance, a --

1 there are cases holding that a competitor of an applicant  
2 who has no interest in the subject matter other than the  
3 desire to limit competition can nevertheless have standing  
4 to appear in a case.

5 There are decisions holding that an organization  
6 which has as one of its purposes supporting or opposing  
7 different types of administrative action, if any of its  
8 members is in a position to be affected by the Application,  
9 would then have standing to appear and present its case.

10 Again, standing is a fairly amorphous concept.  
11 There's not a definite answer to every question, but there  
12 is someplace to go for an answer, which there would not be  
13 with the substantial interest language.

14 The reason that this language was included in the  
15 Rule was that the committee felt that there would be a  
16 potential for wasting the time of the Division Examiners  
17 and of parties if there were no restrictions on who can  
18 file applications seeking orders from the Division.

19 I believe that concludes my comments on 1206.

20 CHAIRMAN FESMIRE: Any comments from the public?  
21 Mr. Alexander?

22 MR. ALEXANDER: At Burlington we would agree, I  
23 think that we would prefer to use the word "standing" too,  
24 because when you get into adjudicatory matters you're  
25 getting very close to home on financial arrangements and

1 real property and over those situations, so I think it  
2 should be a much narrower view than in adjudicatory  
3 proceedings, so I would agree.

4 CHAIRMAN FESMIRE: Dr. Neeper, since that was the  
5 subject of the comments I received yesterday, I assume you  
6 all have some stuff other than the comments you want to say  
7 here.

8 DR. NEEPER: The situation with standing, we find  
9 to be quite exclusionary of the public. That is, as you  
10 point out, there is case law on standing. I'm not a  
11 lawyer, but for what little I know if it, you usually would  
12 have to show that you were going to be injured, there was  
13 potential injury, as you point out, or some member of an  
14 organization is going to suffer potential injury or some  
15 potential impact.

16 And so this opens the opportunity for us to spend  
17 endless time in hearings arguing the legalities of standing  
18 and whether somebody has standing, rather than arguing the  
19 substance of the hearing. The average citizen isn't going  
20 to be able to determine whether or not they have standing,  
21 coming into a hearing. And I think the public ought to be  
22 able to determine whether or not, at least, it's allowed to  
23 participate in a hearing. And simply saying the word  
24 "standing" doesn't.

25 Now, I understand from what Mr. Brooks says that

1 this wording was put there out of the fear that there would  
2 be improper or abusive practices by persons who have no  
3 business doing what they were trying to do. And in our  
4 experience in other agencies, we have not seen that. And  
5 if that happens, that could be put down by the hearing  
6 officer or the chairperson immediately.

7 So the potential for wasting time by virtue of,  
8 let us say, an irrelevant person taking an irrelevant  
9 action is very small compared with the potential for  
10 wasting time arguing who has standing.

11 If the previous concept of any person being able  
12 to participate has not caused trouble in the past -- and as  
13 far as I know it has not, within the jurisdiction of this  
14 Commission and this agency -- I don't see why we need to  
15 fix it.

16 CHAIRMAN FESMIRE: Any other comments?

17 Commissioner, do you have any questions?

18 COMMISSIONER BAILEY: Well, I would just like to  
19 note that we also received written comments from Yates on  
20 the issue of standing, just for the record. I believe that  
21 we do need to have the word "standing" in there. I think  
22 that it is something definable, that we can use as a  
23 standard. Otherwise, it becomes a very gray matter of who  
24 is a participant or not. I firmly feel we need to have the  
25 word "standing".

1 CHAIRMAN FESMIRE: Commissioner Chavez?

2 COMMISSIONER CHAVEZ: I agree with the necessity  
3 of the word "standing" in there, I think it's important.

4 CHAIRMAN FESMIRE: Mr. Brooks, my question is on  
5 a completely different bent.

6 THE WITNESS: Yes, sir.

7 CHAIRMAN FESMIRE: What we've used 20 days  
8 before, we specifically used 23 days for the -- where the  
9 applicant for an adjudicatory hearing should file a written  
10 application. I'm assuming there was a reason for that,  
11 other than just add variety to life. Is there?

12 THE WITNESS: Well, that is in the present law,  
13 and the reason for it is to give a period of time -- our  
14 present Rules require that notice to the parties, for  
15 instance, in a compulsory pooling case, to the people to be  
16 pooled, must give notice of the date, time and place of the  
17 hearing.

18 The purpose of the 23 days is to enable the party  
19 to file the application and enable the Commission secretary  
20 to get it docketed so that they then know that it is on the  
21 docket for a particular date in advance of the 20-day time  
22 when they have to send out that notice. For instance, if  
23 our hearing is on Thursdays -- they usually are -- you have  
24 to send out notice on the Friday three weeks before. The  
25 point of that is, Florene has to have the application on

1 Tuesday. That gives her some time to get it docketed and  
2 advise the parties that it has been docketed for a  
3 particular date so they can proceed to do their notice.

4 CHAIRMAN FESMIRE: Okay, so the 23 days is to  
5 allow the 20 days notice in the other --

6 THE WITNESS: Exactly.

7 CHAIRMAN FESMIRE: Okay. That was the only  
8 question I had on 1206. Are there any further comments on  
9 1206?

10 COMMISSIONER CHAVEZ: Just one more. Under B,  
11 you reference "division secretary", not "division clerk".

12 THE WITNESS: Which line?

13 CHAIRMAN FESMIRE: The first line.

14 COMMISSIONER CHAVEZ: Yes, under 1206.B,  
15 "Applicants..." --

16 THE WITNESS: Oh, okay. Yes, that is probably an  
17 error. We had used the term "secretary" in an earlier  
18 draft, so that probably should be changed to "clerk".

19 COMMISSIONER CHAVEZ: Okay.

20 CHAIRMAN FESMIRE: Okay. Mr. Brooks, 1207?

21 THE WITNESS: Very good. 1207 is a provision for  
22 notice of adjudicatory hearings. It is substantially the  
23 same as the existing Rule, which was revised in 2003. It  
24 does expand the notice provision to require an e-mail  
25 address or fax number for the applicant to facilitate

1 respondent's filing responses.

2           There is currently a provision that the Division  
3 shall publish notice at least 10 days before -- There is a  
4 provision that the Division shall publish notice at least  
5 10 days before the hearing in 1207.B. That is not in the  
6 present Rule. Otherwise, it is substantially the present  
7 Rule.

8           Now, in reformatting this Rule, an error was made  
9 that has resulted in a Division comment. The material on  
10 the Division's comments appears as 1207.A.(6), which is  
11 inserted between 1207.A.(5) and 1207.A.(6) as it appears in  
12 the draft -- in the Commission draft. The Division's new  
13 proposed 1207.A.(6) would read, a reasonable identification  
14 of the adjudication subject matter that alerts persons who  
15 may be affected if the Commission grants the application.

16           That is a slightly reworded version of language  
17 that is in the present Rule and was inadvertently omitted  
18 in reformatting the material.

19           CHAIRMAN FESMIRE: Okay. 1207.B?

20           THE WITNESS: Yes, 1207.B is identical in  
21 substance to the present Rule, with the exception of the  
22 10-day requirement, which there is no time period for which  
23 the Division's publication of notice must occur for  
24 adjudicatory proceedings under present rules.

25           CHAIRMAN FESMIRE: Okay. Are there any public

1 comments on 1207?

2 DR. NEEPER: We have some difficulty with the 10-  
3 day notice, but it's not with the 10-day notice *per se*.  
4 It's when you combine the 10-day notice with the other  
5 requirements of adjudicatory hearings, you find that there  
6 is very little time for anyone who wishes to participate to  
7 prepare. That is, the notice is at 10 days, but the  
8 prehearing statement is due at five days, roughly, on the  
9 preceding Thursday. The notice of appearance has to be  
10 made a day before that, and you have to file by paper.

11 And so if you add three days for mailing, it  
12 leaves you usually about two days after the notice in which  
13 to prepare, put your exhibits together, and get the whole  
14 thing prepared. And that's probably not adequate time for  
15 anybody to prepare a meaningful participation.

16 CHAIRMAN FESMIRE: Mr. Brooks, do you have a  
17 response to that?

18 THE WITNESS: Yes. In the first place, of  
19 course, the respondents receive -- there's a 20-day notice  
20 provision for the respondents, which does give them time to  
21 prepare. We do understand that there is a problem for  
22 people who receive notice only through the publication  
23 process. We believe that there is literally time, and of  
24 course there's the opportunity to move for continuance.

25 We were attempting to address a number of issues

1 in setting these deadlines. If we set a publication  
2 deadline that is too close to the time the application is  
3 filed, we run the risk of having to delay hearings for no  
4 reason other than the fact that the publication was not  
5 accomplished within the time required.

6 If we stretch out the time for -- well, if the  
7 time -- if we make the time from filing of application to  
8 last day for publication shorter, we run the risk of having  
9 to put off hearings, like I say, for no reason except  
10 failure to give timely notice.

11 If we try to deal with this problem by making the  
12 time for filing a prehearing statement less, then we are  
13 pushing the time when opposing parties will receive the  
14 prehearing statement up against the time of the hearing.

15 If we try to deal with this by expanding the time  
16 frame from the filing of the application to the date when  
17 the hearing may be set, we slow down our procedure in  
18 routine cases, as compared with how it has been in the  
19 past. So the point of this is, we recognize that these  
20 time frames are not ideal, but any possible change has some  
21 problems with it.

22 CHAIRMAN FESMIRE: Doctor, would you --

23 DR. NEEPER: A possible solution to this is to  
24 recognize that adjudicatory hearings deal with two type of  
25 situations. Probably 95 percent of adjudicatory hearings

1 deal with property and business rights and pooling and  
2 reservoir management and things in which the public has  
3 both no interest and, I will dare say, no business.

4           There are a few others which deal with permitting  
5 and waste management, waste disposal. In those, the public  
6 has a very legitimate interest, and the public's interest  
7 in those matters should be preserved. The public should  
8 not be shut out.

9           But if you make an adjudicatory hearing rule such  
10 that the public cannot participate, you shut yourself off  
11 from both public participation and the source of a lot of  
12 information. And subsequently in my formal direct  
13 testimony, I will give you some stories or examples of the  
14 kind of information that I fear you would be losing.

15           So you may want to distinguish at some point  
16 between those two types of adjudicatory hearings.

17           But as I see it, by treating them all with one  
18 size, and those that do affect the public, you have shut  
19 the public out.

20           CHAIRMAN FESMIRE: Okay.

21           MS. LEACH: Dr. Neeper, what would you propose  
22 instead of the 10 days?

23           DR. NEEPER: There are -- As Mr. Brooks says, you  
24 can extend the notification period. Now, most of your  
25 notification deals with specific persons who are known to

1 have specific interests, in pooling cases, for example, so  
2 they get noticed ahead of time anyway.

3 What I feel I would really propose as the most  
4 workable solution would be to separate these two types of  
5 business for the hearing and saying, if it affects safety  
6 and waste disposal and waste management, you have a longer  
7 notice period and a slightly different participation role.

8 MS. BELIN: How much notice?

9 How much notice?, I've been advised. Well, at  
10 least the 20-day notice of rulemaking.

11 CHAIRMAN FESMIRE: Commissioner, do you have  
12 any --

13 DR. NEEPER: The other --

14 CHAIRMAN FESMIRE: Oh.

15 DR. NEEPER: The other 90 percent of the cases, I  
16 think, don't affect the public. And if it's convenient for  
17 the industry and the Division to operate with 10 days and  
18 that works best for business, I think it should be done.

19 CHAIRMAN FESMIRE: Commissioner?

20 COMMISSIONER BAILEY: I think Dr. Neeper has a  
21 valid point. I just don't know how -- what suggestion to  
22 make for language change at this point. I think we need to  
23 work on that.

24 CHAIRMAN FESMIRE: Mr. Brooks, what if we were to  
25 change -- what would the effect be if we were to change to

1 10 days?

2 THE WITNESS: Change what to 10 days?

3 CHAIRMAN FESMIRE: Change the 10 days to 20 days?

4 THE WITNESS: I believe it would complicate the  
5 Commission secretary's life.

6 (Laughter)

7 THE WITNESS: I see she is nodding over there.  
8 We would not want it to cause her to take retirement.

9 (Laughter)

10 CHAIRMAN FESMIRE: Well, what would we be pushing  
11 against if we were to change it to 20 days?

12 THE WITNESS: If we changed it to 20 days, the  
13 difficulty is in actually getting the publication  
14 requirements when we only receive the application 23 days  
15 -- 20 days -- you receive it on Tuesday afternoon at five  
16 o'clock, it's got to be on the website and the distribution  
17 done by Friday afternoon. And while that usually is  
18 feasible, we were told that, you know, there a lot of slips  
19 between the cup and the lip in terms of getting notices,  
20 and it might happen, and it might cause hearings to have to  
21 be postponed. And it would, in any case, put a stress on  
22 what's a very busy time in terms of getting the docket  
23 ready anyway.

24 CHAIRMAN FESMIRE: Commissioner Chavez?

25 COMMISSIONER CHAVEZ: Well, I agree. I think

1 that Dr. Neeper makes a very valid point about those other  
2 kinds of cases. And I was wondering if there might be a  
3 way to further differentiate between the types of cases,  
4 adjudicatory cases. And Dr. Neeper had some suggestions  
5 about how differentiate between those that would be just  
6 very fine with 10 days and those that would require more  
7 notice.

8 Perhaps if somehow -- when an application is  
9 filed, if it could be determined somehow that this  
10 particular case may have greater public impact or whatever,  
11 go to a 20-day notice on that particular case. But I don't  
12 know if we're introducing something more complex.

13 CHAIRMAN FESMIRE: Well, that seems to me to be  
14 the introduction of an -- almost an arbitrariness --

15 COMMISSIONER CHAVEZ: Yeah, it --

16 CHAIRMAN FESMIRE: -- you know, that would --

17 COMMISSIONER BAILEY: A judgment call.

18 CHAIRMAN FESMIRE: Right. Not that we're not  
19 used to making them, but I'd sure like to avoid them if we  
20 could.

21 MS. LEACH: Maybe Dr. Neeper or his attorney has  
22 language suggestions, and they might even reference the  
23 kind of cases. Because I mean, what I heard him talking  
24 about were really like waste-management-type issues, and  
25 that's under a specific Rule. So it could be 10 days

1     except for cases pursuant to Rule such-and-such, in which  
2     case the notice has to be 20 days.

3             DR. NEEPER: In our written comments we suggested  
4     the language, "in a hearing related to pollution, public  
5     safety, remediation, contamination, waste management, and  
6     waste-management facilities".

7             MS. LEACH: Okay, OCD may have a little trouble  
8     with the concept of pollution because I think they view  
9     every well as potentially, if not done correctly,  
10    potentially a pollution problem with groundwater. So that  
11    may be broader than the Commission can buy off on.

12            DR. NEEPER: Well, you could reduce it, then,  
13    public safety, remediation of contamination -- if you have  
14    contamination there's no question about pollution -- waste  
15    management, waste-management facilities.

16            MS. LEACH: I certainly think remediation and  
17    waste management are specifically identifiable. Public  
18    safety is kind of -- one of those things like pollution: I  
19    think it runs through almost everything that they do.

20            I'm just trying to help whittle down -- Maybe we  
21    want to think about this and, when we come back to it, talk  
22    a little bit more about specific language. But maybe those  
23    are some concepts, and maybe after lunch you guys could  
24    help us a little more.

25            DR. NEEPER: I chatted with my colleague at NMOGA

1 about this, and where it stuck in their craw was in  
2 relation to injection wells. That is a waste-management  
3 facility. And I had to scratch -- I had to think very hard  
4 to think of a case where the public would come into a  
5 hearing on an injection well. I think the danger would be  
6 very small that you would have someone come in and  
7 inappropriately act in that case. But an injection well is  
8 a waste-management facility.

9 MS. LEACH: Yeah, I mean, that's the reason I was  
10 trying to talk about referring to specific rules. Our  
11 surface waste disposal facilities are under Rule 711, and  
12 that's pretty discrete, we all know what we're talking  
13 about. And you know, I can certainly see the public's  
14 involvement there.

15 I don't know -- Do you really want the additional  
16 notice for every kind of -- every possible disposal well?  
17 Because there are a lot of them, so they may be more  
18 problematic for the Commission.

19 DR. BARTLIT: Well, if there's a general  
20 consensus -- and I sense there is to some degree -- on this  
21 notion --

22 MS. LEACH: Uh-huh.

23 DR. BARTLIT: -- of separating the five percent  
24 of the adjudicatory issues that relate to environmental in  
25 some way, and the 95 -- 90, 95 percent that don't, if

1 there's a consensus on that concept, we can work with the  
2 language --

3 MS. LEACH: Uh-huh.

4 DR. BARTLIT: -- amongst ourselves, with you,  
5 with NMOGA, with anybody and everybody, to make that  
6 happen.

7 MS. LEACH: Uh-huh.

8 DR. BARTLIT: It's an important issue, because  
9 the way we were going here, you're going to start  
10 complicating all adjudicatory issues --

11 MS. LEACH: Yeah.

12 DR. BARTLIT: -- and delaying them, for the five  
13 or 10 percent that we care about.

14 MS. LEACH: Yeah, what I'm hearing from the  
15 Commission is that they're amenable to the concept of a 20-  
16 day notice for certain kinds of cases; I'm assuming Rule  
17 711 cases.

18 Is there a better way to define "remediation"  
19 cases? Because remediation can come from any kind of  
20 permitting.

21 CHAIRMAN FESMIRE: Right.

22 MS. LEACH: So the --

23 COMMISSIONER CHAVEZ: Well, in order to avoid --  
24 that's how come I asked the question, because it's too  
25 complex, and it appears that -- very quickly found out that

1 it does get real complicated. I wouldn't have a problem  
2 with the 20 days, because it makes it easier to be sure we  
3 catch everything.

4 In this particular situation, even though it  
5 introduces a little more complexity into the Commission,  
6 the Division, doing its business, if it's appropriate in  
7 order to get the comment and the testimony necessary to  
8 complete that business, we should do it, it's the right  
9 thing to do.

10 DR. NEEPER: Well, be aware that it intersects  
11 the other parts, many parts of the Rule, because it has to  
12 do, then, with standing and with the required activities to  
13 participate. And so potentially, if we do consider two  
14 types of Rule, it might be more than just the 20 days we  
15 want to consider. Am I clear on that?

16 COMMISSIONER CHAVEZ: I understand.

17 CHAIRMAN FESMIRE: Well, I'm wondering how  
18 difficult it -- Granted, it gives us three days to get it  
19 noticed, if we were to go to the 20 days on all of them.  
20 Would that be --

21 MS. DAVIDSON: On all?

22 CHAIRMAN FESMIRE: On all adjudicatory hearings,  
23 yeah.

24 (Laughter)

25 DR. BARTLIT: You can't record her expression.

1 (Laughter)

2 CHAIRMAN FESMIRE: I think I got the answer to my  
3 question.

4 (Laughter)

5 COMMISSIONER CHAVEZ: We need to swear her in.

6 (Laughter)

7 MS. DAVIDSON: It can be done, under certain  
8 conditions. It may not happen -- but --

9 MS. LEACH: Is there a compromise? I mean, could  
10 we just get it out in 23 days before the hearing? Is there  
11 a compromise that works better than 20? I mean, is 15  
12 sufficient for Dr. Neeper's purposes?

13 CHAIRMAN FESMIRE: That would give you a week to  
14 prepare.

15 THE WITNESS: Well, of course 10 is 15.

16 CHAIRMAN FESMIRE: That's true.

17 MS. LEACH: I thought 10 was 12.

18 THE WITNESS: Ten is 14.

19 CHAIRMAN FESMIRE: Ten --

20 THE WITNESS: Ten is 14.

21 MS. LEACH: Because you have the weekend --

22 THE WITNESS: So one day -- 15 is only one day  
23 more than --

24 MS. LEACH: Yeah --

25 THE WITNESS: -- 10.

1 MS. LEACH: -- you're right.

2 CHAIRMAN FESMIRE: Mr. Carr?

3 MR. CARR: Don't you think, to be sure 10 isn't  
4 15 and 23 isn't --

5 (Laughter)

6 MR. CARR: -- that you ought to have one uniform  
7 way announced of counting your days?

8 MS. BADA: I actually do on the computation of  
9 time.

10 MR. CARR: But I mean, if we're trying to seek a  
11 rehearing and it's 10 days, it's actually not, it's  
12 actually 15 because it's less than 10, but 23 days before  
13 is 23 days before for filing. It seems to me you've got a  
14 confusion, and this would be a chance to clean that up at  
15 the same time.

16 And maybe, you know, you could have an  
17 application filed a day or two earlier, I mean, because  
18 you're creating, in effect, a problem getting these  
19 correctly in the newspapers three days from the day they  
20 come in --

21 CHAIRMAN FESMIRE: Well, we missed it last time.

22 MR. CARR: I mean, so the whole thing, if it's  
23 all made by rule, it could be fluid. And you ought to --  
24 My thought is, I mean, instead of creating some unworkable  
25 three-day time period, you ought to just look at the whole

1 thing and say, This is going to work.

2 And then I also think it's much wiser to have  
3 standard periods so that you don't have to decide whether  
4 you really have to file on this day or -- I think all cases  
5 should have standard time frames, because it's going to  
6 create a compliance issue that's going to be a nightmare.

7 MS. LEACH: The 23 days is in our current  
8 Rules --

9 THE WITNESS: Yes.

10 MS. LEACH: -- is that correct? It's not  
11 statutory?

12 THE WITNESS: No, it is not.

13 MS. LEACH: So it could be changed by the  
14 Commission.

15 MR. CARR: Because I think that would work better  
16 from an industry point of view. If everybody knows they  
17 file a few days earlier so the notice can be made, that's  
18 much better than creating a three-day turnaround to get it  
19 in and to the newspaper, because I think the important  
20 thing is, as you go through this, to try and not make it so  
21 complicated that, especially with more people coming into  
22 the process that aren't attorneys and aren't -- you know,  
23 we never can figure it out anyway, how would you expect  
24 them to do it? You know, I think it needs to make sense.

25 MS. LEACH: So if you went to 30 days for filing,

1 then 20 days for notice might be more workable. Actual,  
2 real days, count them off.

3 CHAIRMAN FESMIRE: Well, as long we're above 10  
4 days, they'll be actual, real days.

5 Does anybody have that Rule off the top of their  
6 head, any practicing attorneys, the -- Is it like Texas, up  
7 to 10 days you don't count the weekends, after 10 days you  
8 count everything?

9 COMMISSIONER CHAVEZ: Uh-huh.

10 THE WITNESS: Well, in Texas it's a different  
11 number of days, though.

12 CHAIRMAN FESMIRE: It's 11.

13 MS. BADA: It's actually in the statute --

14 THE WITNESS: New Mexico, if it's less than 11,  
15 you count -- If I recall rightly, though, in Texas any  
16 period above three days you count the weekends.

17 CHAIRMAN FESMIRE: I don't remember.

18 THE WITNESS: I believe that is correct in Texas.  
19 But you know, there's no relevance to Texas for this  
20 proceeding.

21 CHAIRMAN FESMIRE: So --

22 MS. LEACH: It is statutory in New Mexico, I  
23 believe.

24 THE WITNESS: It might be helpful in our Rules if  
25 we -- whenever we refer to a time less than 10 days we --

1 10 days or less, we put "business days", just so people  
2 dealing with our Rules would know and not have to cross-  
3 reference it to a rule, a catch-all rule.

4 DR. NEEPER: It's a small point, but do you mean  
5 11 days, since Rule 1226 says 11 days?

6 THE WITNESS: Less than 11, if I --

7 DR. NEEPER: Less than 11.

8 THE WITNESS: So 10 or less.

9 CHAIRMAN FESMIRE: Okay. So the problem that  
10 we're addressing is mitigated somewhat by the fact that if  
11 it's 10 days, you've actually got 10 business days. That  
12 gives you four extra days, generally. Is there any way  
13 that that can't be done? No, it would -- you would have at  
14 least two weekends in a 10-day stretch, wouldn't you? No?

15 MS. LEACH: Not always.

16 CHAIRMAN FESMIRE: Not always.

17 MS. LEACH: Usually.

18 DR. NEEPER: Maybe I -- since I'm sworn, I can do  
19 this. I have a calendar where I try to deal with this  
20 issue, I think.

21 If a hearing is scheduled on a Thursday -- this  
22 is an adjudicatory hearing -- then the statement has to be  
23 in a week before, on this Thursday. Your appearance has to  
24 be in on that Wednesday. The notice is published on this  
25 Wednesday.

1           So you have these two business days and these two  
2 business days. You really have four business days before  
3 your appearance and five before your notice -- your notice  
4 of intent and your exhibits.

5           But you're required to use the U.S. Mail unless  
6 you live in Santa Fe or have runners. So you'd better get  
7 your mailing in about here on day 7 or 8. That gives you  
8 about these two. So if you read the notice on this day,  
9 you have a day or two, practically, to get this done. And  
10 so you hope that you don't have other business to do on  
11 those days because this is when it must be done.

12           In fact, you usually learn about these things far  
13 ahead and you spend weeks working on them, as everybody  
14 knows. But I think we should preserve as much fairness to  
15 the public as we can.

16           CHAIRMAN FESMIRE: Okay, any other comments on  
17 1207?

18           COMMISSIONER CHAVEZ: Oh, I'm sorry, yes, I did.  
19 Under 1207.A.(2), "whether the case is set for hearing  
20 before the commission or a division examiner". The process  
21 for making that determination isn't set clear previously,  
22 and I don't know whether it had to be under 1206 of  
23 initiating an adjudicatory hearing, where it says it shall  
24 be -- the applicant -- the person "may file an application  
25 with the division for an adjudicatory hearing."

1           And then you go to 1207, and -- A.(2), and say  
2 "whether the case is set for hearing before the commission  
3 or a division examiner". And the link there, I think,  
4 isn't clear, unless it's made further on, *de novo* or  
5 something further on in the Rules.

6           THE WITNESS: I believe there is something  
7 relevant in the *de novo* -- provisions regarding application  
8 for *de novo* hearing, but I actually have forgotten them  
9 right at the moment.

10          MS. BADA: They're actually in 1218.

11          THE WITNESS: I'm sorry?

12          CHAIRMAN FESMIRE: 1218?

13          MS. BADA: It talks about which ones go before  
14 the Commission.

15          THE WITNESS: Right, but is there a provision for  
16 when you have to -- Is there a provision for how long --  
17 There is in the present Rules, but I'm not sure if it's  
18 here. Is there a provision that you have to file the *de*  
19 *novo* at least 23 days before it's set for hearing?

20          MS. BADA: I don't know, let's see.

21          THE WITNESS: I think that may have dropped  
22 out --

23          MS. BADA: Yeah, that must have.

24          THE WITNESS: -- because I believe that is in the  
25 present Rules, and I think it may have dropped out in the

1 revision.

2 MS. BADA: Yeah.

3 COMMISSIONER CHAVEZ: Okay. Well, that's the  
4 only I had, then.

5 CHAIRMAN FESMIRE: Okay.

6 COMMISSIONER CHAVEZ: Thank you.

7 CHAIRMAN FESMIRE: Mr. Brooks, would you proceed  
8 to 1208, please?

9 THE WITNESS: Yes. Rule 1208 is entirely new.  
10 Its purpose is to define who are the parties to  
11 adjudicatory proceedings. As I stated, we have avoided the  
12 use of the term "party" in connection with rulemakings,  
13 because we have presupposed that a rulemaking is a public  
14 participation proceeding and that there are not parties as  
15 such. In an adjudicatory proceeding we want to define who  
16 are the parties.

17 And we have defined the parties include the  
18 applicant. Then they include everyone who is entitled to  
19 notice. That would be the statutory or regulatory notice  
20 that prescribes particular persons who are entitled to  
21 particular classes -- to notices of particular classes of  
22 applications. They are parties if they appear. Any other  
23 person can become a party by intervening. Intervention is  
24 dealt with in Rule 1209.

25 Now, appearance can be made in several ways. It

1 can be made by a written filing, or it can be made by an  
2 oral appearance at a hearing.

3 A party who does not make a written filing at  
4 least one day prior to the prehearing statement deadline  
5 would not be allowed to present technical testimony. That  
6 is for the purpose of preventing ambushes of those persons  
7 who have timely filed appearances or the applicant. But  
8 they would be otherwise permitted to participate in the  
9 proceeding.

10 Under 1208.C, however, for the protection of  
11 respondents, under 1208.C, a party who did not receive a  
12 notice at least three days prior to the time for filing an  
13 appearance would be entitled to a continuance.

14 I believe that's a summary. I'll be glad to  
15 answer questions.

16 Q. (By Ms. Bada) David, could you address the  
17 Division's comments on that section?

18 A. Yes, let me -- I wrote a note to myself about  
19 them, but it is illegible. I can't read my own  
20 handwriting, so I have to go to the Division draft.

21 Okay, the Division has clarified -- has requested  
22 that we clarify what constitutes a written appearance, and  
23 the language the Division has recommended -- I don't know  
24 if you have that before you -- it says parties shall be  
25 deemed to have made an appearance when they have either

1 sent a letter regarding the case to the Division or  
2 Commission clerk or made an appearance at any hearing  
3 regarding the case before the Commission or a Division  
4 Examiner. A written appearance shall not be complete until  
5 the appearing party has provided notice to other parties of  
6 record.

7 Basically, we agree with that. That is a needed  
8 clarification.

9 CHAIRMAN FESMIRE: Any comments from the public?

10 DR. BARTLIT: The issue remains the same with us,  
11 you know, this -- again, the fundamental one of standing.  
12 And this seems to retain the same definition of standing to  
13 which we have expressed differing views for quite some  
14 time, for reasons.

15 And again, I would emphasize that 90 percent or  
16 95 percent of the cases that are reservoir-management,  
17 property interests, are very different from what we're  
18 interested in. And to think of these all in the same way,  
19 I think, is difficult for you, it's difficult for us, it  
20 causes lots of problems.

21 Most of the things we're not contending about, we  
22 do not have a differing view from what's in here on most of  
23 the issues, adjudicatory issues. But there's that small  
24 part that we hear a great deal about. And we do not want  
25 to prolong discussions or argue about the 90 percent in

1 which there is no disagreement with the 10 -- five or 10  
2 percent of the cases which we feel strongly about.

3 And so I just say, is there a way to -- instead  
4 of avoiding -- hassling -- a lot of fights about things  
5 that we don't really care to argue about, we agree with  
6 them. But we feel strongly about those five or 10 percent,  
7 and it comes up over and over. Almost everything we've  
8 covered under an adjudicatory issue, it will come up in one  
9 way or another. It came up in notice, it comes up in who  
10 can intervene, the same word "standing" is there. It's the  
11 same issue, it's not a different issue.

12 You know, we've proposed a solution from our  
13 side, you can put in words that make that distinction. I'm  
14 sure there are other words that -- We're happy to entertain  
15 ideas from anyone and everyone.

16 But that's the nub of a lot of what -- of why  
17 we're here, that one point. And it reflects itself in  
18 many, many other ways. And we can talk about them  
19 piecemeal, but that's the core of it.

20 CHAIRMAN FESMIRE: Ms. Belin?

21 MS. BELIN: I just -- Might I make one suggestion  
22 as to a possible compromise, given that it sounds like the  
23 Commission wants to stick with this standing concept? In  
24 the Public Regulation Commission Rules there is a provision  
25 that even just -- even with the standing requirement, that

1 in cases -- I forget the term exactly, but of great public  
2 interest and where there's no undue prejudice to the  
3 parties, the hearing examiner may allow intervention.

4 In other words, opening the door to the  
5 possibility -- We are very concerned about having to spend  
6 all the resources fighting about standing and not being  
7 able to address the substance. And it might help if the  
8 Hearing Examiner had authority, in essence, in cases of  
9 public interest where there isn't prejudice to anyone, to  
10 bypass that. And so that would discourage people from  
11 unnecessarily fighting over that issue.

12 CHAIRMAN FESMIRE: Well, Miss Belin, you know, I  
13 thought separating it out between rulemaking and  
14 adjudicatory hearings was the compromise that we'd reached.  
15 You know, I wasn't aware of this issue until yesterday when  
16 I got your -- the comments. So this is, you know, a bit of  
17 a surprise to me, because I thought we'd already addressed  
18 this issue, and I thought we'd agreed on the way to address  
19 it.

20 DR. BARTLIT: Those -- If I may, those ideas were  
21 in the comments Dr. Neepor submitted for the July 7th or  
22 8th, or whatever it was, hearing.

23 CHAIRMAN FESMIRE: And I thought we'd addressed  
24 those --

25 DR. BARTLIT: And there was a specific one --

1 CHAIRMAN FESMIRE: -- in separating out the  
2 rulemaking.

3 DR. BARTLIT: -- about separating -- about making  
4 adjudicatory hearings, two kinds of adjudicatory -- that  
5 notion is in those comments. So it's been around --

6 CHAIRMAN FESMIRE: Okay.

7 MS. BELIN: Well, we would apologize if there --  
8 Certainly, we appreciated the distinction between the  
9 rulemaking and the adjudicatory hearings. I think that's  
10 an important step, and we definitely appreciate that, and  
11 not to perpetuate the party concept in the rulemakings, and  
12 I think that's a great measure.

13 I don't think that this group -- that New Mexico  
14 Citizens for Clean Air and Water -- I think they've been  
15 consistent in wanting the opportunity to participate in  
16 adjudicatory hearings of environmental concern and wanting  
17 to be able to present testimony and to cross-examine, and  
18 I'm sorry if there's been confusion.

19 CHAIRMAN FESMIRE: And I don't think the concept  
20 of standing would prevent that.

21 MS. BELIN: Well, we hope not, but we are  
22 concerned that it might. And I -- you know, I'm sure all  
23 of us lawyers have spent a lot of time looking at standing  
24 and know just how perplexing it can be. And so I guess  
25 what I was just suggesting is that maybe there -- that you

1 can add a provision saying that in cases of public interest  
2 where there's no undue prejudice, the Hearing Examiner can  
3 allow intervention in any case. Just -- just a thought to  
4 throw out to address that.

5 CHAIRMAN FESMIRE: Okay. Commissioner Bailey?

6 COMMISSIONER BAILEY: I support the Division's  
7 language.

8 COMMISSIONER CHAVEZ: I do too.

9 CHAIRMAN FESMIRE: Commissioner Chavez?

10 Okay. Anything else on 1208?

11 Mr. Carr?

12 MR. CARR: Mr. Chairman, I might just point that  
13 -- and this is my own statement -- that I think the people  
14 in this room, the 90-percent/10-percent distinction would  
15 probably pretty well work. There is some concern somebody  
16 else might have a 70/30 or 50/50.

17 But in terms of the 10 percent the Rule as  
18 written says, "The parties to an adjudicatory proceeding  
19 shall include the applicant; any person to whom statute,  
20 rule or order requires notice..." And so if there are  
21 particular kinds of cases, like a disposal application  
22 where the surface owner is also required to get notice,  
23 that there may be a way, even through that, to try and  
24 better define -- or to expand it if there is a particular  
25 type of case to which people are entitled to standing.

1 Just a thought.

2 CHAIRMAN FESMIRE: Ms. Bada?

3 MS. BADA: I just wanted to follow up with David.

4 Q. (By Ms. Bada) The Division had proposed  
5 renumbering 1208. Are we okay with that?

6 A. Renumbering 1208? It would appear to me that  
7 it's A, B and C in the June 8th draft, and --

8 Q. Right.

9 A. -- it's also A, B and C in the Commission -- or  
10 -- I'm not sure what the renumbering is. Okay, I must have  
11 a superseded draft of the Division's -- I had -- yeah, this  
12 draft is apparently not the final draft of the Division's  
13 comments.

14 Yeah, I have no problem with that. I believe  
15 that would make it clearer, the proposed splitting out the  
16 identification of the persons who can file as A.(1), (2)  
17 and (3); and then the balance of 1208.A would become  
18 1208.B; 1208.B and C would become 1208.C and D,  
19 respectively, and I think that would make it clearer.

20 CHAIRMAN FESMIRE: Any further comments on 1208?

21 1209, Mr. Brooks?

22 THE WITNESS: Well, I think we've already talked  
23 about 1209 to some extent. 1209 is the intervention Rule.

24 It provides, as presently written, that a person with a

25 substantial interest in a case's subject matter may

1 intervene. The proposal is to change that to "standing".  
2 That is the Division's proposal.

3 And for the same reasons that we believe that  
4 standing should be the determining factor in who can file  
5 an application, we would also think that standing should be  
6 the determining factor in who can intervene. But even if  
7 -- assuming the Commission agrees with that. But if the  
8 Commission disagrees, we still think that the same  
9 standards should apply in Rule 1209 to who can intervene as  
10 would apply to who can file an application under Rule 1206.

11 The rest of the provisions of 1209 are simply  
12 stating what is required in an application for  
13 intervention.

14 1209.A provides that -- for allowing late  
15 intervention. Basically, the intervent- is -- the timely  
16 intervention must be one day before the time for filing a  
17 prehearing statement, so that the parties filing prehearing  
18 statements can know who needs to be served with a  
19 prehearing statement and can also know what the issues are.  
20 In the interest of clarifying the issues, 1209.A.(4)  
21 requires the petition in intervention state the extent to  
22 which the intervenor opposes the issuance of the order the  
23 applicant seeks.

24 I believe that's all my comments on this.

25 CHAIRMAN FESMIRE: Public comments?

1 MS. LEACH: I have a question, if I may.

2 CHAIRMAN FESMIRE: Yes, ma'am.

3 MS. LEACH: Ms. Belin, if I understood your  
4 proposal a while ago, it would be perhaps in Part C of 1209  
5 where you would add the additional language, because that's  
6 where the Division -- may strike a notice of intervention  
7 if the notice fails to show that the intervenor has  
8 standing, as it were. So if you would add like in a less  
9 in cases of sufficient public interest, then there's no  
10 prejudice to the parties, then the Examiner does not have  
11 to strike.

12 MS. BELIN: That is exactly where I would, yes.

13 DR. NEEPER: I have an example of that language,  
14 or close to it, would be to allow intervention if it is  
15 unopposed and to require that participation be in the  
16 public interest if it is opposed. I mean, that's the PRC  
17 language.

18 MS. BELIN: And something about no undue  
19 prejudice too.

20 CHAIRMAN FESMIRE: Ms. Belin, why don't you give  
21 me that wording so I can catch it.

22 MS. BELIN: I'll try to --

23 MS. BADA: I can look it up on my --

24 MS. BELIN: -- get that, I'm sorry.

25 CHAIRMAN FESMIRE: Okay, but why don't you draft

1 a wording for Section C that would be --

2 MS. BELIN: Okay.

3 MS. LEACH: I'm sure they can bring that in after  
4 lunch.

5 CHAIRMAN FESMIRE: Are you hinting?

6 MS. LEACH: Just trying to give them time so  
7 they're not scurrying right there in front of us.

8 CHAIRMAN FESMIRE: Okay.

9 1210 has got -- while it's the world's longest  
10 section, it's only got one proposed change, right?

11 THE WITNESS: 1210 is essentially unchanged.

12 CHAIRMAN FESMIRE: Okay. Why don't we work  
13 through 1210, and then we'll break for lunch?

14 But we're still on 1209. Is there any more  
15 public comment on 1209?

16 Okay, let's go to -- Oh, I'm sorry, Commissioner,  
17 did you have --

18 COMMISSIONER BAILEY: No comment.

19 COMMISSIONER CHAVEZ: No comment.

20 CHAIRMAN FESMIRE: Let's go to 1210 then.

21 THE WITNESS: 1210 is the Rule regarding notice  
22 to parties. That is to say, it defines who are the  
23 respondents who have to get notice in particular types of  
24 hearings and how the notice is to be given. The only  
25 change here has to do with service by publication, where a

1 party's address is unknown. The requirement is stated here  
2 that the newspaper publication must be 10 days prior to the  
3 hearing.

4 The previous Rule did not state specifically, but  
5 because other provisions of the Rule required that parties  
6 be given notice 20 days in advance, it seemed to imply that  
7 the newspaper -- the present Rule seems to imply that the  
8 newspaper publication must occur 20 days prior to the  
9 hearing, which is extremely difficult to do if you don't  
10 find out confirmation of your hearing date until 22 days  
11 prior to the hearing, after you've filed your application  
12 and Florene has made out the docket. So that's the reason  
13 for this change.

14 CHAIRMAN FESMIRE: Okay. Any public comment on  
15 that change?

16 Commissioner Bailey?

17 COMMISSIONER BAILEY: I'll support this one.

18 CHAIRMAN FESMIRE: Commissioner Chavez?

19 COMMISSIONER CHAVEZ: No problem, no problem with  
20 it.

21 CHAIRMAN FESMIRE: Okay. Why don't we break for  
22 lunch and reconvene at one o'clock by that clock.

23 Thank you very much.

24 (Thereupon, noon recess was taken at 11:50 a.m.)

25 (The following proceedings had at 1:04 p.m.)

1           CHAIRMAN FESMIRE: Let's go back on the record.  
2 It's, for all practical purposes, one o'clock, and we're up  
3 through -- up to Rule 1211.

4           Is there any comment to this point that anybody  
5 thought about over lunch that they wanted to add?

6           MS. BELIN: Mr. Chairman, Carol had asked about  
7 our language suggestions relating to intervention and  
8 standing, and I just prepared some suggested language that  
9 is a new section to go in the intervention proceeding  
10 section, which is 1209, and an extra phrase to go into the  
11 1206, initiating adjudicatory hearing.

12           I'd be happy to pass out the suggested language,  
13 however you want to proceed.

14           CHAIRMAN FESMIRE: Okay, the one you did on 1209,  
15 that was an additional phrase in 1209.C that you were  
16 suggesting?

17           MS. BELIN: What I'm suggesting is inserting a  
18 new 1209.B and moving the current 1209.B to 1209.C. Oh,  
19 there is a C, yeah. And then moving C to D.

20           CHAIRMAN FESMIRE: Okay, what's your suggested  
21 language?

22           MS. BELIN: The suggested language is, "Where an  
23 intervenor's standing is disputed, the division examiner or  
24 commission chairman may, at their discretion, permit the  
25 intervention if they find that the participation of the

1 intervenor is substantially in the public interest, or that  
2 it poses no undue prejudice for the other parties."

3 CHAIRMAN FESMIRE: And...

4 MS. LEACH: Mr. Chairman, if she handed it out,  
5 then the opposing or potentially opposing parties over  
6 there could see it --

7 CHAIRMAN FESMIRE: Okay.

8 MS. LEACH: -- which might make them feel a  
9 little better, or perhaps worse.

10 (Laughter)

11 MR. CARR: Could you clarify who you think is  
12 opposing?

13 MS. LEACH: I said potentially opposing party.

14 (Laughter)

15 CHAIRMAN FESMIRE: That's mighty cheeky from the  
16 guy that doesn't know who he's representing.

17 (Laughter)

18 (Off the record)

19 MS. BELIN: I'm sorry, there is a Section D, I  
20 just haven't turned to the next page, so... But the  
21 language is under B there. That's the only new language  
22 there.

23 CHAIRMAN FESMIRE: Ms. Belin, when we get to --  
24 in the deliberations and reach 1206 and 1209, there's no  
25 way I can put it in my handwritten notes, so would you make

1 sure that we cover these when we get there?

2 MS. BELIN: Yes, I will.

3 CHAIRMAN FESMIRE: Because I might have the -- I  
4 have a habit of, if I put it in this stack, forgetting  
5 about it when it comes time.

6 Mr. Carr, are there any comments on their  
7 proposed changes to 1209 or 1206?

8 MR. CARR: 1206, not 1209.

9 CHAIRMAN FESMIRE: Okay.

10 MR. CARR: I mean, if I read -- the added  
11 language is in bold print, and if that's it -- as I read  
12 it, it says that you could have an adjudicatory hearing  
13 directed at any individual operator if you can show it's in  
14 the public interest to do that, making, in essence, anyone  
15 a sort of private attorney general to connect you, I would  
16 think.

17 And if that's what it means, then I'm sure, if  
18 anyone would hire me, I probably --

19 (Laughter)

20 DR. NEEPER: This is in 1206, "Initiating an  
21 Adjudicatory Hearing". I can't see where it's in the  
22 public interest to go after a private operator per se, but  
23 I can give an example where this might be used and where  
24 this actually has been used.

25 Let us presume there is a case of a petroleum

1 spill that has contaminated groundwater. Plans have been  
2 submitted to OCD, the arguments and deliberations over  
3 those plans have gone on for months while the pollution  
4 spreads. The operator would like to get along with the job  
5 but decisions can't be made. The citizens want a better  
6 job of cleanup than is proposed by the Stage 2 plan, things  
7 are dragging out and the pollution is growing. And in the  
8 actual case it was about six feet deep on the aquifer and  
9 growing.

10 In frustration, a citizen files for a hearing.  
11 That is the citizen's option at that point, to get some  
12 action on -- to get the case drawn up and action on it.  
13 And in that case, I think you would say it was in the  
14 public interest for a citizen to take that action.

15 Historically, what happened in that case was that  
16 the responsible party showed up in the citizen's living  
17 room, they negotiated together for a day, gave their  
18 options to OCD, it was signed off by OCD, and what had been  
19 taking months of procedure was solved in two days, only  
20 because that citizen had the option of filing for an  
21 adjudicatory hearing.

22 CHAIRMAN FESMIRE: Okay. Any further comment on  
23 the two proposed changes?

24 THE WITNESS: Well, I would make a comment, Mr.  
25 Chairman, on Dr. Neeper's hypo- -- or example, not

1 hypothetical, because I gather it was an actual case. But  
2 the way he described it, it would seem to me that the  
3 citizen in question would be a person who presumably would  
4 have standing in that type of situation, if it was a person  
5 whose property was affected by the pollution involved.

6 DR. NEEPER: The property was about 200 miles  
7 from anything the citizen owned.

8 CHAIRMAN FESMIRE: Okay, anything else we need to  
9 cover before proceeding to 1211?

10 Okay. Mr. Brooks, let's talk about 1211.

11 THE WITNESS: Okay. 1211 is the prehearing  
12 statement Rule. Most of the text of 1211 is taken from the  
13 existing Rule. There are three changes that are  
14 highlighted in green.

15 The first one is to qualify the requirement that  
16 prehearing statement be served on other parties by stating  
17 that it only needs to be served on those parties who have  
18 filed their appearance at least one day prior to the date  
19 the prehearing statement was due, that being intended to  
20 eliminate the uncertainty that a party filing a prehearing  
21 statement may be placed and as to who -- to whom they must  
22 file -- upon whom they must serve the prehearing statement.

23 The second change provides that if a party's  
24 filed pleadings do not have a facsimile number or e-mail  
25 address, then a prehearing statement may be served on that

1 party by ordinary mail. Because of the short time  
2 deadlines involved in these cases, the Rule requires -- the  
3 new Rule, as the present Rule, requires that service of the  
4 prehearing statements on the parties be electronic and not  
5 by mail.

6           However, that can create problems if the person  
7 preparing and serving the prehearing statement does not  
8 have ready access to a facsimile number or e-mail address,  
9 and therefore we suggest that if that is not provided, that  
10 they not be required to serve electronically.

11           Finally, the last sentence requires the  
12 furnishing of a facsimile number or e-mail address in a  
13 pleading. I believe that this may be duplicative in the  
14 sense that most -- that our other pleading rules that we've  
15 already gone over contain that requirement. This is to be  
16 a catch-all to make sure we haven't omitted anything -- any  
17 situation where that needs to be the case.

18           Now, the Division has proposed a change in the  
19 first of the three changes. I believe it -- No, it's in  
20 between the first and the second change. The sentence  
21 reads, "Parties shall accomplish service by and  
22 delivery..." et cetera "...to [a] party who has entered an  
23 appearance or the party's attorney of record."

24           Now, the intention was, if it -- to a party if  
25 they are not represented by an attorney, and to their

1 attorney if they are, the -- as written, however, literally  
2 it would give the serving party the alternative of serving  
3 either the party or the attorney, which would be confusing,  
4 since the attorneys wouldn't necessarily know what had been  
5 served on their clients.

6 Consequently, the Division has recommended that  
7 we change that to, any party who has entered an appearance  
8 or if, represented by an attorney, the party's attorney of  
9 record.

10 CHAIRMAN FESMIRE: Okay. 1211.B, do you have  
11 some --

12 THE WITNESS: Okay. Oh, yes, I realize we were  
13 going section by section. 1211.B prescribes --

14 COMMISSIONER BAILEY: There was one other  
15 suggestion by the Division, scratch "interested parties"  
16 and just put "parties".

17 CHAIRMAN FESMIRE: Right. The second  
18 recommendation by the Division? I'm sorry.

19 THE WITNESS: Yes, the Division has recommended  
20 the deletion of the material between the second and third  
21 green highlighted paragraph, because that material was  
22 incorporated in another rule pursuant to the Division's  
23 recommended amendment to Rule 1208.

24 MS. LEACH: No, we're just talking about  
25 "interested" being the word that's in front of the word

1 "parties".

2 MS. BADA: I think that was a prior version.

3 THE WITNESS: Okay. Again, I seem to have the  
4 wrong version of the Division's comments. I apologize.

5 We had attempted to eliminate all references to,  
6 quote, interested parties, because there was no definition  
7 of that term.

8 CHAIRMAN FESMIRE: Okay. Now 1211.B.

9 THE WITNESS: Okay, 1211.B prescribes the  
10 contents of a prehearing statement. 1211.B.(1) is an  
11 amplified version of the present Rule. The first change is  
12 the insertion of 5:00 p.m. Mountain Time for the time for  
13 filing. This is an ambiguity. Our offices would not be  
14 open for filing after that time, but the Rule would --  
15 literally read, would permit filing at any time on that  
16 calendar day.

17 (1).(a) says that the prehearing statement shall  
18 include the name of the party and the party's attorney.  
19 The present Rule requires the names of the parties and  
20 their attorneys, and it occurred to the committee that  
21 little purpose was served in requiring each party to list  
22 all the other parties' names and attorneys, since each  
23 party should be responsible for providing that information  
24 directly to the Division.

25 In (c), B.(1).(c) -- this is 1211.B.(1).(c) --

1 this is an amplification of the present Rule requiring  
2 identification of witnesses by requiring that expert  
3 witnesses be identified by their field of expertise as well  
4 as their name.

5 Other than those changes, the provisions of  
6 1211.B.(1) are the same as the existing Rule.

7 Now, before I go on to 1211.B.(2), (3) and (4),  
8 because the Division has some recommended changes in  
9 1211.B.(1), but none in (2), (3) and (4), I will go on and  
10 describe those.

11 The first one is in the second line where it says  
12 it's to be served on the parties or their counsel of  
13 record. Once again, the Division has indicated that for  
14 purposes of clarification we insert the words, "for parties  
15 that are represented".

16 And in the fourth line of 1211.B.(1), the  
17 Division has suggested that the requirement for filing on  
18 Friday be changed to the Thursday before the hearing. That  
19 was intended -- that would apply to both the Commission and  
20 Division hearings, but the purpose of it was for Commission  
21 hearings so that -- to require that prehearing statements  
22 be filed on Thursday so that they could be made available  
23 to the Commissioners prior to the weekend.

24 CHAIRMAN FESMIRE: Okay.

25 THE WITNESS: 1211.B.(2) requires first off that

1 a party who opposes the application include in their  
2 prehearing statement a statement of the extent to which  
3 they oppose the application and the reasons for their  
4 opposition. The present Rule simply requires a statement  
5 of the case and does not have any requirement that a party  
6 state their contentions in a prehearing statement, which  
7 makes them much less useful to the decision makers in  
8 trying to figure out what issues are actually going to be  
9 presented.

10 The next sentence of 1211.B.(2) is the one that's  
11 likely to be very controversial. That particular provision  
12 requires that in hearings before the Commission, exhibits  
13 to be offered in evidence be filed with the prehearing  
14 statement.

15 You will recall that earlier in the day we noted  
16 that the same requirement existed in rulemaking proceedings  
17 which are also proceedings before the Commission.

18 At the public workshop on this Rule, we found  
19 that nearly all stakeholder groups opposed the requirement  
20 for prefiling of exhibits. The committee recommended  
21 deleting that for Division Examiner hearings, because  
22 Division Examiner hearings are frequently settled prior to  
23 the hearing. A fairly large portion of them, for one --  
24 are either continued or settled so that they do not go  
25 forward as provided, and we thought that the points made

1 there, that it would be burdensome to require pre-filing of  
2 exhibits in view of the likelihood of the docket  
3 collapsing, was a valid point.

4           However, for Commission hearings it was our  
5 belief that it would assist the Commissioners in being well  
6 educated prior to the hearing, and that Commission hearings  
7 were normally contested hearings at which a vigorous  
8 presentation would be made and that it would be very  
9 helpful to the Commissioners to have prefiled exhibits.  
10 That was the reason for the recommendation on that subject.

11           The last sentence is the sanction provision that  
12 the Commission may exclude witnesses or exhibits if the  
13 prehearing statement rules have not been complied with. I  
14 would note that there are some differences in language  
15 between this and the Rule applicable to rulemaking  
16 proceedings, particularly the use in this Rule of the words  
17 about witnesses or exhibits offered for rebuttal.

18           Having served in an advisory capacity to the  
19 advisory committee for the revision of the Texas Rules of  
20 Civil Procedure at one time, I'm aware of a pitfall in the  
21 word "rebuttal" which I will point out. We used it anyway  
22 on the theory that the Commission would have an instinctive  
23 idea of what it means, but the problem with the rule is  
24 that the party not having the burden of proof can make a  
25 somewhat specious but nevertheless somewhat valid argument

1 that any witness or exhibit that they propose to offer is  
2 for rebuttal, because the whole point of the case being  
3 presented by the defendant or the party not having the  
4 burden of proof is to rebut the evidence offered by the  
5 plaintiff to meet their burden of proof.

6 So I don't know if any clarification of that  
7 would be necessary or not, I just point it out as being  
8 somewhat of a problem, perhaps, of this language.

9 Now, the rebuttal language is not used in  
10 rulemaking, and I do not recall if we had a specific reason  
11 why we used different language in the sanction provisions  
12 for rulemaking, versus this provision.

13 1211.B.(3) states that a prehearing statement  
14 filed by a corporation or other entity must include a sworn  
15 statement attesting to the authority of the person who will  
16 be appearing at the hearing on behalf of that entity.

17 1211.B.(4) requires the Commission clerk to  
18 disseminate copies of the prehearing statement and exhibits  
19 to the Commission members. Again, there is a difference  
20 between this provision and the rulemaking provision in that  
21 it does not prescribe a time frame for doing that, and I  
22 believe there was some sentiment to delete that time frame  
23 from the rulemaking requirement.

24 1211.C deals with motions for continuance. It  
25 requires that motions for continuance be filed 48 hours

1 prior to the time the hearing is set.

2 This was something of a compromise suggestion,  
3 the idea being that until a party has received opposing  
4 parties' prehearing statements and has an idea what the  
5 issues are and what case their opponent is going to  
6 present, they may not know whether or not a continuance is  
7 going to be needed. So the feeling of the industry, at  
8 least, was that the continuance time should be later than  
9 the prehearing statement time, but that it should be far  
10 enough in advance of the hearing in order to allow parties  
11 and witnesses to revise their travel plans prior to the  
12 hearing.

13 I believe that concludes my comments on 1211.

14 CHAIRMAN FESMIRE: Okay, any public comments on  
15 1211?

16 MR. ALEXANDER: On the --

17 CHAIRMAN FESMIRE: Mr. Alexander?

18 MR. ALEXANDER: Yes, on the filing, prefiling  
19 these exhibits for Commission cases, would it not be  
20 acceptable that the parties could amend their exhibits in a  
21 nonsubstantial manner, and it wouldn't violate the -- you  
22 know, the principle that they couldn't testify later on or  
23 submit their exhibits? Because a lot of times, especially  
24 if somebody is maybe going to oppose you, you could clarify  
25 your exhibit and still keep the main theme and thought on

1 the application that you filed.

2 And the way I read it is that you would prefile  
3 those exhibits and you could not change them. Is that my  
4 understanding of the way it reads?

5 THE WITNESS: I believe that it would be  
6 addressed to the discretion of the Commission, the way it  
7 reads.

8 CHAIRMAN FESMIRE: I don't think there would be  
9 -- I mean, when somebody gets up to present their exhibits,  
10 I think it would be essentially impossible for the  
11 Commission to say, No, that's not what your exhibit says;  
12 testify correctly.

13 So I don't see the need for that. I mean, I  
14 understand your point --

15 MR. ALEXANDER: Yes, sir.

16 CHAIRMAN FESMIRE: -- but I think it's implied in  
17 there that if there is a need -- and again, it would be up  
18 to the Commission whether it would be a -- you know, a  
19 change of the exhibit or introduction of another exhibit.

20 MR. ALEXANDER: And that last statement you made,  
21 I wanted to touch on that too. It may be necessary to  
22 develop a rebuttal exhibit once you saw the opposition  
23 against you, and I was wondering if that would be  
24 precluded.

25 CHAIRMAN FESMIRE: Unless the party -- On B.(2),

1 "...unless the party offers such evidence solely for  
2 rebuttal or makes a satisfactory showing of good cause for  
3 failure to disclose the witness or exhibit." I think  
4 there's a generally accepted exclusion to, you know, the  
5 statement that we're talking about, about rebuttal  
6 testimony. I mean, anything that's developed during the  
7 hearing that needs to be rebutted is absolutely  
8 permissible, as far as I'm concerned.

9 MR. ALEXANDER: Thank you for that clarification.

10 CHAIRMAN FESMIRE: Dr. Neeper?

11 DR. NEEPER: (Shakes head)

12 COMMISSIONER BAILEY: -- your comments?

13 COMMISSIONER CHAVEZ: I just had one question on  
14 (2). It begins with "Any party other than the applicant".  
15 Might there be another party who is in support of an  
16 application in an adjudicatory hearing, and they wouldn't  
17 necessary fall on this? Because this seems to presume that  
18 anybody but the applicant is opposed.

19 THE WITNESS: Well, it says, "...shall  
20 include...a statement of the extent, if any, to which the  
21 party opposes the issuance of the order..." So if it does  
22 not oppose the issuance of the order, then that would not  
23 apply.

24 Of course, it might make sense to say, shall  
25 include a statement whether it supports or opposes the

1 issuance of the order.

2 CHAIRMAN FESMIRE: Is that something that the  
3 Commission thinks we need to take up?

4 COMMISSIONER CHAVEZ: I think -- I see what Dave  
5 is trying to say here, and I think that might handle it  
6 there. Let's see. It might still be -- It would be  
7 clearer if it says, which the party opposes or supports,  
8 and that way people who read it would know what's expected  
9 then.

10 Mr. Brooks, and also in this case and other cases  
11 where the proposed Rule -- where the Rule talks about  
12 exhibits and copies of exhibits, there's no problem with  
13 electronic forms of those exhibits at all, is there, or --

14 THE WITNESS: I do not believe there is any  
15 specification one way or another on that subject in these  
16 Rules.

17 COMMISSIONER CHAVEZ: Thank you, that's all I  
18 have.

19 CHAIRMAN FESMIRE: Any further comments on 1201?  
20 Ms. Belin?

21 MS. BELIN: Yeah, Mr. Chairman, we had to point  
22 out that there's still a provision in A about one original  
23 and five copies in the first sentence, and I assume that's  
24 being changed to -- or should be changed to six copies, to  
25 conform to the same idea as...

1 THE WITNESS: Probably it should. I believe the  
2 Division missed that in preparing their comments, if I have  
3 the right draft in front of me.

4 CHAIRMAN FESMIRE: That question has already been  
5 answered.

6 (Laughter)

7 DR. NEEPER: Okay, there is one subtle point that  
8 still deals with that. Even if one is required to file six  
9 copies, that still requires doing it by mail, as far as I  
10 can tell. In a sense, you can file only one copy  
11 electronically. Or at least I would interpret it to say  
12 you want physical, paper copies.

13 CHAIRMAN FESMIRE: That would seem to be implied,  
14 wouldn't it? I mean, there's no use filing more than one  
15 electronic copy, is there?

16 COMMISSIONER CHAVEZ: Send the same file --

17 (Laughter)

18 CHAIRMAN FESMIRE: The same thing occurs in the  
19 next line of the -- the second -- actually the first line  
20 on the next page, one original and five copies.

21 MS. LEACH: That just gets you down to who pays  
22 for the time and paper for copying, whether it's the  
23 participants or the Division. So the question is, do we  
24 have staff just make up copies?

25 MS. BELIN: Well, back to the issue that we were

1 talking about before, timing, the numbers of days and all  
2 that, from out point of view it's numbers of days. We'll  
3 be happy to pay for copies, but we really don't want to  
4 lose the extra two or three days it takes for the mail to  
5 work.

6 CHAIRMAN FESMIRE: Okay. Anything else on 1211?  
7 Mr. Brooks, let's go to 1212.

8 THE WITNESS: Okay. 1212.A and B are identical  
9 to -- or rather are the same in substance as existing  
10 Rules.

11 1212.C attempts to define what we have not done  
12 before, the rules for participation in adjudicatory  
13 hearings. It may not be in a very logical order because  
14 about the third sentence says, "Participation in  
15 adjudicatory hearings shall be limited to parties, as  
16 defined in..." another rule, and perhaps that should really  
17 be the first sentence.

18 But going through it in the order in which it's  
19 stated, the first sentence says parties may appear *pro se*  
20 or by counsel. Then the next couple of sentences make  
21 clear that collective entities may appear *pro se* through an  
22 authorized officer or member.

23 Then participation is limited to the parties,  
24 except that governmental entities can appear to make a  
25 statement without intervening in the case. This was

1 primarily designed to deal with the way in which  
2 particularly the Bureau of Land Management and I think to  
3 some extent the State Land Office participated in our  
4 hearings in the past, where they have usually sent a  
5 representative, often not an attorney, to state their  
6 position in reference to a particular application, not to  
7 present testimony.

8           Then it says that the Commission or the Examiner  
9 shall have discretion to allow any other person present to  
10 make a statement, but not to present evidence or cross-  
11 examine witnesses. So that obviously is directed to a  
12 person who is not a party or a representative of a party.  
13 But if a person makes a statement, then under the final  
14 sentence they would be subject to cross-examination.

15           Let me get the right rule before -- up on the  
16 screen.

17           Okay, that concludes my comments on Section 12- -  
18 - Well, I would just state that I believe there has been a  
19 supposition previously that we were required to limit  
20 representation of parties to licensed attorneys, based on a  
21 1958 Attorney General's opinion. I think there was a  
22 decision made within the agency that the Attorney General  
23 apparently having reversed that policy, and furthermore  
24 that not being the policy of other administrative agencies,  
25 that we were not bound to limit participation to attorneys.

1 CHAIRMAN FESMIRE: Okay. Any comments on 1212?  
2 Okay, 1213 there were no changes in.

3 COMMISSIONER BAILEY: Should that citation be  
4 changed to 08 instead of 1212?

5 CHAIRMAN FESMIRE: Yeah, if I could run through  
6 that, make the changes during deliberations.

7 COMMISSIONER BAILEY: Okay.

8 CHAIRMAN FESMIRE: Mr. Brooks, would you like to  
9 go through 1214?

10 THE WITNESS: Okay. 1214 is intended to  
11 establish what we have never really had at OCD in the past,  
12 and that is a prehearing procedure. We have had Rule  
13 1212.A, which deals with the issuance of subpoenas, and  
14 that basically tracks a statutory provision that authorizes  
15 the Division to issue subpoenas.

16 Now, we have encountered -- What the Division  
17 does in practice is that we issue subpoenas for production  
18 of documentary evidence, and that is done more or less  
19 routinely. Basically, anyone who requests a subpoena gets  
20 one. We do not attempt to hold hearings on the issuance of  
21 subpoenas, but rather we would expect the party who opposes  
22 the requested production to file a motion to quash.

23 Rule 1214 as amended seeks to incorporate that  
24 into the Rules, stating that the Division Director or that  
25 the Examiner may consider motions for protection or

1 quashing of subpoenas prior to the hearing or may reserve  
2 such matters for consideration at the hearing in their  
3 discretion.

4           Now, the last sentence deals with subpoenas for  
5 depositions. It has not been customary to conduct  
6 depositions, and there have been very few Division  
7 proceedings in which parties have taken prehearing  
8 depositions, and it seemed to be the consensus of the  
9 attorneys who practice here that that's really a good thing  
10 and that we would be slowing down and complicating the  
11 proceedings if we established a habit of parties taking  
12 prehearing depositions. Consequently, we have provided for  
13 it but have stated that it would be only in extraordinary  
14 circumstances for good cause that subpoenas for depositions  
15 would be issued.

16           1214.B deals with prehearing conferences. The  
17 only change is to include a provision to ensure that all  
18 parties receive notice of a prehearing conference.

19           1214.C is to make a provision for the manner of  
20 conduct of hearings that must occur on motions where it's  
21 necessary to have a hearing on the motion prior to the  
22 hearing on the merits. The primary things that we want to  
23 provide for in there are -- that we have provided in there,  
24 are that notice must be given to all parties and that if  
25 evidence is taken, it is done on the record as in other

1 cases.

2           The provision contemplates that if the matter is  
3 pending before the Division, that the Examiner assigned to  
4 the case will conduct any prehearing motion hearings. If  
5 it is assigned to the Commission, then the Director will  
6 conduct those hearings.

7           And we intentionally used the word -- the phrase  
8 Division Director, the title Division Director, rather than  
9 Chair of the Commission, because while customarily those  
10 have been held by the same person, the Statute does not  
11 actually require that. Any member of the Commission may be  
12 elected as chair, but the Director is the one that would be  
13 in the office day to day and would be the person who would  
14 be available to conduct hearings at times when the  
15 Commission was not in session.

16           It does, however, have a discretionary provision  
17 that the Director may assign the matters -- prehearing  
18 matters to an Examiner. However, for the protection of the  
19 *de novo* nature of the Commission review, it provides that  
20 if prehearing matters before the Commission are assigned to  
21 an Examiner, that it be an Examiner who has not previously  
22 participated in that case.

23           I believe that that summarizes the matters that  
24 are covered in 1214.

25           CHAIRMAN FESMIRE: Is there any public comment on

1 1214?

2 Q. (By Ms. Bada) David, did the Division have any  
3 suggested changes to any of the provisions in 1214?

4 A. Apparently not, assuming this is the correct  
5 draft.

6 MS. BADA: Ah, no 1215, okay. I can't read my  
7 own notes.

8 THE WITNESS: Well, I was having that same  
9 problem.

10 CHAIRMAN FESMIRE: Okay. There were changes to  
11 1215 --

12 COMMISSIONER CHAVEZ: I had one question.

13 CHAIRMAN FESMIRE: Oh, I'm sorry.

14 COMMISSIONER CHAVEZ: And Dave, this may just be  
15 because I'm not that familiar with the subpoena process.  
16 Under A, "...production of books, papers or other tangible  
17 things in advance...", if there's information that may be  
18 only in electronic form that's to be submitted, that would  
19 be, basically you're saying, reduced to a printout or  
20 something like that when you say tangible things, for the  
21 subpoena to be effective?

22 THE WITNESS: Yes, that is archaic language, it's  
23 language that's copied from a statute long before we had  
24 stuff in electronic format. But I don't really see --  
25 well, I guess you could -- I guess you could require

1 somebody to transmit an electronic file by e-mail, and that  
2 would be questionable whether that would be requiring the  
3 production of tangible or not. I think --

4 CHAIRMAN FESMIRE: I don't think the question is  
5 whether or not it could be required to be transmitted in  
6 electronic format, it's whether or not this wording would  
7 be broad enough to require the production of information  
8 stored in electronic format.

9 THE WITNESS: Yeah, it might be desirable to  
10 amplify that to make that clear.

11 CHAIRMAN FESMIRE: Okay. I'm sorry, I didn't  
12 mean to run over you.

13 COMMISSIONER CHAVEZ: No, I just was -- I'm not  
14 familiar with that process. I just really haven't been  
15 involved in it, that's all.

16 THE WITNESS: Well, I think everyone has  
17 basically assumed that a subpoena can require someone to  
18 produce a printout, and the issue has not actually arisen,  
19 to my knowledge, in this venue, or in the venue in which I  
20 previously served, so I can't comment on it, on what I said  
21 previously.

22 CHAIRMAN FESMIRE: Okay. Any further comment on  
23 1215?

24 COMMISSIONER BAILEY: No.

25 COMMISSIONER CHAVEZ: No.

1 CHAIRMAN FESMIRE: Mr. Brooks, let's proceed to  
2 -- I mean, 1214?

3 Let's proceed to 1215.

4 THE WITNESS: Okay. Rule 1215 deals with the  
5 Rules of Evidence as applied in adjudicatory proceedings.  
6 The second and third sentences of 1215.A represent a change  
7 in that the previous Rule had said that the Rules of  
8 Evidence and the Rules of Civil Procedure will control, but  
9 suggested that exceptions could be made.

10 The present Rule says, "The rules of evidence  
11 applicable in a trial before a court without a jury shall  
12 not control, but division examiners and the commission may  
13 use such rules as guidance in conducting adjudicatory  
14 hearings." I don't exactly -- I don't know what that  
15 means, really, but I believe that it is language that's  
16 very similar to what is used in other administrative  
17 contexts.

18 For instance, with regard to hearings before the  
19 State Engineer, hearings before the Environment Department,  
20 I believe their rules have very similar provisions to that.  
21 And I don't know that it's anything substantively  
22 different, really, from the present Rule.

23 The last sentence says, "The commission or  
24 division examiner may take administrative notice of the  
25 authenticity of documents copied from the division's

1 files." It does not attempt to give a broad definition of  
2 the concept of administrative notice, but there has been a  
3 concern that parties have from time to time requested the  
4 Commission or the Examiner to take administrative notice of  
5 entire files without producing them and making them a part  
6 of the record.

7 This Rule does not prohibit that, but it suggests  
8 that perhaps a more limited concept of administrative  
9 notice is appropriate. It makes clear what is subject to  
10 administrative notice, without specifying what is not  
11 subject to administrative notice.

12 It would seem to me that for the purposes of  
13 making a clear record, whatever -- particularly before the  
14 Commission where it's -- hearings are subject to judicial  
15 review, that whatever evidence the Commission is to  
16 consider should be made a part of the record. And if it is  
17 to be authenticated by administrative notice, it should  
18 nevertheless be copied and placed in the record.

19 1211.B is unchanged.

20 1211.C --

21 CHAIRMAN FESMIRE: 1215, I think.

22 THE WITNESS: 1215, I'm sorry. 1215.C provides -  
23 - is in the same -- for the same purpose as the last  
24 sentence of 1215.A, to make a complete record it provides  
25 that a party requesting incorporation of records from a

1 previous hearing shall include copies of the records.

2 I believe that's all my comments on -- Well, no,  
3 wait. Were there -- Oh, yes, there were recommended  
4 Division changes in 1215.

5 In 1215.A, the second line, we again have used  
6 the word "interested parties", and we wanted to delete the  
7 phrase "interested".

8 And the addition -- the Division had recommended  
9 the addition of a sentence after the one about the Rules of  
10 Evidence applicable in trials before a jury, et cetera.  
11 After adjudicatory hearings have the sentence, The  
12 Commission or Division Examiner may admit any relevant  
13 evidence, unless it is immaterial, repetitious or otherwise  
14 unreliable.

15 It seems to me there's some contradiction between  
16 that and suggesting that the Rules of Evidence provide a  
17 guide, but as a practical matter I think people dealing  
18 with administrative hearings will be able to apply that  
19 without difficulty.

20 I guess that concludes my observations on 1215.

21 I would mention that there was a Division-  
22 recommended change in 1212 which I failed to note. Do you  
23 wish me to discuss the change in 1212 at this time, since I  
24 just picked up on it?

25 CHAIRMAN FESMIRE: Yeah, real quickly, if you

1 would.

2 THE WITNESS: Okay, it's just a change -- it's  
3 just an erroneous cross-reference. There's a reference in  
4 1212.C to 19.15.14.1212. It should be 19.15.14.1208, and  
5 the Division had noted that change.

6 That concludes my comments on 1215 also.

7 CHAIRMAN FESMIRE: Are there any public comments  
8 on 1215?

9 Doctor?

10 DR. NEEPER: We would support the sentence that  
11 the Division inserted regarding the admission of any  
12 relevant evidence, simply because we feel that any hearing  
13 should be able to seek what evidence and information it  
14 needs.

15 CHAIRMAN FESMIRE: Any further comments?  
16 Commissioners?

17 COMMISSIONER BAILEY: No.

18 COMMISSIONER CHAVEZ: Yes, on C, Dave, you say  
19 that "A party requesting incorporation of records from  
20 previous division examiner hearings at a commission  
21 hearing..."

22 If they're incorporating records from a previous  
23 commission hearing, would that also apply?

24 THE WITNESS: Not as written, but I think it  
25 should. I guess I'm not up here to make recommendations

1 for changes in the draft that we've submitted, but I think  
2 it would be a better rule if we simply deleted the word  
3 "division examiner".

4 COMMISSIONER CHAVEZ: That's the only comment  
5 that I have.

6 CHAIRMAN FESMIRE: That's 1216.C?

7 COMMISSIONER BAILEY: -15.

8 CHAIRMAN FESMIRE: -15.C, I'm sorry.

9 Are there any further comments on 1215?

10 Mr. Brooks, I believe we have one change in 1216?

11 THE WITNESS: That is correct. Actually, we have  
12 one change that is in the present recommended text and  
13 another change that had been recommended by the Division.

14 The change that's in the June 8th text is --  
15 Well, first of all, I should say 1216 deals with the  
16 qualifications of Division Examiners. There is one change  
17 made, and because it's a deletion it does not appear here.  
18 Let me get the Rule up here again. I'm having trouble  
19 getting these rules up where we should be.

20 The present Rule requires six years of experience  
21 for a Division Examiner. The new Rule would reduce that to  
22 two years. I believe the reason for the reduction is that  
23 in light of retirements we're facing the necessity of  
24 hiring additional Examiners in a market in which  
25 experienced personnel are difficult to hire, and we're

1 concerned that we may not be able to find people that can  
2 meet the requirements that are specified here.

3           The change recommended by the Division resulted,  
4 I believe, from a comment filed by Yates. They pointed out  
5 that there was an ambiguity in terms of the portion which  
6 specifies the experience and then says, "or is a licensed  
7 lawyer", as though a licensed lawyer had to also have  
8 prescribed amount of technical experience.

9           Yates's recommendation was that we clarify that  
10 by providing that yes, the licensed lawyer would have to  
11 have the specified two years of technical experience.

12           The Division's recommendation is that we clarify  
13 it the other way, that a lawyer not be required to have any  
14 specific experience, the thinking being that some types of  
15 applications are primarily legal in their orientation and  
16 that it would be preferable to allow a lawyer to be  
17 assigned as an examiner without specific experience  
18 requirements.

19           There's also been discussion within the Division  
20 of adopting a system similar to that of the Texas Railroad  
21 Commission where a lawyer and technical person would be  
22 assigned as co-examiners. And in order to give the  
23 Division flexibility we wanted to not specify specific  
24 requirements for an attorney examiner, other than licensure  
25 as a lawyer.

1 CHAIRMAN FESMIRE: Okay, any public comment on  
2 1216?

3 Doctor?

4 DR. NEEPER: No.

5 DR. BARTLIT: Got a problem, obviously you're  
6 trying to deal with.

7 CHAIRMAN FESMIRE: We've got a problem.

8 Commissioners?

9 COMMISSIONER BAILEY: I think lawyers need to  
10 have experience too.

11 CHAIRMAN FESMIRE: Commissioner Chavez?

12 COMMISSIONER CHAVEZ: I don't have a problem with  
13 it in that the appointment by the Director would be  
14 appropriate to the type of case that it would be, given  
15 that if it was a case that involved only procedural or  
16 legal issues, as Dave described, it would be assigned to an  
17 attorney if there were no technical issues involved in it,  
18 and therefore it still gives the Director the ability to  
19 assign and appoint an Examiner appropriately to the case or  
20 the application, so I don't have problems with it.

21 CHAIRMAN FESMIRE: Okay, I guess that's another  
22 one we'll talk about during deliberations.

23 COMMISSIONER BAILEY: Okay.

24 CHAIRMAN FESMIRE: There were no changes in 1217,  
25 if I'm reading this correctly. Or is 1217 a new provision?

1 THE WITNESS: I believe there were no more  
2 changes until 1221.

3 CHAIRMAN FESMIRE: Is 1217 not a new provision?

4 MS. BADA: No, it's not.

5 THE WITNESS: No, I believe not. I believe  
6 that's in the present Rules.

7 CHAIRMAN FESMIRE: Okay, so 1221 is up. Mr.  
8 Brooks?

9 THE WITNESS: Okay, 1221 is a stay provision. I  
10 say it is; 1221.A deals with *de novo* applications, the  
11 filing of *de novo* applications, but there are no  
12 substantive changes in that.

13 1221.B deals with the stay of orders. It has  
14 been reworded to make it clearer. The basic -- the  
15 principal substantive change is that the stay provision of  
16 the pre-existing Rule applied only to orders of the  
17 Division, whereas the new Rule would apply to -- would  
18 permit orders of the Commission to be stayed as well.

19 Because the Commission could not be assembled on  
20 short notice when a stay order would have to be acted on,  
21 the Division Director is given the power to stay Commission  
22 orders pending action by the Commission, and the last  
23 sentence provides that, "Any division director's order  
24 staying a commission order shall be effective only until  
25 the commission acts on the motion for stay."

1           So if a party desires to appeal from a Commission  
2 order and requests that the order be stayed pending their  
3 appeal, of course the courts would have the power to stay  
4 it, but this gives the Commission the power -- or gives the  
5 Director the power to stay it, in effect, until the matter  
6 can come before the Commission, and then the Commission  
7 would have the power to decide whether or not to stay it  
8 from that point forward.

9           Obviously the Commission's decision not to stay  
10 an order would not preclude the court from granting a stay  
11 if the court saw fit, but under the principle of exhausting  
12 administrative remedies, one would assume that the court  
13 would not entertain a motion for stay until the Commission  
14 had had an opportunity to do so.

15           The only other change is, on the grounds for  
16 granting a stay, the present says to protect correlative  
17 rights or the environment or prevent gross negative  
18 consequences to any affected party. To be consistent with  
19 many other provisions of our Rules, we wanted to put public  
20 health in there as well.

21           That concludes my comments on 1221.

22           CHAIRMAN FESMIRE: Any public comments on 1221?  
23 Commissioner Bailey?

24           COMMISSIONER BAILEY: No.

25           CHAIRMAN FESMIRE: Commissioner Chavez?

1 COMMISSIONER CHAVEZ: No.

2 CHAIRMAN FESMIRE: The next one we looked at was  
3 1224, wasn't it?

4 THE WITNESS: I believe that's the next place  
5 where there are any changes.

6 The first change in -- 1224 is the *ex parte*  
7 communications Rule. The first change in 1224 is, we have  
8 changed -- we have deleted the word "discuss" to  
9 "advocate", because the rule against discussing the case  
10 with the Division Examiner has been productive of some  
11 problems in that the Division Examiner knows things about  
12 the progress of the case, attorneys naturally attempt to  
13 contact the Examiner to get information about the progress  
14 of the case and what things have to be filed and so forth,  
15 that are not a matter of advocacy, and we thought it's  
16 really not necessary that there be a hearing with everyone  
17 present to air those things.

18 We recognize that judges usually have law clerks  
19 who field that kind of inquiries, or court administrators,  
20 or somebody that the attorneys can contact, but our  
21 Examiners are not furnished with very much staff, so we  
22 believe that that was a desirable change.

23 1224.C provides that -- This is really a concern  
24 that arises from the dual role of the Director as head of  
25 the agency and also as the decision-maker on the

1 Commission, that the Rule "...does not prohibit  
2 communications between the division's attorney or other  
3 staff and the director that are essential to management of  
4 a case."

5 This may seem somewhat of an anomalous provision,  
6 but it is in line with the Federal Administrative Procedure  
7 Act, which provides that *ex parte* communication rules do  
8 not apply to agency heads or the members of boards or  
9 commissions.

10 And the reason for doing that, I believe, from  
11 the federal perspective, is just the same that the Division  
12 has in making this recommendation here. That is that  
13 somebody must make decisions with regard to the position  
14 the Division is to take in case and whether the Division is  
15 to settle and whether they are to continue prosecuting and  
16 so forth, and the person who has the statutory  
17 responsibility to make those decisions, if they're ultimate  
18 major decisions, is only the Director. So that is the  
19 reason for this kind of provision being put in here.

20 I believe that concludes my comments on 1224.

21 CHAIRMAN FESMIRE: Are there any public comments  
22 on 1224?

23 Commission comments?

24 COMMISSIONER BAILEY: Does the term "advocate"  
25 preclude "oppose"? Because if there are opposition

1 interested parties; I'm concerned that the word "advocate"  
2 is only for --

3 THE WITNESS: -- for the applicant?

4 COMMISSIONER BAILEY: -- for one side and not for  
5 the other.

6 THE WITNESS: We intended it to mean advocate any  
7 side of an issue, but I can see that there could be some  
8 ambiguity there.

9 CHAIRMAN FESMIRE: How would you avoid that?

10 THE WITNESS: Advocate any position on the issues  
11 the application involves? Any position with respect to the  
12 issues the application involves?

13 CHAIRMAN FESMIRE: Okay. Any further comments  
14 from the Commission?

15 COMMISSIONER BAILEY: No, that's all.

16 COMMISSIONER CHAVEZ: No comments.

17 CHAIRMAN FESMIRE: I guess the next one is 1226.

18 THE WITNESS: Okay, 1226 is merely a reiteration  
19 of what New Mexico Statutes provide with regard to the  
20 matter of computation of time. I don't think it's really  
21 necessary for us to reiterate in our Rules what the New  
22 Mexico Statutes provide, because they apply to us in any  
23 case. But it was believed by the Committee that some  
24 people would be familiar with our Rules that would not be  
25 familiar with the Statutes, so it was a good idea to have

1 this provision in the Rules also.

2 I would recommend, actually, that we go through  
3 this Rule, and wherever we provide for periods of time 10  
4 days or less, that we insert the word "business days",  
5 because some people reading our Rules may not read all of  
6 our Rules and may not be aware of even this provision of  
7 1226 that is in our Rules.

8 CHAIRMAN FESMIRE: Is that all?

9 THE WITNESS: That concludes my comments on 1226.

10 CHAIRMAN FESMIRE: Any public comment on 1226 and  
11 Mr. Brooks' recommendation?

12 Dr. Neeper?

13 DR. NEEPER: Mr. Brooks' recommendation? We  
14 would welcome any simplification that makes it more clear  
15 to the ordinary person to read.

16 CHAIRMAN FESMIRE: Well, what about Rule 1226?

17 DR. NEEPER: Inclusion of the Rule, I think, is a  
18 good idea. And stating business days in the other parts of  
19 the Rule is a good idea. It just clarifies it.

20 CHAIRMAN FESMIRE: Commissioner Bailey?

21 COMMISSIONER BAILEY: That's fine with me.

22 COMMISSIONER CHAVEZ: Just one caveat. If  
23 statutorily this was changed in the Statutes, which is  
24 probably unlikely to happen, would that cause a problem  
25 with this Rule?

1 THE WITNESS: I think it would.

2 COMMISSIONER CHAVEZ: Okay. Is there another way  
3 to state this, maybe, rather some reference to the Statute,  
4 or is it better -- or did that come up in your discussion,  
5 is to state reference to statute, they shall be computed as  
6 per statute such-and-such?

7 THE WITNESS: Well, that's one way of doing it.  
8 And that would avoid -- if you said as -- according to  
9 blank -- NMSA 1978, as now or hereafter amended, then that  
10 would take care of the problem you've raised.

11 COMMISSIONER CHAVEZ: Do you anticipate -- It's  
12 not likely to be changed, though --

13 THE WITNESS: I have no reason to believe it will  
14 be.

15 CHAIRMAN FESMIRE: Changed and --

16 COMMISSIONER CHAVEZ: Probably --

17 THE WITNESS: Of course --

18 COMMISSIONER CHAVEZ: -- anyway.

19 THE WITNESS: -- the Legislature does not consult  
20 me about what changes they make to the law.

21 (Laughter)

22 COMMISSIONER CHAVEZ: Okay, thank you.

23 THE WITNESS: I have only one further  
24 observation, subject to any further questions that Ms. Bada  
25 may have of me, but --

1 Q. (By Ms. Bada) I only have one. I need to ask  
2 you, in light of the new Small Business Regulatory Act,  
3 whether these proposed Rules have any impact on small  
4 businesses?

5 A. I don't see that they would have any  
6 disproportionate impact on small business. They do not  
7 require any periodic or regular filings or record keeping  
8 that would require the addition of more employees, so I  
9 think basically they would be more or less neutral in that  
10 regard.

11 My one remaining observation went back to this  
12 codification issue. I did think of an additional reason  
13 why the definitions in proposed 19.15.14.7 should perhaps  
14 be moved to 19.15.1.7.

15 I think I can state this without violating the  
16 confidentiality Rule on rules under formation, but it  
17 occurred to me that we are presently working on a revision  
18 of what we call Rule 711, which is what Records and  
19 Archives would call 19.15.9.711, and in the current  
20 development draft, which is in a rather primitive stage at  
21 this point, we did bring the expression "commission clerk"  
22 into that rule.

23 Of course, I don't know whether it will get there  
24 when the Rule actually comes to fruition or not, but the  
25 fact that there may be a need in that Rule or some other to

1 use that term would suggest that it would be appropriate to  
2 move those definitions to 19.15.1.7.

3 Now, I do not know whether, from the Records and  
4 Archives perspective, we can do that without having given  
5 notice that we're going to amend 19.15.1.7. From a due-  
6 process standpoint, I see no reason why that type of notice  
7 would be required if the exact language -- if we've given  
8 notice of the exact language we propose to adopt, and what  
9 we had is simply put in a different place in the Rules.  
10 But I don't know what view Records and Archives would take  
11 of that.

12 CHAIRMAN FESMIRE: Any further questions, Ms.  
13 Bada?

14 MS. BADA: No.

15 CHAIRMAN FESMIRE: Any cross-examination, Mr.  
16 Carr?

17 MR. CARR: No.

18 CHAIRMAN FESMIRE: Ms. Belin?

19 MS. BELIN: Can I ask one question?

20 CHAIRMAN FESMIRE: Sure.

21 THE WITNESS: Sure.

22 CHAIRMAN FESMIRE: That's the idea.

23 MS. BELIN: Well, I appreciate that the procedure  
24 you followed today allowed a pretty good exchange, so I  
25 really don't have a lot of questions.

## EXAMINATION

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BY MS. BELIN:

Q. But I wanted to ask, is it your understanding -- and this is getting back to the question of standing -- is it your understanding that in an adjudicatory proceeding which involves the types of environmental concerns that we were talking about earlier, if there were an environmental organization that did not have members who had property in the immediate vicinity of the affected site, whether -- can you just tell me whether you think that group would have standing to participate in the adjudicatory proceeding?

A. Well, there are two qualifications that I would have to address to answer that question.

The first question relates to property. I do not believe standing dealing with environmental issues is necessarily dependent on property. I read a case quite recently involving the very controversial issue of mountaintop mining and valley fill -- this was out of the Fourth Circuit -- but they allowed standing based on the fact that these parties drove down this highway every day and they had to look at this mine site. So I believe the concept is broader -- there's at least some authority for a concept that's considerably broader than ownership of property.

Let's see, what was the other qualification?

1 I do believe an organization -- for example, an  
2 organization that had no members, that could show that they  
3 -- those members as individuals would be harmed by the  
4 environmental harm that resulted from the specific project  
5 that was at issue would probably not have standing under  
6 existing law. For instance, an organization that was  
7 exclusively devoted to northwestern New Mexico and the --  
8 and say it was permitting a waste facility in the  
9 southeast, I think they probably would not have standing  
10 under the existing decision.

11 Q. Unless perhaps they show that their members  
12 frequented that part of the state --

13 A. Correct.

14 Q. -- and observed birds or --

15 A. Correct.

16 Q. -- something like that?

17 So you're referring to the body of standing law,  
18 federal law relating to the environmental and natural  
19 resource areas, natural resource issues, that's what you're  
20 referring to when you're --

21 A. Most of --

22 Q. -- standing?

23 A. -- my familiarity with that type of law is from  
24 federal decisions, actually. I know there are some New  
25 Mexico decisions, but there's always a much larger body of

1 federal decisions, and I would think that would be where  
2 you would look to a great extent.

3 MS. BELIN: Thank you very much.

4 CHAIRMAN FESMIRE: Ms. Belin.

5 Any further -- any redirect?

6 MS. BADA: No.

7 CHAIRMAN FESMIRE: Mr. Brooks, thank you very  
8 much.

9 Why don't we take about a 10-minute and come back  
10 and begin our deliberations?

11 MS. LEACH: They may want to put on --

12 CHAIRMAN FESMIRE: Oh, I'm sorry --

13 COMMISSIONER CHAVEZ: Yes, Dr. Neeper wanted to  
14 make some --

15 CHAIRMAN FESMIRE: -- that's true --

16 MS. BELIN: Mr. Chairman --

17 CHAIRMAN FESMIRE: -- I apologize.

18 MS. BELIN: -- I think Dr. Neeper has already  
19 stated most of the things that he was intending to address  
20 through his testimony, but he wanted to make a few comments  
21 about why he and the New Mexico Citizens for Clean Air and  
22 Water are concerned about this and just clarify a few more  
23 items, if that's all right.

24 CHAIRMAN FESMIRE: That's all right, I apologize,  
25 I --

1 DR. NEEPER: We can do that --

2 CHAIRMAN FESMIRE: -- completely forgot about  
3 that.

4 DR. NEEPER: -- after the break, if you prefer.

5 MS. BELIN: Yeah.

6 MS. LEACH: Mr. Carr may have something.

7 CHAIRMAN FESMIRE: That's true.

8 MR. CARR: I'll go during the break, see if I  
9 can --

10 CHAIRMAN FESMIRE: Okay.

11 (Laughter)

12 CHAIRMAN FESMIRE: Well, what do you say we hear  
13 from Dr. Neeper, then take the break and hear from Mr.  
14 Carr, if he has anything to add?

15 Dr. Neeper? Let the record that Dr. Neeper has  
16 been previously sworn.

17 DONALD A. NEEPER,  
18 the witness herein, after having been first duly sworn upon  
19 his oath, was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MS. BELIN:

22 Q. Dr. Neeper, would you describe a little bit about  
23 your background and expertise and previous experience in  
24 Commission and Division proceedings?

25 A. My background in environmental matters goes back

1 about 35 years, working with this one environmental group  
2 on general environmental problems in the State of New  
3 Mexico. Initially, there were questions of water  
4 pollution, then a big part of our work was concerning air  
5 pollution from power plants and copper smelters. We felt  
6 we had some notable effect in getting better protection of  
7 the air in those cases --

8 Q. Excuse me, can we back up and make clear what  
9 environmental group you're talking about?

10 A. This is New Mexico Citizens for Clean Air and  
11 Water, Incorporated. The group was formed, I believe,  
12 about 1968. Dr. Bartlit can correct me I'm wrong --

13 DR. BARTLIT: -- -9.

14 THE WITNESS: -- on that. 1969, he says.

15 I have been involved in some environmental things  
16 professionally as being in charge of a RCRA facility  
17 investigation of closed landfills, and professionally my  
18 own research is involved in subsurface transport of  
19 volatile contaminants.

20 But my interest in being here and in these  
21 proceedings is as a citizen of this State, trying to obtain  
22 good environmental protection within the State. The Oil  
23 Conservation Division is charged with all of the  
24 environmental responsibilities for oil and gas exploration  
25 and production that would otherwise fall under RCRA.

1 I wouldn't wish RCRA upon the industry, because  
2 I've been a RCRA-regulated party, and that's very difficult  
3 administratively.

4 On the other hand, I would like to see the spirit  
5 of RCRA regulation, the things it requires in terms of  
6 protecting the environment done, and that stimulates my  
7 interest in the things that the Oil Conservation Division  
8 does.

9 I became interested in rulemaking with OCD about  
10 the time that Rule 116 was adopted. When subsequent  
11 abatement regulations were adopted, I participated in that.  
12 I participated in the STRONGER review of New Mexico about  
13 five years ago and was subsequently -- I served on the  
14 national board of STRONGER for three years. STRONGER is a  
15 national nonprofit funded by the EPA and industry to review  
16 the E-and-P regulations of the various states.

17 So I have a rather broad interest in the  
18 environmental protection responsibilities of the Oil  
19 Conservation Division and the Commission. I have no  
20 particular interest in the large body of work that deals  
21 with property interests and administration.

22 Q. Are you testifying today on your behalf as an  
23 individual, or on behalf of New Mexico Citizens for Clean  
24 Air and Water?

25 A. I'm testifying today on behalf of New Mexico

1 Citizens for Clean Air and Water. I bear a signed letter  
2 signifying action by the board of that agency in  
3 designating me as the spokesman.

4 Q. And that group has already participated in Oil  
5 Conservation Division proceedings in the past?

6 A. Yes, we have participated in the past.

7 Q. Can you present your comments, whatever comments  
8 you want to present, that you didn't get a chance to  
9 present earlier today?

10 A. My comments deal with the importance of citizen  
11 participation, because I believe the Commission may very  
12 well wonder why we are so concerned about a few days of  
13 opportunity here or there for the public to participate, or  
14 why we are so concerned with the ability to participate.

15 Mr. Brooks' recent testimony brought out one of  
16 these points when by his judgment he guessed that unless an  
17 organization had a member who was damaged or potentially  
18 damaged by environmental excess at someplace, the  
19 organization would not have standing to participate in OCD  
20 hearings.

21 That somewhat frightens us, because we try to  
22 deal with the questions of environment statewide, and even,  
23 in fact, regionwide, and occasionally we work on national  
24 issues. Let me illustrate that with a couple of examples.

25 Why is it important for the citizen to be able to

1 appear?

2 One recent case was the landfill case that has  
3 been decided. In its concluding week we testified on that,  
4 on a number of technical issues. And I notice that a good  
5 part of the day of the hearing of that was spent on legal  
6 issues.

7 Most of the technical issues -- that is, what's  
8 really going to happen with this landfill? -- were brought  
9 up by us. And ultimately, if you look at it, the only  
10 reason for regulating a landfill on private land is  
11 environmental. So the real issues that should come to  
12 attention are environmental.

13 In its concluding decision, the Oil Conservation  
14 Division presented approximately 10 technical issues  
15 regarding that facility. Seven of those issues we brought  
16 to the hearing, and they would not have been at the hearing  
17 otherwise; they were not otherwise brought up.

18 Furthermore it was our testimony, and our  
19 testimony alone, that brought to light the long-term lack  
20 of compliance of that facility with its existing permit,  
21 which required certain sampling and certain reporting which  
22 had not been done for many years.

23 This is information that was brought to a  
24 hearing. It's an adjudicatory hearing. It would not  
25 otherwise have come to the hearing, except for our

1 participation. And we therefore feel it is important for  
2 citizens to be able to participate.

3 OCD's decision in that case cited several  
4 situations in which the Supreme Court required that the  
5 public have the ability to participate meaningfully in  
6 permitting processes.

7 The proposed Rule that we have, which would make  
8 it questionable at best for citizens to have standing in  
9 these cases, seems to be contradictory to that very logic  
10 that was in OCD's recent decision.

11 I will give a second example. The case which was  
12 dismissed this morning of a salt pond shows -- would show  
13 some example of citizen participation. In that case, I  
14 carefully reviewed the application and prepared for the  
15 hearing. I did so with sufficient care that I duplicated  
16 all of the calculations that were in the proposal.

17 The proposal presented certain calculations  
18 showing what the advocate or the proposer expected to be  
19 the extent of seepage of brine from the pond. My own  
20 calculations agreed exactly with those of the proposal, so  
21 long as I assumed the pond was empty and never had water  
22 put in it.

23 I shared this information widely, and I think it  
24 may have had some influence in the retraction of the  
25 Application. Nonetheless, had it come to hearing, this

1 information, my side of the story, may have been of  
2 interest to those who had to make the decision.

3 No one person has all of the truth. I don't have  
4 all of the truth. Anything I present is going to have my  
5 slant on it. The same thing is going to be true for any  
6 other person who presents testimony or evidence. And  
7 therefore, it's necessary that we all be able to question  
8 each other. And therefore, it's necessary to have access  
9 to these kinds of proceedings that impact the public  
10 interest.

11 And now I am testifying and I am open to cross-  
12 examination.

13 CHAIRMAN FESMIRE: Ms. Bada?

14 MS. BADA: No.

15 CHAIRMAN FESMIRE: Mr. Carr?

16 MR. CARR: No, no questions.

17 CHAIRMAN FESMIRE: Commissioners?

18 COMMISSIONER BAILEY: No questions.

19 COMMISSIONER CHAVEZ: No questions.

20 CHAIRMAN FESMIRE: I have no questions either.

21 Ms. Belin, thank you.

22 THE WITNESS: Thank you for your attention.

23 CHAIRMAN FESMIRE: Thank you, Doctor.

24 Mr. Carr?

25 MR. CARR: I would like to say something, if I

1 could. I am here as the attorney today for Burlington  
2 Resources. I was a member of the committee.

3 And my comments are not directed to any  
4 particular issue, but I think something needs to be said  
5 from our side. And I'm not saying that to try and draw a  
6 line here, because I don't really think there is a line  
7 between industry and people who have environmental  
8 concerns.

9 And nothing is worse for our industry than an  
10 environmental problem. And to address these head on and in  
11 a timely fashion is in the best interest of everyone in  
12 this room, whether we're representing industry,  
13 environmental groups or the agency.

14 And I think that furthermore, full participation  
15 in the process that develops Rules and focuses on issues  
16 that can impact the environment is important, and it's  
17 again in the best interests of anyone.

18 And what we were doing as we drafted these Rules  
19 -- and I think it's a process that won't end here today --  
20 is to try and assure that the Rules allow full, legitimate  
21 participation in these things and also safeguard against  
22 abuse.

23 And we become too concerned about perhaps  
24 sometimes watching for abuse, and we may draft rules that  
25 in many ways are too restrictive, because the truth of the

1 matter is, you cannot draft a rule that will work well if  
2 it isn't intelligently implemented and enforced.

3 And so I think what we had here is an effort  
4 today to address concerns to recognize that there are other  
5 stakeholders that have legitimate concerns, and the Rules  
6 today, I think, as proposed, are a large first step in that  
7 direction.

8 But I would point out that I think that you don't  
9 ever close the door on something like this, and it's a  
10 matter that will be subject to further refinement, whether  
11 it's identifying particular types of cases that need  
12 additional work or not.

13 But I'd like to seriously let you know that this  
14 was a process where I think real efforts were made to  
15 recognize that there are other people who have legitimate  
16 concerns and try and do it in a way that opens the door and  
17 at the same time assures that those few who might want to  
18 abuse, just like we have on our side a few who want to  
19 abuse, don't somehow subvert the process.

20 CHAIRMAN FESMIRE: Absolutely. And Mr. Carr, I  
21 want to take the opportunity now to thank you for your  
22 participation in that --

23 MR. CARR: We did most of it by the Internet, so  
24 it was the best --

25 (Laughter)

1           CHAIRMAN FESMIRE: Anybody else have anything  
2 they wish to say?

3           Well, why don't we take a 10-minute break, and  
4 we'll come back and convene on this issue at about 20 till  
5 3:00.

6           MS. LEACH: May I make a suggestion?

7           CHAIRMAN FESMIRE: Yes, ma'am.

8           MS. LEACH: While you're on break, Commissioners,  
9 why don't you give a little consideration to whether or not  
10 you need any -- or would want any additional testimony in  
11 any area, because I assume shortly after we come back,  
12 we'll be closing the record and not be able to ask those  
13 questions. So we'll need to do those when we first come  
14 back if we have some more -- assuming we can get everybody  
15 to come back after the break for final, last-minute  
16 testimony.

17           CHAIRMAN FESMIRE: Okay. Yeah, why don't we --  
18 We'll do it that way.

19           Thank you all, and I'll see you in about ten  
20 minutes.

21           (Thereupon, a recess was taken at 2:30 p.m.)

22           (The following proceedings had at 2:40 p.m.)

23           CHAIRMAN FESMIRE: Let's go back on the record.  
24 Dr. Bartlit?

25           DR. BARTLIT: I wonder if I might make a comment

1 to the Commission after we had discussions and all, and I  
2 think it's relevant to the -- The issue is standing, that's  
3 the big issue with us, and we heard a cross-examination and  
4 answer, well, if we had someone in the area affected  
5 immediately by an issue in the southwest -- southeast and  
6 northwest corner of the state.

7 In the real world we hear that often from  
8 participants before this Commission. What does that mean  
9 for an environmental group like ours? We can -- If there's  
10 an issue coming forward before the Commission, we can go  
11 and get a member. There are local troublemakers, hotheads,  
12 upset people, unhappy with the environment. They're  
13 everywhere, we know that. We can go contact one of those,  
14 sign them up and have a person to meet the standing  
15 requirement.

16 How has that helped anyone? It's taken our time  
17 to do that, and resources. It's perhaps encouraged a  
18 hothead, a sorehead. It doesn't help industry at all. I  
19 mean, this person will just come and express great  
20 grievance and dissatisfaction with the industry in general.  
21 It will do some of the things that we're trying to prevent  
22 from happening, interfering with proceedings and using up  
23 time.

24 I don't think anyone's interests are served. You  
25 won't get any more information from that; it will still

1 come from down deeper and others, this lady, a man or  
2 woman. And we've met the standing requirement, as we've  
3 discussed back and forth in the cross-examination. It  
4 hasn't helped the Commission, has hurt us, wasted our time,  
5 doesn't help that lady, doesn't help industry, doesn't help  
6 the process.

7 That's a way -- I think that needs to be  
8 considered, that scenario. That's a real scenario. It  
9 affects the decision you're making. We have a -- certain  
10 things we want to accomplish, and I hear no one on any side  
11 trying to keep us from accomplishing that. But that  
12 standing thing and the interpretations that we heard in  
13 cross-examination are a stumbling block that drives things  
14 in the direction that I've just discussed now, which is not  
15 useful.

16 So I'd just -- I ask you to consider that element  
17 of the problem too when you're deliberating.

18 Thank you for your time.

19 CHAIRMAN FESMIRE: Thank you, Doctor.

20 Before we go any farther, I do want to take the  
21 time on the record to express my thanks to Mr. Brooks and  
22 the work that he's put in on this. When I was thanking Mr.  
23 Carr, I forgot to mention that you chaired the committee,  
24 and I do appreciate it, and I appreciate your preparedness  
25 today. I mean, I think that turned a couple of day's worth

1 of work into a good three-quarters of a day.

2 (Laughter)

3 MR. BROOKS: Thank you, sir. And I think you  
4 should also thank Ms. Bada. She was intimately involved in  
5 the preparation also.

6 CHAIRMAN FESMIRE: Cheryl, thank you very much.  
7 And I wanted to do that on the record, so I appreciate the  
8 work that both of you put in. And I think we came out with  
9 a good product to work with, and I appreciate it.

10 At this time I was going to ask the  
11 Commissioners, did they think of any other questions that  
12 we needed to ask before we begin our deliberations?

13 COMMISSIONER BAILEY: I don't think so.

14 COMMISSIONER CHAVEZ: I can't think of anything  
15 else that we would need.

16 CHAIRMAN FESMIRE: Ms. Leach, did you have  
17 anything that you think we need to bring out before we  
18 begin deliberations?

19 MS. LEACH: Since I can talk to you in  
20 deliberations, I probably don't need to bring this up, but  
21 I will anyway so you can start thinking about it.

22 One of the things -- there are kind of two parts  
23 to the standing issue, at least, but looking at the  
24 language that Ms. Belin brought in, the 1209 is like really  
25 the procedural, who gets to participate in the hearing.

1           The 1206, as Mr. Carr correctly identified, would  
2 almost create a citizen suit provision. There are very few  
3 citizen suit provisions in state law. A couple of them do  
4 happen to apply to the Mining Act stuff, so I mean, I know  
5 that's pretty seriously controversial. And, you know,  
6 there may be people who would challenge that because you  
7 don't have statutory authority to do it.

8           There might be a possibility, and you know, I'd  
9 have to really go back and look through all your records on  
10 whether -- because that is sort of a significant change,  
11 whether or not you've given sufficient notice that the  
12 people would know that that even was going to be an issue  
13 at the hearing.

14           And so I just wanted to sort of raise those  
15 issues before you before you went off into the deep end,  
16 and wanted to do it now in case they had something else  
17 they wanted to say about it.

18           CHAIRMAN FESMIRE: Okay. Ms. Belin, did you want  
19 to respond?

20           MS. BELIN: Well, certainly our intent is not to  
21 sneak through this back door of citizen suit provision. I  
22 think Dr. Neeper has stated our intent, was just citing a  
23 situation which could arise in which there was no other way  
24 for a concerned environmental group to get involved. So  
25 that language was just a lunch-hour, sit-down-at-the-

1 typewriter...

2           If there's some other way of doing that without  
3 creating what you see as a citizen suit provision, we would  
4 be open to it.

5           MS. LEACH: There's certainly a complaint process  
6 of like writing to the Division and that kind of thing,  
7 that initiates an investigation and might get you to the  
8 same place. But as far as like a formal hearing process in  
9 front of the Commission, there really isn't one if you  
10 don't have standing. But then -- I think it's pretty hard  
11 to find that you don't have standing, but that's my  
12 interpretation of standing.

13           MS. BELIN: Just find a person --

14           MS. LEACH: Well, I think especially with that  
15 groundwater that's, you know, a public resource of the  
16 State and that kind of stuff, it's pretty hard to say you  
17 don't have standing.

18           CHAIRMAN FESMIRE: I end up with this same  
19 problem with industry an awful lot. I think we want to get  
20 to the same place, we just don't trust each other enough to  
21 -- "believe" is the wrong word, but for lack of a better  
22 word, I'll -- believe their interpretation.

23           I too think standing is an awfully lot broader  
24 than -- and I would be hard put to find a situation where,  
25 you know, an organization like you all's wouldn't have

1 standing to do that.

2 But at the same time, I don't want to get into a  
3 situation where we waste time and air grievances that are  
4 best aired someplace else.

5 With that --

6 COMMISSIONER CHAVEZ: One more thing. Dr. Neeper  
7 spoke and used the chart earlier, and I don't know, is it  
8 an issue whether that be admitted as evidence? He did  
9 speak from it.

10 DR. NEEPER: I brought it in exhibit form, for  
11 submission as exhibits if that would please the Commission.

12 COMMISSIONER CHAVEZ: I don't know if it's an  
13 issue. He spoke on it, it's on the record.

14 CHAIRMAN FESMIRE: I think we'd like to make one  
15 copy of it a part of the record.

16 MS. BELIN: Yeah, we'll move it into the record.  
17 It's a comparison between the existing Rule and the  
18 proposed Rule.

19 DR. NEEPER: Well, the calendar I held up, so I  
20 suspect we should put into the record as exhibits.

21 CHAIRMAN FESMIRE: Both sides of the --

22 DR. NEEPER: Both sides of that. I can't  
23 remember how many copies --

24 CHAIRMAN FESMIRE: Well, I think the important  
25 one would go to the Commission secretary/clerk.

1 MS. BELIN: You don't need the big copy, right,  
2 you just need the --

3 DR. NEEPER: The little copy

4 CHAIRMAN FESMIRE: We don't need the big copy for  
5 the record. I may want to grab the big copy so I know what  
6 we've done.

7 DR. NEEPER: They're identical. Here's three  
8 copies, I think. I have many more. Mr. Fesmire do you  
9 want a personal copy?

10 CHAIRMAN FESMIRE: We might -- if you don't mind,  
11 would you leave that around to work with during the  
12 deliberation?

13 DR. NEEPER: You make me very happy.

14 (Laughter)

15 CHAIRMAN FESMIRE: If there are no further  
16 comments, we'll go ahead and go into deliberative session  
17 now.

18 COMMISSIONER CHAVEZ: Do we have to accept those  
19 that he moved into --

20 CHAIRMAN FESMIRE: No, I think just making it  
21 part of the record is --

22 COMMISSIONER CHAVEZ: Okay.

23 CHAIRMAN FESMIRE: -- sufficient.

24 CHAIRMAN FESMIRE: We'll go ahead and begin our  
25 deliberations now.

1 My intention is to go through and unless -- go  
2 through with the Commissioners the proposal that we -- the  
3 proposed Rule that we noticed out, and go through and make  
4 changes from that copy, and I think I have kept a pretty  
5 good record of where we had questions and things that we  
6 wanted to discuss and perhaps vote on.

7 As we go through, if the Commissioners see  
8 something that I missed, please bring it to my attention,  
9 because I don't mean to rush past it and I'd rather keep it  
10 in order.

11 As we do this, Florene, would you be so kind as  
12 to try to keep up with the changes that we make?

13 MS. DAVIDSON: Sure.

14 CHAIRMAN FESMIRE: The first issue that I thought  
15 arose, arose in 1201.B. But before we --

16 MS. LEACH: Do you want to deal with the issues  
17 of like where the definitions goes and those kind of things  
18 that Ms. Bada raised at the very first of --

19 CHAIRMAN FESMIRE: Right.

20 MS. LEACH: -- the hearing?

21 CHAIRMAN FESMIRE: That's -- That is probably the  
22 first issue. Personally, I would like to keep the  
23 definitions in one place. Is there a problem with the  
24 Records and Archives if we do move it out of here?

25 MS. LEACH: To 1.7 as --

1 CHAIRMAN FESMIRE: Yes.

2 MS. LEACH: -- requested by Mr. Brooks?

3 I mean, I think that's a very good proposal,  
4 especially since we're looking at revising a number of  
5 rules and trying to come up with a codification that works  
6 back and forth, so I think we can probably convince  
7 Archives of that.

8 CHAIRMAN FESMIRE: Okay.

9 MS. BADA: We can always do it when they revise  
10 the other rule.

11 MS. LEACH: Yeah, I mean if you basically --  
12 Yeah, so we'll revise that one eventually, and if we can't  
13 do it before, then we can do it then. But basically if the  
14 Commission's pleasure has indicated that we should make  
15 that effort, then I'm sure staff will make that effort, and  
16 I suspect that we'll succeed.

17 CHAIRMAN FESMIRE: Okay. Do we need a motion to  
18 that effect, or can we vote on making all these changes and  
19 then --

20 MS. LEACH: I don't know how you want to proceed,  
21 if you want to vote on each little changes and amendment to  
22 this draft and then vote on all of it sort of at the end --

23 CHAIRMAN FESMIRE: Adopt the draft as amended at  
24 the end?

25 MS. LEACH: Yeah --

1 CHAIRMAN FESMIRE: Okay.

2 MS. LEACH: -- I think that might be the way to  
3 go, in which case you would want to -- like 14.7 basically  
4 say that we -- proposes we move to 1.7, if that can be  
5 arranged with the Records group.

6 CHAIRMAN FESMIRE: Okay. The Chair would  
7 entertain a motion to that effect, if it be the pleasure of  
8 the Commission.

9 COMMISSIONER CHAVEZ: I don't understand what  
10 we're going to be doing now. Is that -- does that mean  
11 that --

12 (Laughter)

13 COMMISSIONER CHAVEZ: Are these definitions going  
14 to be --

15 MS. LEACH: They would be put in with the Rule  
16 that is really mostly definitions.

17 COMMISSIONER CHAVEZ: Right, but at this time --  
18 Oh, what will be happening to these definitions?

19 MS. LEACH: Well, they're not going to go --

20 COMMISSIONER CHAVEZ: Will they be --

21 MS. LEACH: Well, basically it would be that --  
22 the number on them would change from 14.7 to 1.7, just  
23 looking at the last two sections of the number, and that  
24 they be compiled with that rule, instead of Rule -- Part  
25 14.

1           COMMISSIONER CHAVEZ: Okay, that means we would  
2 not have these definitions in the Rule that we would sign;  
3 is that correct?

4           MS. LEACH: No, they would be there, but it will  
5 look a little different than it does here.

6           COMMISSIONER CHAVEZ: Okay.

7           MS. LEACH: Instead of having a 14.7 number for  
8 definitions, probably it would be set out as an amendment  
9 to Part 1 --

10          COMMISSIONER CHAVEZ: Okay.

11          MS. LEACH: -- and that would show up in your  
12 final rulemaking, the copy of which gets sent to Records  
13 and Archives.

14          COMMISSIONER CHAVEZ: Okay, I'm sorry, I was  
15 getting confused here where these were going to end up as  
16 far as referencing, and that won't be an issue, but not  
17 having advertised the change to those other rules?

18          MS. LEACH: Yeah, and Records may give us a  
19 little bit of trouble with that. Because it's not a  
20 substantive change, it's only a numbering change, I think  
21 they will let us do that.

22          So -- I mean, what you're saying is that we try.  
23 If we don't try -- if they don't buy it, then we'll come  
24 back and they'll be here until such time as we formally  
25 amend that Rule, so --

1 COMMISSIONER CHAVEZ: Okay.

2 MS. LEACH: -- with --

3 COMMISSIONER CHAVEZ: Okay.

4 MS. LEACH: -- appropriate notice.

5 COMMISSIONER CHAVEZ: Great.

6 CHAIRMAN FESMIRE: Okay.

7 COMMISSIONER CHAVEZ: Well, as I understand it,  
8 then, I move that we do put those definitions in the  
9 definition section of the Rules and Regulations.

10 CHAIRMAN FESMIRE: Is there --

11 COMMISSIONER BAILEY: I second.

12 CHAIRMAN FESMIRE: All those in favor?

13 COMMISSIONER CHAVEZ: Aye.

14 COMMISSIONER BAILEY: Aye.

15 CHAIRMAN FESMIRE: The motion passes. We will  
16 move the definitions in the draft under 19.15.14.7 to the  
17 definitions section of the Oil Conservation Commission  
18 Rules.

19 The next issue I had is 1204.B, where we changed  
20 one original and five copies to six copies.

21 COMMISSIONER BAILEY: Did you skip 1201?

22 MS. LEACH: He said 1201, or -- I think you meant  
23 1201.

24 CHAIRMAN FESMIRE: I meant 1201. What did I say?

25 MS. LEACH: 1204.

1 COMMISSIONER BAILEY: 1204.

2 CHAIRMAN FESMIRE: I said -- I meant 1201.B --

3 MS. LEACH: Okay.

4 COMMISSIONER CHAVEZ: Okay.

5 CHAIRMAN FESMIRE: -- where it says, "An  
6 applicant shall file one original and five copies of the  
7 application..." and we -- the first issue that we had is  
8 that that should be changed to reflect the Division's --  
9 Let me make sure that they --

10 COMMISSIONER CHAVEZ: That occurs in two places  
11 in B.

12 CHAIRMAN FESMIRE: Right. Right, and I think the  
13 proposal was -- although the Division didn't catch this in  
14 theirs -- that we change the one original and five copies  
15 in both places where it appears in 1201.B to six copies.

16 MS. BADA: I think we said six -- I think the way  
17 the Division framed, it was six sets, but either works.

18 CHAIRMAN FESMIRE: Okay.

19 COMMISSIONER CHAVEZ: Six sets of the  
20 application, I think, is what I had seen, and --

21 CHAIRMAN FESMIRE: Okay, that we change it to  
22 "six sets of the application". Is there --

23 COMMISSIONER BAILEY: I move that we change those  
24 words to "six sets".

25 CHAIRMAN FESMIRE: Okay.

1 COMMISSIONER CHAVEZ: I second.

2 CHAIRMAN FESMIRE: All those in favor?

3 COMMISSIONER CHAVEZ: Aye.

4 COMMISSIONER BAILEY: Aye.

5 CHAIRMAN FESMIRE: 1201.B, the phrase "one  
6 original and five copies" we'll change to "six sets", both  
7 places that it appears.

8 The next item of concern I had was in 1204.A

9 COMMISSIONER BAILEY: 1203?

10 CHAIRMAN FESMIRE: Oh, yes, you're absolutely  
11 right, "or electronic". Add the phrase "or electronic"  
12 between the words "written" and "comments" on the first  
13 line of 1203, so that it reads, "Any person may submit  
14 written or electronic comments on a proposed rule change,  
15 and those comments shall be made part of the hearing  
16 record."

17 COMMISSIONER BAILEY: Shouldn't that be in two  
18 places, both in the title of that rule and in that spot  
19 that you've commented on?

20 CHAIRMAN FESMIRE: "Written or Electronic  
21 Comments" is the title?

22 COMMISSIONER BAILEY: Uh-huh.

23 COMMISSIONER CHAVEZ: Yeah.

24 CHAIRMAN FESMIRE: Okay.

25 MS. LEACH: Why don't you just say "Comments on

1 Rulemaking"?

2 COMMISSIONER CHAVEZ: That should be -- just  
3 clarify it. "Comments on Rulemaking" would be okay.

4 CHAIRMAN FESMIRE: So we strike "written" in both  
5 places -- or strike --

6 COMMISSIONER CHAVEZ: -- "written" in the title.

7 CHAIRMAN FESMIRE: Strike "written" in the title.

8 COMMISSIONER BAILEY: Uh-huh.

9 CHAIRMAN FESMIRE: Strike "written" in the  
10 title --

11 MS. LEACH: And then you might want to say  
12 "written, electronic or facsimile".

13 CHAIRMAN FESMIRE: "Written, electronic or  
14 facsimile", in that first line.

15 Florene, did you get that?

16 MS. DAVIDSON: Uh-huh.

17 CHAIRMAN FESMIRE: Okay. So the motion before us  
18 is that the first line in Rule 1203, including the title,  
19 shall read, "Comments on Rulemaking: Any person may submit  
20 written, electronic or facsimile comments on a proposed  
21 rule change, and those comments shall be made a part of the  
22 hearing record."

23 Is there a motion to that effect?

24 COMMISSIONER BAILEY: I move.

25 COMMISSIONER CHAVEZ: I second.

1 CHAIRMAN FESMIRE: All those in favor?

2 COMMISSIONER BAILEY: Aye.

3 COMMISSIONER CHAVEZ: Aye.

4 CHAIRMAN FESMIRE: The motion carries. We will  
5 change Rule 1203 to reflect that.

6 MS. LEACH: Mr. Chairman --

7 CHAIRMAN FESMIRE: Yes, ma'am.

8 MS. LEACH: -- you had some discussion in 1202  
9 about "The Division shall publish notice of any proposed  
10 rulemaking..."

11 COMMISSIONER CHAVEZ: Oh, yes.

12 MS. LEACH: "Set for hearing", we had talked  
13 about putting in there, just so that in case the Commission  
14 decides not to have a hearing on a proposed application, on  
15 an application for a proposed rule, that then we wouldn't  
16 be doing all the notice. It was just a clarification,  
17 because this clearly is intended to apply to rulemaking  
18 that's going to a hearing.

19 CHAIRMAN FESMIRE: Okay. I must have slept  
20 through that one because I didn't pick it up, but I  
21 remember talking about it.

22 "The Division shall notice -- " " -- shall  
23 publish notice of any proposed rulemaking -- " and what was  
24 the --

25 MS. LEACH: " -- set for hearing -- "

1 CHAIRMAN FESMIRE: " -- set for hearing -- "

2 COMMISSIONER CHAVEZ: " -- set for hearing -- "

3 CHAIRMAN FESMIRE: " -- in the name of the 'State  
4 of New Mexico'..." Is the consensus of the Commission that  
5 we need to --

6 COMMISSIONER CHAVEZ: Yes, it is.

7 COMMISSIONER BAILEY: I move that we accept it.

8 COMMISSIONER CHAVEZ: And I second.

9 CHAIRMAN FESMIRE: All those in favor?

10 COMMISSIONER BAILEY: Aye.

11 COMMISSIONER CHAVEZ: Aye.

12 CHAIRMAN FESMIRE: Opposed? Rule 1202 shall --  
13 the first sentence in Rule 1202 shall read, "The Division  
14 shall publish notice of any proposed rulemaking set for  
15 hearing in the name of the 'State of New Mexico'..."

16 Anything on 1203 -- Well, we've already talked  
17 about 1203.

18 COMMISSIONER CHAVEZ: 1203.

19 CHAIRMAN FESMIRE: 1204? I have a couple of  
20 changes in that. The first proposal was that we remove  
21 B.(5) and C.(3).

22 MS. LEACH: Wait, Mr. Chairman. One of the  
23 things that was discussed was that we change the title of A  
24 so that it was parallel to B, with "Technical testimony" in  
25 B, so that perhaps A should be labeled "Nontechnical

1 testimony".

2 CHAIRMAN FESMIRE: Absolutely, I did get that, I  
3 just went over it.

4 "Nontechnical Participation by the General  
5 Public" --

6 MS. LEACH: You can just say "Nontechnical  
7 testimony", since B is labeled "Technical testimony", if  
8 you want to, so that they're more parallel.

9 CHAIRMAN FESMIRE: Okay. So Section 1204.A, the  
10 title should read "Nontechnical Testimony by the General  
11 Public".

12 COMMISSIONER CHAVEZ: That's not --

13 MS. LEACH: You don't even have to say "General  
14 Public" if you don't want to.

15 COMMISSIONER CHAVEZ: Just be -- "Nontechnical"  
16 would be adequate.

17 CHAIRMAN FESMIRE: "Nontechnical Testimony".  
18 Okay.

19 Is there a motion to that effect?

20 COMMISSIONER CHAVEZ: I so move.

21 COMMISSIONER BAILEY: Second.

22 CHAIRMAN FESMIRE: All those in favor?

23 COMMISSIONER BAILEY: Aye.

24 COMMISSIONER CHAVEZ: Aye.

25 CHAIRMAN FESMIRE: The motion carries, so that

1 Subsection A shall be titled "Nontechnical testimony".

2 Subsection A.2, we've got the recommendation from  
3 the Division that we change "one original and five copies"  
4 to "six sets". It appears once...

5 COMMISSIONER CHAVEZ: The wording here is just a  
6 little bit different.

7 CHAIRMAN FESMIRE: Yeah.

8 COMMISSIONER CHAVEZ: Well, the first part says  
9 an original and five copies on the fourth line, and that  
10 should read "six sets of each exhibit".

11 CHAIRMAN FESMIRE: "Six sets of each exhibit".  
12 "A person offering exhibits shall provide six sets of each  
13 exhibit for the commission, copies for each of those  
14 individuals or entities that have filed an intent to  
15 present technical testimony or cross-examine witnesses at  
16 the hearing and five additional copies for others who may  
17 attend the hearing."

18 COMMISSIONER CHAVEZ: That's correct, yes.

19 CHAIRMAN FESMIRE: Okay.

20 COMMISSIONER CHAVEZ: Fine.

21 CHAIRMAN FESMIRE: So 1204.A.(2), the fourth line  
22 on the proposed Rule shall read, "six sets" in place of  
23 "one original and five copies". Is there a motion?

24 COMMISSIONER BAILEY: I so move.

25 COMMISSIONER CHAVEZ: Second.

1 CHAIRMAN FESMIRE: All those in favor?

2 COMMISSIONER BAILEY: Aye.

3 COMMISSIONER CHAVEZ: Aye.

4 CHAIRMAN FESMIRE: The motion carries.

5 1204.A.(2) shall read as such.

6 There was also some discussion in 1204.B.(1) that  
7 it say -- that the wording be "no later than five business  
8 days", instead of "10 days".

9 COMMISSIONER BAILEY: I move we accept that.

10 COMMISSIONER CHAVEZ: I second.

11 CHAIRMAN FESMIRE: All those in favor?

12 COMMISSIONER BAILEY: Aye.

13 COMMISSIONER CHAVEZ: Aye.

14 CHAIRMAN FESMIRE: Motion carries. Subsection  
15 1204.B.(1) shall read, "Any person, including the division,  
16 who intends to present technical testimony or cross-  
17 examiner witnesses at the hearing shall, no later than five  
18 business days before the scheduled hearing date..."

19 MS. LEACH: Mr. Chairman, it might be a good time  
20 to take up now the proposal that any time that you're  
21 talking about 10 days or less, you might want to say  
22 business days, and you could instruct staff to insert that  
23 wherever it needs to be inserted.

24 COMMISSIONER CHAVEZ: Rather than vote on every  
25 one?

1 MS. LEACH: Huh?

2 COMMISSIONER CHAVEZ: Rather than just vote on  
3 every one, we just do that?

4 MS. LEACH: Just trying to speed things on.

5 CHAIRMAN FESMIRE: Okay, I think that's a very  
6 good idea. And Mr. Chavez, would you like to make a motion  
7 to that effect?

8 COMMISSIONER CHAVEZ: I so move.

9 COMMISSIONER BAILEY: Second.

10 CHAIRMAN FESMIRE: And all those in favor?

11 COMMISSIONER BAILEY: Aye.

12 COMMISSIONER CHAVEZ: Aye.

13 CHAIRMAN FESMIRE: The motion carries. Let the  
14 record reflect that staff will be instructed everywhere the  
15 new Rule says 10 days or less -- everywhere the Rule says  
16 10 days or less, it will be changed to "10 business days"  
17 or -- no?

18 COMMISSIONER CHAVEZ: Where there's a reference  
19 to days --

20 MS. LEACH: Yeah, where there's a reference to  
21 days that is less than 11 days, you'll use the word  
22 "business".

23 CHAIRMAN FESMIRE: Got you.

24 Okay. There was also some discussion that we  
25 remove B.5.

1 COMMISSIONER CHAVEZ: On that same -- under (1)  
2 it references "...an original pre-hearing statement plus  
3 five copies..." That should probably read that it should  
4 be "...six sets of a prehearing statement with the  
5 commission clerk..."

6 CHAIRMAN FESMIRE: Absolutely. Okay.

7 MS. LEACH: Maybe that's another one you may want  
8 to do globally, that any place it says "one original and  
9 five copies", that staff change that to "six sets".

10 CHAIRMAN FESMIRE: The Chair would entertain a  
11 motion to that effect.

12 COMMISSIONER BAILEY: I so move.

13 COMMISSIONER CHAVEZ: I second.

14 CHAIRMAN FESMIRE: Staff will be instructed to  
15 make that change globally.

16 Now B.(5), 1204.B.(5), "No later than four days  
17 before the scheduled hearing date, the Commission clerk  
18 shall deliver a copy of all prehearing statements including  
19 exhibits to all commissioners."

20 The --

21 COMMISSIONER CHAVEZ: I move that be stricken,  
22 because it's a procedural issue internally. It doesn't  
23 have to be part of the Rules.

24 CHAIRMAN FESMIRE: I'm glad you remembered why.

25 Is there a second?

1 COMMISSIONER BAILEY: Second.

2 CHAIRMAN FESMIRE: All those in favor?

3 COMMISSIONER BAILEY: Aye.

4 COMMISSIONER CHAVEZ: Aye.

5 CHAIRMAN FESMIRE: Opposed? The motion carries.

6 Subsection 1204.B.(5) of the proposed Rules shall be  
7 stricken.

8 There was also an issue raised with C.(3).

9 COMMISSIONER CHAVEZ: It was the same issue, and  
10 I move --

11 CHAIRMAN FESMIRE: It was the same --

12 COMMISSIONER CHAVEZ: -- that it be stricken.

13 CHAIRMAN FESMIRE: All those in favor?

14 COMMISSIONER BAILEY: Aye.

15 COMMISSIONER CHAVEZ: Aye.

16 CHAIRMAN FESMIRE: That motion also carries.

17 Subsection 1204.B -- or excuse me, C.(3) shall be stricken  
18 from the proposed ordinance -- from the proposed Rule.

19 1204.A.(2) we've already covered under the six  
20 copies global change, or six sets, I'm sorry.

21 The next issue that I have is 1205.C.(1) six  
22 copies -- I mean, "five copies" change to "six sets",  
23 1205.C.(1).

24 COMMISSIONER BAILEY: You skipped 1205.A.(2).(h).

25 CHAIRMAN FESMIRE: Oh, yes. Well, I --

1 COMMISSIONER CHAVEZ: -- hadn't gotten there yet.

2 CHAIRMAN FESMIRE: I hadn't gotten there, no.

3 COMMISSIONER BAILEY: Oh.

4 CHAIRMAN FESMIRE: Hadn't gotten there yet,

5 but --

6 COMMISSIONER BAILEY: I'm sorry, I thought you --

7 MS. DAVIDSON: We all got confused.

8 COMMISSIONER BAILEY: If I could, there was

9 something --

10 CHAIRMAN FESMIRE: I just -- We talked about it

11 later.

12 COMMISSIONER CHAVEZ: I think there is under (d),  
13 but go ahead and deal with (h), since you brought it up.

14 CHAIRMAN FESMIRE: Okay, on 1205.A.(2).(h), there  
15 is a concern there that the -- only if the hearing was  
16 started or without further notice. It currently reads, "if  
17 the hearing is not completed on the day that it commences,  
18 the commission may, by announcement, continue the hearing  
19 as necessary."

20 There are actually two issues here, whether we  
21 want to do that if the hearing was not started; and if it  
22 was not started, do we want to do that without further  
23 notice.

24 Commissioner Chavez, do you have --

25 COMMISSIONER CHAVEZ: Well, I'm -- if the

1 Commission -- if the hearing doesn't commence, the people  
2 who participate, I'd anticipated, would have been here and  
3 would know, furthermore, if we continued on the docket,  
4 which in the docket would appear. So I would propose that  
5 we just add the language "without further notice" after  
6 "necessary", and I think we will -- we can handle it that  
7 way.

8 CHAIRMAN FESMIRE: Commissioner Bailey?

9 COMMISSIONER BAILEY: I think the only language  
10 we should use -- should add, is "without further notice" --

11 CHAIRMAN FESMIRE: Okay.

12 COMMISSIONER BAILEY: -- because -- particularly  
13 since 1211.C discusses motions for continuance also.

14 CHAIRMAN FESMIRE: Okay. That leaves the issue  
15 that we will still be able to continue a hearing that  
16 hasn't been begun, that hasn't begun, without further  
17 notice, simply by making announcement -- making the  
18 announcement that we can. Is that the intention of the  
19 Commission?

20 COMMISSIONER BAILEY: Yes.

21 COMMISSIONER CHAVEZ: Yes.

22 CHAIRMAN FESMIRE: Okay. The Chair will  
23 entertain a motion that the phrase "without further notice"  
24 be added to 1205.A.(2).(h).

25 COMMISSIONER CHAVEZ: I so move.

1 COMMISSIONER BAILEY: Second.

2 CHAIRMAN FESMIRE: All those in favor?

3 COMMISSIONER BAILEY: Aye.

4 COMMISSIONER CHAVEZ: Aye.

5 CHAIRMAN FESMIRE: Opposed? The motion carries.

6 So A.(2).(h) shall read, "if the hearing is not  
7 completed on the day that it commences, the commission may,  
8 by announcement, continue the hearing as necessary without  
9 further notice."

10 1205.B.(3), who may cross-examine? This is the  
11 note I have on here. 1205.B.(3), B.(3). "Any person who  
12 testifies at the hearing is subject to cross-examination on  
13 the subject matter of his direct testimony. Any person who  
14 presents technical testimony may also be cross-examined on  
15 matters related to his background and qualifications. The  
16 commission may limit cross-examination to avoid harassment,  
17 intimidation, needless expenditure of time or undue  
18 repetition."

19 MS. LEACH: Mr. Chairman, in the first sentence  
20 is where there was a request to insert -- "Any person who  
21 testifies at a hearing is subject to cross-examination..."  
22 and then insert, "by any person filing a prehearing  
23 statement", so that cross-examination will be limited to  
24 those people who did file a prehearing statement, not to  
25 just anyone who walked into the room that day.

1 CHAIRMAN FESMIRE: Commissioner Bailey, do you --

2 COMMISSIONER BAILEY: I agree with that.

3 COMMISSIONER CHAVEZ: I think that's -- that's  
4 actually covered under --

5 CHAIRMAN FESMIRE: -- 1204.B.

6 COMMISSIONER CHAVEZ: -- B, yes, it is. So does  
7 it just reiterate what we say?

8 MS. LEACH: I think it's just clarity and  
9 reassurance --

10 COMMISSIONER CHAVEZ: Okay --

11 MS. LEACH: -- in that case, and I think --

12 COMMISSIONER CHAVEZ: -- well, I --

13 MS. LEACH: -- there's certainly no  
14 contradiction.

15 COMMISSIONER CHAVEZ: It won't be in conflict  
16 with, that's for sure anyway. I don't have an opposition  
17 to inserting it.

18 CHAIRMAN FESMIRE: Okay, so the Chair would  
19 entertain a motion to that effect.

20 COMMISSIONER BAILEY: I so move.

21 COMMISSIONER CHAVEZ: Second.

22 CHAIRMAN FESMIRE: All those in favor?

23 COMMISSIONER BAILEY: Aye.

24 COMMISSIONER CHAVEZ: Aye.

25 CHAIRMAN FESMIRE: The motion carries. So

1 Section 1205.B.(3) shall read, from the beginning, "Any  
2 person who testifies at the hearing is subject to cross-  
3 examination by any person filing a prehearing notice on the  
4 subject and matter of his direct testimony."

5 MS. LEACH: Prehearing notice?

6 COMMISSIONER BAILEY: Statement.

7 MS. LEACH: Prehearing statement.

8 CHAIRMAN FESMIRE: Statement, I'm sorry.

9 MS. LEACH: I'm sorry.

10 CHAIRMAN FESMIRE: Statement. Okay. Prehearing  
11 statement, okay.

12 The next issue I have is 1205.A.(2).(d).

13 COMMISSIONER CHAVEZ: Yes, I had asked if that  
14 was too limiting in case the Commission Chairman wanted to  
15 use other factors for establishing the order for  
16 participants' testimony, for efficient hearing process.

17 CHAIRMAN FESMIRE: Where should --

18 COMMISSIONER CHAVEZ: I would say that it could  
19 be after the word "hearing", at -- or other factors to  
20 allow for an efficient process.

21 MS. LEACH: Why don't you say "sign-in sheets",  
22 comma, strike the "and" there, and then add at the end of  
23 that, "and other appropriate factors"?

24 CHAIRMAN FESMIRE: "And the availability of  
25 witnesses who cannot be present"?

1 MS. LEACH: Well, we just struck the "and", so  
2 it's just a comma in the series.

3 CHAIRMAN FESMIRE: Okay, comma, "the  
4 availability -- "

5 COMMISSIONER CHAVEZ: I see.

6 MS. LEACH: Uh-huh.

7 CHAIRMAN FESMIRE: " -- of witnesses who cannot  
8 be present for the...hearing" and --

9 MS. LEACH: -- "any other appropriate factor".

10 CHAIRMAN FESMIRE: -- "any other appropriate  
11 factor".

12 COMMISSIONER CHAVEZ: That would be fine.

13 CHAIRMAN FESMIRE: So the Chair would entertain a  
14 motion to that effect.

15 COMMISSIONER CHAVEZ: I so move.

16 COMMISSIONER BAILEY: Second.

17 CHAIRMAN FESMIRE: All those in favor?

18 COMMISSIONER CHAVEZ: Aye.

19 COMMISSIONER BAILEY: Aye.

20 CHAIRMAN FESMIRE: The motion carries.

21 So -- and the motion was that 1205.A.(2).(d)  
22 shall read, "the commission chair shall establish an order  
23 for other participants' testimony based upon notices of  
24 intent to present technical testimony, sign-in sheets, the  
25 availability of witnesses who cannot be present for the

1 entire hearing, and any other appropriate factors".

2 Should "factors" be plural or -- ?

3 MS. LEACH: Singular.

4 CHAIRMAN FESMIRE: Singular, "any other  
5 appropriate factor".

6 MS. LEACH: Or you can strike the "any" and then  
7 you can have an "s".

8 CHAIRMAN FESMIRE: "...and any other appropriate  
9 factor" --

10 MS. LEACH: Okay.

11 CHAIRMAN FESMIRE: -- period.

12 The next issue I have is 1205.A.(2).(a), and the  
13 note I have is, "or reference to predetermined procedures,  
14 quote, prehearing". A.(2).(a): "the hearing shall begin  
15 with a statement from the commission chairman identifying  
16 the hearing's nature and the subject matter and explaining  
17 the procedures to be followed" -- oh --

18 MS. LEACH: Commissioner Chavez raised that, and  
19 that's the one that we talked about. I think if it were a  
20 situation where the Commissioner acted as a prehearing  
21 officer and did prehearing procedures in writing, that then  
22 those could be explained in the -- publicly, in a fairly  
23 brief manner, because they would already have been  
24 available in writing.

25 COMMISSIONER CHAVEZ: Yeah, in the end I think --

1 I asked the question, but I think in the end it was  
2 answered that "explaining the procedures to be followed" is  
3 broad enough to include --

4 CHAIRMAN FESMIRE: Okay.

5 COMMISSIONER CHAVEZ: -- referring to procedures,  
6 the written procedures.

7 CHAIRMAN FESMIRE: Commissioner Bailey, do you  
8 think we need to address that in any way?

9 COMMISSIONER BAILEY: I don't think we need to  
10 change that.

11 CHAIRMAN FESMIRE: Okay. The next issue I have  
12 is 1205.A.(2).(h), the phrase "without further notice".

13 MS. LEACH: We already did that one.

14 CHAIRMAN FESMIRE: I'm sorry.

15 COMMISSIONER CHAVEZ: We took it out of order.

16 CHAIRMAN FESMIRE: The next one I have is  
17 1205.E.(2). My notes are "notice", question mark, "what is  
18 due process?", "who is noticed?", and underline the word  
19 "rebuttal". "See 1202, same notice to re-open."

20 1205.E.(2): "If, during the course of  
21 deliberations, the commission determines that additional  
22 testimony or documentary evidence is necessary for a proper  
23 decision on the proposed rule change, the commission may  
24 consistent with due process requirements, reopen the  
25 hearing for additional evidence."

1 MS. LEACH: If you'll recall, Mr. Brooks  
2 testified he didn't know exactly what that would mean,  
3 depending on the circumstances. And as I recall, I  
4 proposed that you would take out the "consistent with due  
5 process requirements" and say "reopen the hearing for  
6 additional evidence after notice in accordance with" -- I  
7 think it's 1204 -- "is provided".

8 So that I -- my proposal would make -- if you  
9 were really going to take evidence again, that you would  
10 basically have to go through the notice process again.

11 CHAIRMAN FESMIRE: Okay, so your proposal is  
12 that, "If during the course of deliberations, the  
13 commission determines that additional testimony or  
14 documentary evidence is necessary for a proper decision on  
15 the proposed rule change, the commission may reopen the  
16 hearing for additional evidence after notice consistent  
17 with -- " Let's make sure. 1204.B. Is that correct?

18 MS. BADA: 1202.

19 MS. LEACH: That's 1202.

20 CHAIRMAN FESMIRE: 1202.

21 MS. LEACH: Yes. Basically --

22 COMMISSIONER BAILEY: Carol, would it be notice  
23 to all participants, not to everyone that was on the  
24 original notice?

25 MS. LEACH: You know, I think if they've made a

1 request for notice about rulemaking, that then you need to  
2 send them a notice.

3 CHAIRMAN FESMIRE: Okay.

4 MS. LEACH: I mean, it's real -- it's real  
5 unusual to go back and truly reopen for additional  
6 evidence, and it's -- you know, it means something's likely  
7 to change. And so I would prefer us to lean on the side of  
8 providing the additional notice to anybody who's  
9 interested.

10 CHAIRMAN FESMIRE: Okay. So the proposal is that  
11 on 1205.E.(2), "If during the course of deliberations, the  
12 commission determines that additional testimony or  
13 documentary evidence is necessary for a proper decision on  
14 the proposed rule change, the commission may reopen the  
15 hearing for additional evidence after notice" -- "after  
16 proper notice pursuant to Rule 1202"?

17 MS. LEACH: Uh-huh.

18 CHAIRMAN FESMIRE: And we'll have to make sure  
19 that that's --

20 MS. LEACH: Look at the --

21 CHAIRMAN FESMIRE: -- cited correctly.

22 MS. LEACH: -- real NMAC site, and say -- I don't  
23 think you need "proper notice", just "after notice pursuant  
24 to Rule 1202 is provided".

25 CHAIRMAN FESMIRE: Okay, the Chair would

1 entertain a motion to that effect.

2 COMMISSIONER BAILEY: I so move.

3 COMMISSIONER CHAVEZ: I second.

4 CHAIRMAN FESMIRE: All those in favor?

5 COMMISSIONER BAILEY: Aye.

6 COMMISSIONER CHAVEZ: Aye.

7 CHAIRMAN FESMIRE: The motion passed. 1205.E.(2)  
8 shall read, "If during the course of deliberations, the  
9 commission determines that additional testimony or  
10 documentary evidence is necessary for a proper decision on  
11 the proposed rule change, the commission may reopen the  
12 hearing for additional evidence after pursuant to Rule  
13 1202".

14 MS. LEACH: The reason I think that works and  
15 doesn't cause a problem is because basically -- the  
16 Commission, the next time you take evidence will be at the  
17 next meeting, because I mean like right now if you decided  
18 you wanted to take evidence and it seems pretty close after  
19 the meeting, you know, most of the people are gone. So you  
20 don't -- you don't really want that to happen. So it would  
21 be -- it would be the notice for your next meeting, so it  
22 really is not going to be a delay.

23 CHAIRMAN FESMIRE: Okay. That is all I had up  
24 through 1205. Do any of the Commissioners have any issues  
25 up to --

1           COMMISSIONER CHAVEZ: I had noted this on my  
2 notes earlier, and I missed it earlier when Mr. Brooks was  
3 testifying under E.(1), which is, "If a quorum of the  
4 commission attended the hearing, and if the hearing agenda  
5 indicates that a decision might be made..."

6           If there isn't a quorum, is it the -- does that  
7 presume that the hearing can be conducted without a quorum?

8           CHAIRMAN FESMIRE: No, what this says is that the  
9 Commission may immediately deliberate. It doesn't say that  
10 they can't if a quorum wasn't present, but there are other  
11 rules that would address that. All it's saying is that if  
12 the quorum was present at the hearing and the notice was  
13 provided, that a decision could be made, that they could  
14 make that decision, they could deliberate immediately.

15          COMMISSIONER CHAVEZ: Okay, thank you.

16          CHAIRMAN FESMIRE: I think. I'm trying to figure  
17 why would we get into the quorum thing anyhow, though, now  
18 that --

19          COMMISSIONER CHAVEZ: Well, that's why I brought  
20 it up, or -- thinking about it earlier. But I don't see  
21 that the way it's stated it's an issue.

22          CHAIRMAN FESMIRE: Right.

23          COMMISSIONER CHAVEZ: I just didn't understand if  
24 there was an interpretation out of that.

25          CHAIRMAN FESMIRE: Okay.

1 MS. LEACH: I think you're right, I think other  
2 law takes care of the quorum, that you -- you wouldn't have  
3 to have it here, but I don't -- this does not contradict  
4 other law, so I think you're fine.

5 COMMISSIONER CHAVEZ: Okay.

6 CHAIRMAN FESMIRE: Okay. Now we get into 1206  
7 and the proposal on 1206.A. The proposal is that "The  
8 division, attorney general, any operator or producer or any  
9 other person may file an application with the division for  
10 an adjudicatory hearing. The division director, upon  
11 receiving a division examiner's recommendation, may dismiss  
12 an application for an adjudicatory proceeding upon a  
13 showing that the applicant does not have standing in the  
14 subject matter, and that the application is not  
15 substantially in the public interest."

16 That is the proposal. The changes from the  
17 Division's proposal is that -- is "...and that the  
18 application is not substantially in the public interest."

19 Counsel is of the opinion that that may create  
20 some sort of citizen suit, entitlement? That's not the  
21 right word. Why don't you --

22 MS. LEACH: Counsel will try to explain what she  
23 said. There are really two changes here. The first one is  
24 the proposal that came from the Division that was endorsed  
25 by Mr. Brooks, that where we have "substantial interest",

1 we change that to the word "standing".

2 And the reason we did that is because there -- or  
3 the proposal -- the testimony was, because there is a body  
4 of case law that defines what standing is. And as Mr.  
5 Brooks testified, it is pretty broad. The example he gave  
6 was basically people concerned about the view as they drove  
7 by a mountaintop mining operation. So that gives you an  
8 idea of how broad standing can be.

9 Then the proposal that was given to us shortly  
10 after lunch by Ms. Belin would basically take -- would add  
11 to that the concept that anybody can bring an application  
12 for a hearing, provided that the application is not --  
13 provided that -- this is going to get into a double  
14 negative -- providing that the --

15 (Laughter)

16 MS. LEACH: -- it says that the Division Director  
17 does not find it not to be substantially in the public  
18 interest. So I'm sure there's a way to say that without  
19 the double negatives, but I didn't find it right now.

20 So that substantially broadens who can bring an  
21 application, so -- and that is what I think industry was  
22 concerned about, then. That truly is like a citizen suit  
23 provision where any citizen can bring something, whether or  
24 not they have anything other than a fairly generalized  
25 public interest concern.

1           CHAIRMAN FESMIRE: Okay.

2           COMMISSIONER CHAVEZ: If there's a substant to  
3 it, I would say it would have to deal with the Oil and Gas  
4 Act, in the interest of conservation and the prevention of  
5 waste and the issues that are legislated for the Commission  
6 to act on, so that I don't know that I -- I might myself  
7 accept some language that says "the application is not  
8 substantially in the interest of the protection of  
9 correlative rights, the prevention of waste and the -- "

10           MS. LEACH: " -- protection of groundwater -- "

11           CHAIRMAN FESMIRE: " -- human health and the  
12 environment -- "

13           MS. LEACH: " -- human health -- "

14           COMMISSIONER CHAVEZ: So just those specific  
15 issues --

16           MS. LEACH: Yeah.

17           COMMISSIONER CHAVEZ: -- dealing with the Oil and  
18 Gas Act, that type of limitation, that language, I think,  
19 might be -- I'd like to think about that.

20           CHAIRMAN FESMIRE: Okay. So you're proposing,  
21 "and that application is -- "

22           COMMISSIONER CHAVEZ: Well, I don't know that I  
23 want to propose it, I just brought that up --

24           CHAIRMAN FESMIRE: Discuss --

25           COMMISSIONER CHAVEZ: -- to discuss that as the

1 substance that we have to deal with where there are things  
2 that -- We are charged by the Oil and Gas Act to do these  
3 things, and if an application from the public substantially  
4 deals with that, I think we're charged to hear it.

5 CHAIRMAN FESMIRE: "may dismiss an application  
6 for an adjudicatory proceeding upon a showing that the  
7 applicant does not have standing in the subject matter -- "

8 MS. LEACH: You'd have to show both to dismiss  
9 it. One, no standing --

10 CHAIRMAN FESMIRE: Right.

11 MS. LEACH: -- under whatever we decide  
12 "standing" means, and that it's not in the public -- not  
13 substantially in the public interest. So to dismiss it,  
14 you would have to show both of those.

15 COMMISSIONER BAILEY: Why don't we just put  
16 "standing" in both places and leave it at that? Because if  
17 there are issues connected with standing at a specific  
18 case, then we could talk about those other topics that  
19 you're bringing up.

20 COMMISSIONER CHAVEZ: I think -- That's a good  
21 idea.

22 MS. LEACH: So yeah, because -- And here it's  
23 standing to initiate a case --

24 COMMISSIONER BAILEY: Yeah.

25 MS. LEACH: -- other places, it's standing to

1 participate in a case, and those are different concepts.

2 COMMISSIONER BAILEY: So if we have "standing" in  
3 the first line, "or any other person may file an  
4 application", and then farther on down, "upon a showing  
5 that the applicant does not have standing", which is what  
6 the Division suggested.

7 COMMISSIONER CHAVEZ: I could accept that, yes,  
8 just to draw up the portion --

9 CHAIRMAN FESMIRE: Okay.

10 COMMISSIONER CHAVEZ: -- and the application is  
11 not substantially in the public interest.

12 CHAIRMAN FESMIRE: Okay, so the Chair would  
13 entertain a motion to that effect.

14 COMMISSIONER BAILEY: I move that we accept the  
15 Division suggestion with -- inserting the words "with  
16 standing", in place of "a substantial interest in the  
17 subject matter", and also in the first line.

18 CHAIRMAN FESMIRE: Okay.

19 COMMISSIONER CHAVEZ: I second the motion.

20 CHAIRMAN FESMIRE: All those in favor?

21 COMMISSIONER BAILEY: Aye.

22 COMMISSIONER CHAVEZ: Aye.

23 CHAIRMAN FESMIRE: Opposed? Okay, the motion  
24 passes. 1206.A shall read, "The division, attorney  
25 general, or any operator or producer or any other person

1 with standing may file an application with the division for  
2 an adjudicatory hearing. The division director, upon  
3 receiving a division examiner's recommendation, may dismiss  
4 an application for an adjudicatory proceeding upon a  
5 showing that the applicant does not have standing" period.

6 1206.B, here's where we put "division secretary"  
7 instead of "division clerk" on the first line. The  
8 recommendation is that we change the recommended rule to  
9 read, "Applicants for the adjudicatory hearings shall file  
10 written applications with the division clerk at least 23  
11 days before the application's scheduled hearing date."

12 COMMISSIONER CHAVEZ: I move that we accept that.

13 COMMISSIONER BAILEY: Second.

14 CHAIRMAN FESMIRE: All those in favor?

15 COMMISSIONER BAILEY: Aye.

16 COMMISSIONER CHAVEZ: Aye.

17 CHAIRMAN FESMIRE: The motion carries. 1206.B  
18 shall read "Applicants for adjudicatory hearings shall file  
19 written applications with the division clerk at least 23  
20 days before the application's scheduled hearing date."

21 The next issue I have -- Does anybody have any  
22 other issues with 1206?

23 COMMISSIONER CHAVEZ: No.

24 COMMISSIONER BAILEY: No.

25 CHAIRMAN FESMIRE: Okay.

1 MS. LEACH: It might be appropriate with what  
2 you're doing on 1206, because these have been kind of  
3 contested issues on this standing question, to go ahead and  
4 put some of your reasons for making those changes on the  
5 record at this point, because you will need them there  
6 eventually, and it may be easier while we're at that  
7 point --

8 CHAIRMAN FESMIRE: Okay.

9 MS. LEACH: -- to talk about why you did what you  
10 did in 1206.

11 CHAIRMAN FESMIRE: I think, as Mr. Brooks  
12 testified, I think "standing" is a well-defined legal  
13 concept. I think it's broad enough to address the concerns  
14 of the New Mexico Citizens for Clean Air and Water, whereas  
15 "a substantial interest in the subject matter" would have  
16 to be reinterpreted and would be subject to a range of  
17 interpretations by any court reviewing a decision. And for  
18 that reason, I agree with the motion and the Division's  
19 recommendation.

20 COMMISSIONER BAILEY: I agree.

21 COMMISSIONER CHAVEZ: And I agree for the same  
22 reasons. I think it will give the Division and the  
23 Commission the ability to conduct their business more  
24 efficiently.

25 MS. LEACH: Thank you.

1 CHAIRMAN FESMIRE: Any time.

2 The next issue that I have is issue 1207.A.(6).  
3 The Division recommended a change to the proposed Rule to  
4 make number (6) read, "a reasonable identification of the  
5 adjudication's subject matter that alerts persons who may  
6 be affected if the division grants the application" and  
7 then a renumbering of the subsequent subsections.

8 COMMISSIONER CHAVEZ: Well, it would be a  
9 renumbering off (6) to (7) and inserting a new (6).

10 CHAIRMAN FESMIRE: Right.

11 COMMISSIONER CHAVEZ: Okay.

12 CHAIRMAN FESMIRE: Right. And the new (6) shall  
13 read, "a reasonable identification of the adjudication's  
14 subject matter that alerts persons who may be affected if  
15 the division grants the application".

16 Is there any discussion?

17 COMMISSIONER BAILEY: I move that we adopt that.

18 COMMISSIONER CHAVEZ: I second the motion.

19 CHAIRMAN FESMIRE: All those in favor?

20 COMMISSIONER BAILEY: Aye.

21 COMMISSIONER CHAVEZ: Aye.

22 CHAIRMAN FESMIRE: All those opposed? The motion  
23 carries. 1207.A shall add a new subsection which shall be  
24 numbered (6), and it shall read, "a reasonable  
25 identification of the adjudication's subject matter that

1 alerts persons who may be affected if the division grants  
2 the application" and the subsequent subsections under A  
3 shall be renumbered from -- to accommodate the inclusion of  
4 the new number (6).

5 The next issue I have is 1207.B.(2), where it  
6 says 10 days. "The division shall publish notice of each  
7 adjudicatory hearing before the commission or a division  
8 examiner at least 10 days before the hearing".

9 This is the one where the issue was whether or  
10 not there would be enough time to prepare for the hearing.  
11 I'm sympathetic to the issue, but I'm not sure that I know  
12 how to change it so that it would be -- to adequately  
13 address --

14 MS. LEACH: We had a couple of suggestions during  
15 the testimony. One would be changing this to 20 days, and  
16 if you did that, you would need to go back to part B in  
17 1206 where it now says 23 days, and the suggestion was that  
18 you could change that to 30 days to make that work. And  
19 then I think that gives them sufficient time to meet the  
20 rest of the timetable that's in here.

21 What that probably does -- its effect is to make  
22 each case that's going probably be heard a month later than  
23 it otherwise would be heard.

24 CHAIRMAN FESMIRE: Say that again, I'm sorry, I  
25 didn't --

1 MS. LEACH: I said what the -- the net effect of  
2 basically making them -- like if there was a decision from  
3 the Hearing Examiner and you had to file 30 days before the  
4 Commission could meet on it, then basically you're probably  
5 going to delay everything by a month, is what I see as the  
6 largest impact of that, so that you're not going to -- you  
7 have a decision on, say, September 15th, you're probably  
8 not going to make a Commission Hearing on October 15th,  
9 just using those as sample dates. Instead, it would  
10 probably be at the next Commission Hearing in November.

11 As sort of a point of fact, most of them slip  
12 that way anyway, and at least in my limited experience in  
13 watching the Commission they rarely come up at the very  
14 next Commission Hearing. So I'm not sure how much of an  
15 actual impact it has.

16 CHAIRMAN FESMIRE: Are there going to --

17 MS. LEACH: But that's what it would do.

18 The other proposal on how to maybe fix this is to  
19 decide that there are two kinds of adjudicatory cases that  
20 come to the Commission: those that are the traditional  
21 industry-versus-industry cases like the correlative rights,  
22 the pooling cases, those kind of things; and those that  
23 we're seeing as having a more impact on the public, such as  
24 those who would not have notice until like probably that  
25 point, those that affect the surface waste disposal

1 facilities, other things affecting remediation,  
2 groundwater, that kind of thing, and whether there's a way  
3 we could describe those kind of cases and have a different  
4 time frame from them.

5 I mean, it's -- Those are the two proposals. One  
6 is pretty simple but affects every case, the other one is  
7 probably more and more complex to write but might just  
8 affect only a portion of the cases.

9 CHAIRMAN FESMIRE: What would happen if we simply  
10 extended this period by five days?

11 MS. LEACH: I proposed that, and everybody  
12 reminded me that 10 days is really more like 14 days, with  
13 our rule on not counting business days and that kind of  
14 thing. If you put it --

15 CHAIRMAN FESMIRE: Right, so that's just --

16 MS. LEACH: -- if you say 15 days, it really is  
17 15 days, so there's only day difference there, so...

18 COMMISSIONER CHAVEZ: I'd -- At this point I'd  
19 lean more towards extending 1206.B to 30 and allowing the  
20 20 days under 1207.B.

21 CHAIRMAN FESMIRE: That's going to be a major  
22 change over what we're doing now.

23 COMMISSIONER CHAVEZ: The issue is, what's  
24 practical and being able to do. If it's -- again -- Let me  
25 put it this way: I think we do need to extend 1207.B to 20

1 days.

2 CHAIRMAN FESMIRE: To 30 days?

3 COMMISSIONER CHAVEZ: No, 1207.B --

4 CHAIRMAN FESMIRE: Okay.

5 COMMISSIONER CHAVEZ: -- to 30 -- I'm sorry, to  
6 20.

7 CHAIRMAN FESMIRE: To 20, okay.

8 COMMISSIONER CHAVEZ: But the issue is, how are  
9 we going to get there from here, given what we've got under  
10 1206.B? If -- One of the things too is, when we make a  
11 rule that's right, we have to be able to, you know, do the  
12 work to get it to work -- do the work necessary to be sure  
13 that it's accomplished. And basically if that's the right  
14 thing to do, 23 and 20, well, we're still going to have to  
15 get it done.

16 CHAIRMAN FESMIRE: Right. Commissioner?

17 COMMISSIONER BAILEY: How -- What kind of  
18 percentage would fall under this extended time period?  
19 Probably a very small number of cases, as opposed to the  
20 normal industry-versus-industry-type cases; isn't that  
21 right?

22 CHAIRMAN FESMIRE: I don't know, I think -- I'm  
23 assuming my experience has been typical, but I'm thinking a  
24 pretty significant number of them would fall under that --

25 COMMISSIONER BAILEY: You think --

1 CHAIRMAN FESMIRE: -- maybe 25 percent.

2 COMMISSIONER BAILEY: Hm. Because if I  
3 understood it, it was more with disposal pits --

4 CHAIRMAN FESMIRE: Uh-huh.

5 COMMISSIONER BAILEY: -- and water contamination,  
6 and I didn't realize the percentage was that high.

7 CHAIRMAN FESMIRE: Most of the others are -- go  
8 down on the administrative level --

9 COMMISSIONER BAILEY: Yeah.

10 CHAIRMAN FESMIRE: -- so...

11 What kind of problems would we be causing if we  
12 did raise it from 10 to 20 and 23 to 30 on 1206?

13 MS. LEACH: Well, while we didn't have many  
14 industry representatives here, they really didn't reflect  
15 there was a problem.

16 CHAIRMAN FESMIRE: There's always, you know, the  
17 law of unintended consequences --

18 MS. LEACH: Uh-huh.

19 CHAIRMAN FESMIRE: -- but I don't think it would  
20 be a problem other than, you know, a significant number  
21 would be kicked out to the next month, if we went that way.  
22 And like you said, a lot of them go there anyhow. Those  
23 that don't are generally some sort of emergency situation  
24 we could handle under the emergency rules, isn't it?

25 MS. LEACH: Yeah, we do have that authority. And

1 basically for cases that are just going to the Division,  
2 you're really just talking about a week delay --

3 CHAIRMAN FESMIRE: Right.

4 MS. LEACH: -- so...

5 CHAIRMAN FESMIRE: I would suggest that we do 20  
6 and 30, then.

7 COMMISSIONER CHAVEZ: I would go with that.

8 CHAIRMAN FESMIRE: Is there a motion to that  
9 effect?

10 COMMISSIONER CHAVEZ: I so move.

11 COMMISSIONER BAILEY: Second.

12 CHAIRMAN FESMIRE: All those in favor?

13 COMMISSIONER CHAVEZ: Aye.

14 COMMISSIONER BAILEY: Aye.

15 CHAIRMAN FESMIRE: All those opposed? The motion  
16 carries.

17 The motion is that 1207.B read, "The division  
18 shall publish notice of each adjudicatory hearing before  
19 the commission or a division examiner at least 20 days  
20 before the hearing".

21 The motion also changed 1206.B to read, "The  
22 applicants for adjudicatory hearings shall file written  
23 applications with the division secretary -- "

24 COMMISSIONER CHAVEZ: "clerk" now.

25 CHAIRMAN FESMIRE: "clerk", I'm sorry. " -- the

1 division clerk at least 30 days prior to the applicant's  
2 scheduled hearing date."

3 That takes care of 1207.

4 1208, the note I have is, "Division. What  
5 constitutes a Division appearance? Division change." Does  
6 anybody have any better notes than that?

7 MS. LEACH: I think it's asking you to look at  
8 the comments from the Division in its proposed change on  
9 this section --

10 CHAIRMAN FESMIRE: You're right.

11 MS. LEACH: -- which they renumber in A to break  
12 that sentence up, so it's numbered down (1), (2) and (3),  
13 which is not really a substantive change but a style  
14 change.

15 CHAIRMAN FESMIRE: Okay. The Division's  
16 suggested style change is laid out in its proposed changes.  
17 The Chair would entertain a motion to adopt the Division's  
18 proposed changes to 1208.

19 COMMISSIONER BAILEY: I so move.

20 COMMISSIONER CHAVEZ: I second.

21 CHAIRMAN FESMIRE: All those in favor?

22 COMMISSIONER BAILEY: Aye.

23 COMMISSIONER CHAVEZ: Aye.

24 CHAIRMAN FESMIRE: The motion carries. And I'm  
25 going to have to make reference to the Division's proposed

1 changes for these style changes and numbering, punctuation  
2 and lettering.

3 MS. LEACH: Okay.

4 CHAIRMAN FESMIRE: Okay?

5 MS. LEACH: I think that makes sense. And you  
6 want all of the changes as proposed, because they broke --  
7 they brought the old A up into A and B --

8 CHAIRMAN FESMIRE: Right.

9 MS. LEACH: -- and then renumbered. Okay.

10 CHAIRMAN FESMIRE: And then renumbered.

11 MS. LEACH: So all of the changes from the  
12 Division comments.

13 CHAIRMAN FESMIRE: Right.

14 MS. LEACH: I just wanted to make sure I  
15 understood.

16 COMMISSIONER BAILEY: You changed the word from  
17 "subparagraph" to "paragraph" in C of their --

18 CHAIRMAN FESMIRE: Yes, that was my intent. Is  
19 that --

20 COMMISSIONER BAILEY: Okay.

21 CHAIRMAN FESMIRE: Is that your intent?

22 COMMISSIONER CHAVEZ: Okay.

23 CHAIRMAN FESMIRE: The next one is 1209, and --

24 MS. LEACH: This is another standing --

25 CHAIRMAN FESMIRE: Right.

1 MS. LEACH: -- and we have the proposed language  
2 from Ms. Belin.

3 CHAIRMAN FESMIRE: For 1209.C. The -- I think we  
4 need to address this all in one deal. The Division's  
5 proposed change is to read, "Any person with standing with  
6 respect to the case's subject matter may intervene by  
7 filing a written notice of intervention with the division  
8 or commission clerk, as applicable, at least one day before  
9 the date for filing of a pre-hearing statement."

10 And then B, "The division examiner or commission  
11 chairman may -- " Well, Ms. Belin is proposing a new B  
12 that reads, "Where an intervenor's standing is disputed,  
13 the division examiner or commission chairman may, at their  
14 discretion, permit the intervention if they find that the  
15 participation of the intervenor is substantially in the  
16 public interest or that it poses no undue prejudice to  
17 the...parties."

18 Do we have the same problem that we had in 1206  
19 with the citizen suit provisions?

20 MS. LEACH: I don't view it the same, Mr.  
21 Chairman, because that's initiating a case, and this is  
22 intervening in an existing case. So the case is going  
23 forward anyway, so it's not like they're starting a suit  
24 separately or a case separately.

25 CHAIRMAN FESMIRE: Okay.

1 MS. LEACH: This is -- they want to comment on a  
2 case that's already existing.

3 CHAIRMAN FESMIRE: What is the feeling of the  
4 Commission on adding B?

5 MS. LEACH: Mr. Chairman --

6 COMMISSIONER CHAVEZ: I wouldn't mind -- Go  
7 ahead.

8 MS. LEACH: -- I was --

9 COMMISSIONER CHAVEZ: -- I wouldn't mind changing  
10 the wording of the "in the public interest" to the -- "the  
11 interest of efficient" -- or -- making a good decision,  
12 coming out with a good --

13 (Laughter)

14 COMMISSIONER CHAVEZ: -- the words here, but if  
15 the intervenor can add substance to the case, that helps  
16 the Examiner or the Commission come to a better decision,  
17 it -- when they have something to add that's substantive,  
18 and I just don't know how to word that.

19 We may have the same issue here that I brought up  
20 earlier. It has to be substantive to what we're here  
21 for --

22 CHAIRMAN FESMIRE: Uh-huh.

23 COMMISSIONER CHAVEZ: -- prevention of waste,  
24 protection of correlative rights and --

25 CHAIRMAN FESMIRE: "...find that the

1 participation of the intervenor is substantially -- "

2 If they find that the participation of the  
3 intervenor contributes or can -- will contribute  
4 substantially to the prevention of waste?

5 COMMISSIONER CHAVEZ: Or just the disposition of  
6 the case, or -- maybe we don't have to go too long with it,  
7 or something along those lines.

8 COMMISSIONER BAILEY: Well, I think it's a good  
9 idea to reiterate what the Commission responsibilities are.

10 CHAIRMAN FESMIRE: ...to the prevention of waste,  
11 protection of correlative rights --

12 COMMISSIONER CHAVEZ: -- and the protection of  
13 public health and the environment.

14 CHAIRMAN FESMIRE: -- or the protection. "Or".

15 COMMISSIONER CHAVEZ: Okay.

16 CHAIRMAN FESMIRE: Okay. So B, we would make the  
17 standing change in A and the standing change in what will  
18 now be D, so that the whole thing will read, starting from  
19 A: "Any person with standing with respect to the case's  
20 subject matter may intervene by filing a written notice of  
21 intervention with the division or commission clerk, as  
22 applicable, at least one day before the date for filing a  
23 prehearing statement. Notice of intervention shall include  
24 the intervenor's name, the intervenor's address, or the  
25 address of the intervenor's attorney, including an e-mail

1 address and fax number if available, the nature of the  
2 intervenor's interest in the application and the extent to  
3 which the intervenor opposes issuance of the order  
4 applicant seeks.

5 "B. Where an intervenor's standing is disputed,  
6 the division examiner or commission chairman may, at their  
7 discretion, permit the intervention if they find that the  
8 participation will contribute substantially to the  
9 prevention of waste, protection of correlative rights, or  
10 the protection of public health and the environment."

11 MS. LEACH: Mr. Chairman --

12 CHAIRMAN FESMIRE: Yes, ma'am.

13 MS. LEACH: -- I have a little trouble, and I  
14 should have brought this up, if I'd thought about it, when  
15 Ms. Belin was here. That whole part, proposed new B,  
16 starts, "Where an intervenor's standing is disputed..."  
17 That's really not what I think you're looking at, because  
18 anybody can dispute anything.

19 What you're really looking at is a situation  
20 where the proposed intervenor does not have standing, you  
21 still may want him to participate because it would  
22 contribute substantially to the Commission's understanding  
23 of the issues, is what I'm hearing you say.

24 So I would propose that basically instead of  
25 saying where an intervening standing is disputed, that you

1 either say where a proposed intervening -- intervenor is  
2 found not to have standing, then they can still continue to  
3 participate under these certain circumstances.

4 Or, you can take your certain circumstances and  
5 put it in the existing C as basically sort of "unless"  
6 language at the end of the current draft C.

7 Am I making sense?

8 CHAIRMAN FESMIRE: Yes, ma'am, yeah. A lot of  
9 sense. You know, and I'm -- How about where an intervenor  
10 does not have standing? Is there any easier way to say  
11 that?

12 MS. LEACH: No, that's a concept in C. If you  
13 look at the exist- -- if you leave the existing B alone --  
14 If you change A the way you talked about, if you leave the  
15 existing B alone and you look at C, you're basically  
16 saying, the Commission Chairman may strike a notice of  
17 intervention on a party's motion if the notice fails to  
18 show that the intervenor has substantial interest in the  
19 hearing, okay?

20 You might not want it to just be the notice, but  
21 basically if the intervenor fails to show he has  
22 substantial interest in the -- or he has standing in the  
23 hearing.

24 COMMISSIONER BAILEY: And then to scratch the  
25 proposed B that was given to us.

1 MS. LEACH: Except -- unless you want to put at  
2 the end of C, "unless", and then go into your public-  
3 interest concept.

4 COMMISSIONER BAILEY: But --

5 CHAIRMAN FESMIRE: Okay.

6 COMMISSIONER BAILEY: -- the more I think about  
7 this, the more we're saying, Throw out the "standing" part.

8 MS. LEACH: I thought we were putting the  
9 "standing" part in and requiring standing unless you really  
10 have a specific interest in -- that you guys were talk- --  
11 a specific contribution to make. I didn't get your exact  
12 language, Mr. Chairman, I'm sorry.

13 CHAIRMAN FESMIRE: Well, may I propose something  
14 and see if --

15 MS. LEACH: Yeah.

16 CHAIRMAN FESMIRE: And I think this is what the  
17 counsel was proposing, but the Division Examiner or the  
18 Commission Chairman may strike a notice of intervention on  
19 a party's motion if the notice fails to show that the  
20 intervenor has standing to intervene in a hearing, unless  
21 the Division Examiner or Commission -- unless the Division  
22 Examiner or Commission Chairman believes that intervenor's  
23 participation will contribute substantially to the  
24 prevention of waste, protection of correlative rights or  
25 the protection of public health and the environment.

1 MS. LEACH: The only thing I'd change in that is,  
2 basically instead of saying "if the notice fails to show",  
3 I'd say "if the intervenor fails to show he has standing".

4 CHAIRMAN FESMIRE: Unless -- the Division  
5 Examiner or Commission may strike a notice of intervention  
6 if the --

7 MS. LEACH: Because you might want to have a  
8 hearing on whether or not there's standing, as opposed to  
9 just deciding on the notice.

10 CHAIRMAN FESMIRE: Okay. So it would read -- A  
11 and B would be the same, with the standing change in A, and  
12 then C would read, "The Division Examiner or the Commission  
13 Chairman may strike a notice of intervention on a party's  
14 motion if intervenor fails to show that the intervenor has  
15 standing to intervene in a hearing, or that intervenor's  
16 participation will contribute substantially to the  
17 prevention of waste, protection of correlative rights -- "

18 MS. LEACH: I think you can just say "has  
19 standing" --

20 COMMISSIONER BAILEY: Uh-huh.

21 MS. LEACH: -- to make that a little simpler, and  
22 then go to your "unless" clause --

23 CHAIRMAN FESMIRE: Okay.

24 MS. LEACH: -- if that's the direction the  
25 Commission wants to go --

1 CHAIRMAN FESMIRE: Party's motion --

2 MS. LEACH: -- instead of saying -- instead of  
3 repeating "standing to intervene".

4 CHAIRMAN FESMIRE: Okay, "The Division Examiner  
5 or the Commission Chairman may strike a notice of  
6 intervention on a party's motion if the intervenor has  
7 standing -- "

8 MS. LEACH: " -- if the intervenor fails to show  
9 that the intervenor -- "

10 CHAIRMAN FESMIRE: " -- fails to show -- "

11 MS. LEACH: " -- has standing -- "

12 CHAIRMAN FESMIRE: Okay. " -- intervenor fails  
13 to show that the intervenor has standing -- "

14 Oh, okay, " -- to intervene in a hearing" is the  
15 part that you want stricken?

16 MS. LEACH: Yeah.

17 CHAIRMAN FESMIRE: Okay. So it will read, "The  
18 Division Examiner or the Commission Chairman may strike a  
19 notice of intervention on a party's motion if the  
20 intervenor fails to show that the intervenor has standing  
21 to intervene -- "

22 No. No, no. Why don't you read what you --

23 MS. LEACH: It's what you read, except I would  
24 take out the last "to intervene", basically, have  
25 standing -- if you want to say --

1 CHAIRMAN FESMIRE: " -- has standing -- "

2 MS. LEACH: " -- has standing in the case -- "

3 CHAIRMAN FESMIRE: " -- has standing -- " Okay.

4 MS. LEACH: Or just leave it as "has standing", I  
5 think, works.

6 CHAIRMAN FESMIRE: " -- has standing unless  
7 intervenor shows that intervention will -- " Okay. Follow  
8 me through one more time.

9 COMMISSIONER CHAVEZ: Okay.

10 CHAIRMAN FESMIRE: "The Division Examiner or the  
11 Commission Chairman may strike a notice of intervention on  
12 a party's motion if the intervenor fails to show that the  
13 intervenor has standing, unless intervenor shows that  
14 intervention will contribute substantially to the  
15 prevention of waste, protection of correlative rights or  
16 the protection of public health and the environment".

17 Is that -- Florene is over here going, What?

18 (Laughter)

19 COMMISSIONER BAILEY: Because that last one is  
20 not a complete sentence, is part of what she's frowning at.

21 CHAIRMAN FESMIRE: Okay.

22 COMMISSIONER CHAVEZ: Is the "unless" after a  
23 comma?

24 CHAIRMAN FESMIRE: Yeah, comma, "unless".

25 MS. LEACH: " -- unless the intervenor shows -- "

1 Say the "show" part again, Mr. Chairman.

2 CHAIRMAN FESMIRE: Okay. " -- unless intervenor  
3 shows that intervention will contribute substantially to  
4 the prevention of waste, protection of correlative rights  
5 or the protection of public health and the environment".

6 COMMISSIONER BAILEY: Is that going to contradict  
7 any test there is for standing?

8 CHAIRMAN FESMIRE: No, this is absolutely -- By  
9 the time we get to this part, we've already determined that  
10 they don't have standing. The only way they can get in  
11 under this if they show that the intervention will  
12 contribute substantially to the prevention of waste -- "

13 COMMISSIONER BAILEY: Then do we need this?

14 CHAIRMAN FESMIRE: The reason that I think we do  
15 is in the case that they're talking about, somebody who,  
16 you know, believes they have standing but -- you know, have  
17 been shown not to have standing but would like to  
18 participate. We can allow them to participate if they will  
19 -- if their participation will help us prevent waste,  
20 protect correlative rights or -- public health.

21 COMMISSIONER BAILEY: Are we opening it up for  
22 citizen suits again, doing that?

23 MS. LEACH: I don't think this -- It wouldn't be  
24 like a true citizen suit, because they couldn't initiate  
25 the suit. They would participate in this case -- there

1 would be potentially a broader participation in a case that  
2 was already ongoing than you would have by normal standing  
3 rules.

4 I'm not sure how much of a difference it really  
5 makes, but it does let more people potentially come in, but  
6 it's still controlled by the Commission or by the Hearing  
7 Examiner, because this is a discretionary thing, because  
8 you would have to find something about -- Okay, first, I  
9 think standing is pretty broad. Second, even if you find  
10 out that they don't meet the standing test, then you would  
11 have to find that there was still some sort of significant  
12 contribution this person could bring in order to let them  
13 proceed with intervening. So it would be controlled by the  
14 Commission.

15 COMMISSIONER CHAVEZ: I move we adopt that  
16 language.

17 CHAIRMAN FESMIRE: Is there a second? Well, I'll  
18 second it.

19 COMMISSIONER BAILEY: Okay.

20 CHAIRMAN FESMIRE: All those in favor?

21 COMMISSIONER CHAVEZ: Aye.

22 CHAIRMAN FESMIRE: Aye. The motion carries.

23 MS. LEACH: This is one of those where you may  
24 want to explain on the record why you did what you did.

25 CHAIRMAN FESMIRE: Right. The 1206 -- I'm sorry,

1 I've got the wrong paper here. No wonder it didn't --

2 MS. LEACH: 1209.

3 CHAIRMAN FESMIRE: 1209.A, the first part, shall  
4 read, "Any person with standing with respect to the case's  
5 subject matter...", and 1209.C shall read, "The Division  
6 Examiner or the Commission Chairman may strike a notice of  
7 intervention on a party's motion if the intervenor fails to  
8 show that the intervenor has standing to intervene, unless  
9 intervenor shows that that intervention will contribute  
10 substantially to the prevention of waste, protection of  
11 correlative rights or the protection of public health and  
12 the environment".

13 Is that your intention, Commissioner?

14 COMMISSIONER CHAVEZ: Yes, it is.

15 CHAIRMAN FESMIRE: Commissioner Bailey, are you  
16 still --

17 COMMISSIONER BAILEY: I'm thinking.

18 (Laughter)

19 CHAIRMAN FESMIRE: My reasoning for this is that  
20 it broadens -- while I too believe that the concept of  
21 standing is broad enough to provide meaningful public  
22 participation from most of the citizens of New Mexico, that  
23 if there is a reason based in the mandates that the  
24 Legislature has given the Oil Conservation Division to  
25 include people in the process who would not have standing

1 under our definition, that this will allow them to  
2 participate meaningfully in the process, while at the same  
3 time providing the Director and the Hearing Examiner with  
4 enough control to ensure that the process itself is  
5 adequately protected.

6 COMMISSIONER CHAVEZ: I agree that it also gives  
7 the intervenor the opportunity to show why their  
8 intervention is important, in relationship to the mandate  
9 that the Commission has.

10 COMMISSIONER BAILEY: My hesitation comes from  
11 the question of whether or not we are absolutely doing away  
12 with the question of standing and allows anybody from  
13 anywhere, for any purpose, because the jurisdiction over  
14 waste, correlative rights, human health, protection of the  
15 environment, is so broad that I'm thinking that we have  
16 just eliminated any standing requirements by adding that  
17 phrase, and that's why I'm hesitant to support that.

18 COMMISSIONER CHAVEZ: If it was more specific to  
19 the case at hand -- is this what -- I hope -- I'm trying to  
20 understand what you're trying to say here, that initially  
21 we talked or brought up the idea that it had to deal  
22 specifically with that case as part of protecting  
23 correlative rights.

24 And I think that this language still allows that,  
25 that it's not that an intervenor can come in for a broad --

1 in a broad scope where there's a particular case involved,  
2 where the Commission and the Examiner can make a ruling  
3 whether or not, well, that doesn't contribute to  
4 correlative rights in this case or prevention of waste in  
5 this case.

6 So it is limited by the -- by the Division  
7 Examiner and the Commission in those ways, so it can't be a  
8 very broad intervention. It would still have to deal  
9 specifically with that case.

10 COMMISSIONER BAILEY: That convinces me more.

11 MS. LEACH: But I have to say a few things, sort  
12 of a civil procedure for the whole lawyer staff. There are  
13 two kinds of intervention. One's an intervention as a  
14 matter of right. If you have standing under the way I read  
15 this Rule, then you can intervene as a matter of right.  
16 Okay, if you have standing.

17 Then if you don't have standing, it's much more  
18 of a discretionary thing. You can say, We'd like to  
19 participate and here's why. We think we've got some  
20 special expertise or an interest that we think that if we  
21 bring that testimony forward, it would help you make your  
22 decision related to correlative rights, waste, that kind of  
23 things, but we don't really have a right to be in this  
24 case, but we think we could be helpful.

25 And so if they came in under -- and then if the

1 Commission agreed -- and it would be basically if you find  
2 that there's a reason they could make a substantial  
3 contribution in this case, then you would let them  
4 intervene.

5 So it's a fairly narrow sort of discretionary  
6 intervention.

7 COMMISSIONER BAILEY: In that case, I'll support  
8 this, and I'll vote aye for one, also.

9 CHAIRMAN FESMIRE: Thank you, Commissioner.  
10 That's 1209, right? Florene, did you get all  
11 that?

12 MS. DAVIDSON: I -- I will.

13 (Laughter)

14 MS. LEACH: Don't lose your notes, Mr.  
15 Commissioner. The staff may need them.

16 COMMISSIONER CHAVEZ: There might be some  
17 confusion too, just, Florene, because the proposal that was  
18 submitted to us didn't include the C -- a change for the C  
19 at the top of the next page, but what we have, I think  
20 replaces that, so...

21 MS. BADA: Okay, Florene, I think we're all  
22 taking notes --

23 (Laughter)

24 MS. LEACH: We have lots of staff taking notes.  
25 We will meet again soon.

1           CHAIRMAN FESMIRE: The next issue I have is  
2 1210.B, "that was published at least 10 days before the  
3 hearing", and my notes are very sparse on why we wanted to  
4 address this.

5           MS. LEACH: I think that's where you were  
6 starting to talk about the business days and that kind of  
7 thing --

8           CHAIRMAN FESMIRE: Okay.

9           MS. LEACH: -- and I think that's where that was  
10 raised.

11          CHAIRMAN FESMIRE: And a global change, changing  
12 that to "10 business days before the hearing".

13          MS. LEACH: I think takes care of that.

14          CHAIRMAN FESMIRE: Okay.

15          The next one I have is 1211, and the only  
16 comments on this that I captured in my notes were 1211.A  
17 concerning the Division recommendation in about the ninth  
18 line down, "if the party is represented", and two lines  
19 after that, changing "interested parties" to "parties". Is  
20 there --

21          MS. LEACH: In my notes I had a couple of other  
22 things back up on the first sentence in A. You've got an  
23 "original and one copy of pleadings". I think you  
24 basically just want two sets of pleadings there.

25          CHAIRMAN FESMIRE: And the global change wouldn't

1 take care of that.

2 MS. LEACH: The global change will take care of  
3 the "original and five copies" on the next --

4 CHAIRMAN FESMIRE: Right.

5 MS. LEACH: -- line, but I'm not sure it takes  
6 care of the original and one. The global -- like I said,  
7 we'll get the "six sets" on the next line.

8 COMMISSIONER CHAVEZ: Well, I move that we change  
9 on the first line "original and one copy" to "two sets".

10 COMMISSIONER BAILEY: Second.

11 CHAIRMAN FESMIRE: All those in favor?

12 COMMISSIONER BAILEY: Aye.

13 COMMISSIONER CHAVEZ: Aye.

14 CHAIRMAN FESMIRE: Motion carries, and the first  
15 line of 1211.A shall read, "Pleadings. Applicants shall  
16 file two sets of pleadings and correspondence in cases  
17 pending..."

18 MS. LEACH: And then I think you're right, the  
19 next two changes did come from the Division's comments.

20 CHAIRMAN FESMIRE: Right.

21 COMMISSIONER BAILEY: I move we accept those.

22 COMMISSIONER CHAVEZ: I second.

23 CHAIRMAN FESMIRE: All those in favor?

24 COMMISSIONER BAILEY: Aye.

25 COMMISSIONER CHAVEZ: Aye.

1           CHAIRMAN FESMIRE: The motion carries. The  
2 sentence that starts on the eighth line down in 1211.A  
3 shall read, "Parties shall accomplish service by hand  
4 delivery or transmission by facsimile or electronic mail to  
5 any party who has entered an appearance or, if the party is  
6 represented, the party's attorney of record."

7           The next sentence shall read, "Service upon a  
8 party who has not filed a pleading containing a facsimile  
9 number or email address may be made by ordinary first class  
10 mail. Parties shall be deemed to have made an appearance  
11 when they have sent either a letter regarding the case to  
12 the division or commission clerk or made an in person  
13 appearance..."

14           The next issue I have is 1211.B.(1). The  
15 Division recommended in the second line that that sentence  
16 should read, "Any party to an adjudicatory proceeding who  
17 intends to present evidence at the hearing shall file a  
18 pre-hearing statement, and serve copies on other parties or  
19 for parties that are represented, their counsel of  
20 record..."

21           I think it's the addition of "for parties that  
22 are represented".

23           COMMISSIONER CHAVEZ: I move we accept that  
24 recommendation.

25           COMMISSIONER BAILEY: Second.

1 CHAIRMAN FESMIRE: All those in favor?

2 COMMISSIONER BAILEY: Aye.

3 COMMISSIONER CHAVEZ: Aye.

4 CHAIRMAN FESMIRE: The sentence shall read --  
5 Motion carries.

6 The sentence shall read as follows: "Any party  
7 to an adjudicatory proceeding who intends to present  
8 evidence at the hearing shall file a pre-hearing statement,  
9 and serve copies on other parties or, for parties that are  
10 represented, the counsel of record..."

11 The next proposed change is again a Commission-  
12 proposed change. It's on the fourth line down where it  
13 says, "...but in no event later than 5:00 p.m. Mountain  
14 Time, on the Friday..." The Division proposes to change  
15 that to "...Thursday preceding the scheduled hearing date."

16 COMMISSIONER BAILEY: I move we accept that.

17 COMMISSIONER CHAVEZ: I second.

18 CHAIRMAN FESMIRE: All those in favor?

19 COMMISSIONER BAILEY: Aye.

20 COMMISSIONER CHAVEZ: Aye.

21 CHAIRMAN FESMIRE: Opposed? Motion carries.

22 The sentence shall read, "...but in no event -- "  
23 The phrase shall read, "...but in no event later than 5:00  
24 p.m. Mountain Time, on the Thursday preceding the scheduled  
25 hearing date."

1           1211.B.(2), the issue is the phrase, "to which  
2 the party supports or opposes" instead of "if any". It  
3 reads now, "Any party other than the applicant shall  
4 include in its pre-hearing statement a statement of the  
5 extent, if any, to which the party opposes the issuance of  
6 the order..." And the proposal that we were talking about  
7 was, instead of the "if any", "to which the party supports  
8 or opposes".

9           And I guess that would make it read, "Any party  
10 other than the applicant shall include in its pre-hearing  
11 statement a statement -- " A statement to which the party  
12 supports or opposes"?

13           COMMISSIONER CHAVEZ: No, no, I think "the  
14 extent" has to stay in there. "...a statement of the  
15 extent to which the party supports or opposes -- "

16           MS. LEACH: " -- the issuance of the order the  
17 applicant seeks -- "

18           COMMISSIONER CHAVEZ: Yes.

19           MS. LEACH: " -- and the reasons for such -- "

20           COMMISSIONER CHAVEZ: Or the extent to which the  
21 party opposes and supports it. We strike "if any" to say,  
22 "the extent to which the party opposes or supports the  
23 issuance".

24           CHAIRMAN FESMIRE: Okay --

25           COMMISSIONER CHAVEZ: Yeah, right.

1           CHAIRMAN FESMIRE: " -- the extent to which the  
2 party supports or opposes".

3           COMMISSIONER BAILEY: And continuing that  
4 sentence, "and the reason for such support or opposition".

5           COMMISSIONER CHAVEZ: Oh, I see. Or saying the  
6 reasons for such support or opposition or something like  
7 that.

8           CHAIRMAN FESMIRE: Okay, I didn't catch all that.  
9 Why don't you read it into the record so that we've got it  
10 on the record?

11           COMMISSIONER BAILEY: It would read, "Any party  
12 other than the applicant shall include in its pre-hearing  
13 statement a statement of the extent to which the party  
14 supports or opposes the issuance of the order the applicant  
15 seeks and the reasons for such support or opposition."

16           CHAIRMAN FESMIRE: The Chair would entertain a  
17 motion to adopt that wording.

18           COMMISSIONER CHAVEZ: I move so.

19           COMMISSIONER BAILEY: Second.

20           CHAIRMAN FESMIRE: All those in favor?

21           COMMISSIONER CHAVEZ: Aye.

22           COMMISSIONER BAILEY: Aye.

23           CHAIRMAN FESMIRE: The motion carries. The  
24 sentence shall read --

25           COMMISSIONER BAILEY: Oh, I just did it.

1 (Laughter)

2 CHAIRMAN FESMIRE: We're doing it twice.

3 COMMISSIONER BAILEY: Really?

4 CHAIRMAN FESMIRE: Yeah.

5 (Laughter)

6 COMMISSIONER BAILEY: Okay, I'll read it again.

7 "Any party other than the applicant shall include in its  
8 pre-hearing statement a statement of the extent to which  
9 the party supports or opposes the issuance of the order the  
10 applicant seeks and the reasons for such support or  
11 opposition."

12 CHAIRMAN FESMIRE: Okay. And I did catch that  
13 1211.A, two sets.

14 Okay, the next one is 1212.C, and that's the  
15 citation which was changed from --

16 COMMISSIONER CHAVEZ: 1212 --

17 CHAIRMAN FESMIRE: 1212.C. The citation was  
18 changed from the fourth line down, 19.15.14.1212 to  
19 19.15.14.1208.

20 COMMISSIONER BAILEY: I so move we make that  
21 change.

22 COMMISSIONER CHAVEZ: I second.

23 CHAIRMAN FESMIRE: All those in favor?

24 COMMISSIONER BAILEY: Aye.

25 COMMISSIONER CHAVEZ: Aye.

1           CHAIRMAN FESMIRE: Motion carries. The fourth  
2 line down in Section 1212.C shall read, "Participation in  
3 adjudicatory hearings shall be limited to parties, as  
4 defined in 19.15.14.1208 NMAC..."

5           The next issue I have is 1214.A, and the question  
6 is data and electronic format and "to require the  
7 production of books, papers, records and data in electronic  
8 format in any proceeding before the Commission or  
9 Division."

10           COMMISSIONER BAILEY: I move we accept that  
11 change.

12           COMMISSIONER CHAVEZ: I second it.

13           CHAIRMAN FESMIRE: All those in favor?

14           COMMISSIONER BAILEY: Aye.

15           COMMISSIONER CHAVEZ: Aye.

16           CHAIRMAN FESMIRE: Motion carries. 1214.A shall  
17 read, "Subpoenas. The commission or its members and the  
18 division director or the division director's authorized  
19 representative have statutory power to subpoena witnesses  
20 and to require the production of books, papers, records and  
21 data in electronic format in any proceeding before the  
22 commission or division."

23           The next issue I have is 1215 --

24           COMMISSIONER BAILEY: Do you want to make that  
25 same change in the green area?

1           CHAIRMAN FESMIRE: I'm glad you caught that. I  
2 would suggest we do. In the proposed Rule 1214.A, the  
3 sixth line down, where the sentence starts, "The division  
4 director or the division director's authorized  
5 representative shall, upon a party's request, issue a  
6 subpoena for the production of books, papers, electronic  
7 records or other tangible things in advance of the  
8 hearing."

9           COMMISSIONER CHAVEZ: In our discussions that we  
10 had about that, issues of tangible things, again, I admit  
11 I'm not that familiar with subpoena process. Do tangible  
12 things include things like samples.

13          CHAIRMAN FESMIRE: Yes, but they wouldn't include  
14 electronic data.

15          COMMISSIONER CHAVEZ: Okay, very good. I just  
16 wanted to be sure that the tangible language -- they didn't  
17 -- if this included things like that.

18          CHAIRMAN FESMIRE: Right.

19          COMMISSIONER CHAVEZ: Very good. So your -- I'm  
20 sorry, your proposal is "books, papers, electronic data or  
21 other tangible things"?

22          CHAIRMAN FESMIRE: And I might strike the word  
23 "other", although books and papers are tangible things.  
24 "Books, papers, other tangible things, or electronic  
25 records"?

1 COMMISSIONER CHAVEZ: That would work.

2 MS. LEACH: Do you want the same language in both  
3 places?

4 COMMISSIONER CHAVEZ: It really should be.

5 CHAIRMAN FESMIRE: Yeah.

6 COMMISSIONER CHAVEZ: It really should be, above  
7 and in the green.

8 CHAIRMAN FESMIRE: Yeah, you're absolutely right.  
9 Require the production of books, papers, and -- So what  
10 should the phrase be?

11 COMMISSIONER BAILEY: Electronic files?

12 COMMISSIONER CHAVEZ: Books, papers, other  
13 tangible things, and -- or electronic data.

14 CHAIRMAN FESMIRE: How about books, papers,  
15 records, other tangible things, and electronic data?

16 COMMISSIONER CHAVEZ: Okay, that would work.

17 CHAIRMAN FESMIRE: So we said, books, papers,  
18 records -- should it be tangible things or tangible items?

19 COMMISSIONER CHAVEZ: I think it's for you.

20 MS. LEACH: Your counsel doesn't have an opinion  
21 on that.

22 (Laughter)

23 CHAIRMAN FESMIRE: Well, things sounds a little  
24 easier, and electronic data. Okay.

25 So in both places where the list occurs in

1 1214.A, the list shall read -- the proposal is that the  
2 list read, "books, papers, records, other tangible things,  
3 and electronic data".

4 COMMISSIONER CHAVEZ: I move we accept that for  
5 both places.

6 COMMISSIONER BAILEY: Second.

7 CHAIRMAN FESMIRE: All those in favor?

8 COMMISSIONER BAILEY: Aye.

9 COMMISSIONER CHAVEZ: Aye.

10 CHAIRMAN FESMIRE: Motion carries. In both  
11 places, in 12- -- in 19.15.14.1214.A where the items to be  
12 subpoenaed are listed, the list shall read, "books, papers,  
13 records, other tangible things, and electronic data".

14 Which leaves 1215. There are two changes  
15 proposed by the Division in 1215.A. The first is on the  
16 second line, to strike "interested" in front of "parties",  
17 and the second is to add the sentence -- after the word  
18 "adjudicatory hearings", period, the proposal is to add the  
19 sentence, "The commission or division examiner may admit  
20 any relevant evidence unless it is immaterial, repetitious  
21 or otherwise unreliable."

22 COMMISSIONER BAILEY: I move we accept those  
23 changes.

24 COMMISSIONER CHAVEZ: Before I second that, I'm  
25 wondering if that's not already in the ordinary course of

1 the procedure for evidence -- when the applicant moves to  
2 accept certain evidence at that point, the Examiner or the  
3 Commission may or may not accept it already based on these  
4 types of criteria?

5 CHAIRMAN FESMIRE: I think it's a technical  
6 change. The Rules of Evidence do not apply, we're saying.  
7 However, this gives the Commissioner reason to sustain  
8 objections that the evidence is not relevant, immaterial or  
9 repetitious.

10 COMMISSIONER CHAVEZ: Oh, okay, I see what you're  
11 saying. Okay, then I second the motion.

12 CHAIRMAN FESMIRE: All those in favor?

13 COMMISSIONER BAILEY: Aye.

14 COMMISSIONER CHAVEZ: Aye.

15 CHAIRMAN FESMIRE: The motion carries. Let the  
16 record reflect that 19.15.14.1215.A shall read,  
17 "Presentation of evidence. Subject to other provisions of  
18 19.15.1214 NMAC, the commission or division examiner shall  
19 afford full opportunity to all parties to an adjudicatory  
20 hearing before the commission or division examiner to  
21 present evidence and to cross-examine witnesses. The rules  
22 of evidence applicable in a trial before a court without a  
23 jury shall not control, but division examiners and the  
24 commission may use such rules as guidance in conducting  
25 adjudicatory hearings. The commission or division examiner

1 may admit any relevant evidence, unless it is immaterial,  
2 repetitious, or otherwise unreliable."

3 There was another issue in 1215.C -- 1215.C --  
4 COMMISSIONER BAILEY: -- to delete "division  
5 examiner".

6 CHAIRMAN FESMIRE: Delete "division examiner".  
7 Boy, I'm glad you figured that out. As far as my records  
8 say, "del" is the Division Examiner.

9 "A party requesting incorporation of records from  
10 previous division examiner hearings at a commission hearing  
11 shall include copies of all records for all commissioners."

12 So the proposal is to have that sentence read, "A  
13 party requesting incorporation of records from previous  
14 hearings at a commission hearing shall include copies of  
15 the record for all commissioners."

16 COMMISSIONER CHAVEZ: I move we accept that.

17 COMMISSIONER BAILEY: Second.

18 CHAIRMAN FESMIRE: All those in favor?

19 COMMISSIONER BAILEY: Aye.

20 COMMISSIONER CHAVEZ: Aye.

21 CHAIRMAN FESMIRE: The motion carries. The  
22 sentence shall read, in 1215.C., "A party requesting  
23 incorporation of records from previous division  
24 hearings -- " no "-- from previous hearings at a commission  
25 hearing shall include copies of the record for all

1 commissioners."

2           Okay, the next thing I have is 1216, and again  
3 these are recommendations by the Division to change the  
4 sentence -- the first sentence, "The division director  
5 shall appoint as division examiners division staff who are  
6 licensed lawyers, or who have at least two years of  
7 experience in hydrogeology, hydrology, geology, petroleum  
8 engineering, environmental engineering or a related field  
9 and a college degree in geology, engineering, hydrology or  
10 a related field", striking "or is a licensed lawyer".

11           COMMISSIONER BAILEY: Don't lawyers indicate  
12 specialty areas, such natural resources or oil and gas or  
13 something like that?

14           MS. LEACH: The Bar has a specialty certification  
15 which you can't qualify for unless you have a number of  
16 years of experience, recommendations from attorneys who  
17 practice in the area, and pretty much a general expertise.

18           COMMISSIONER BAILEY: Would that be a nice  
19 requirement to have here --

20           MS. LEACH: No.

21           COMMISSIONER BAILEY: -- a technical --

22           (Laughter)

23           MS. LEACH: The reason I say that is because  
24 there's not -- I don't have an attorney on staff who would  
25 qualify under the Bar's specialization, because their rules

1 for specialization really are not particularly written for  
2 public-sector attorneys.

3 CHAIRMAN FESMIRE: Right, government attorneys --

4 MS. LEACH: The natural resources work and those  
5 kinds of things are really -- I mean, you qualify on those  
6 by doing title opinions and lots of other things, and as  
7 far as like a real administrative practice, we don't  
8 qualify the way the rules for specialization now exist.

9 If you wanted to have like an attorney who has at  
10 least two years of practice -- I mean, my understanding is,  
11 the reason an attorney might hear a case or might sit with  
12 an otherwise normal hearing examiner who's not an  
13 attorney --

14 (Laughter)

15 MS. LEACH: Whoa, I'm about to get myself in  
16 trouble --

17 CHAIRMAN FESMIRE: That's a very --

18 MS. LEACH: -- on that one.

19 CHAIRMAN FESMIRE: -- prejudicial statement.

20 MS. LEACH: -- is that you want someone who may  
21 be more familiar with the rules of evidence and the  
22 procedures and that kind of thing. And that -- if you  
23 wanted to put like a two-year sort of practice requirement  
24 for those kind of people, I think that's fine, because you  
25 probably don't want an attorney presiding over a hearing

1 who has no experience whatsoever --

2 COMMISSIONER BAILEY: Right, that's what I --

3 MS. LEACH: -- but I mean, you can be a pretty  
4 baby attorney and still be able to have, you know, enough  
5 experience regarding evidence and procedure to be able to  
6 help and assist the hearing officer.

7 So, you know, I don't have any trouble with the  
8 concept of two years' experience for the attorney. I do  
9 have trouble with like really the specialization.

10 COMMISSIONER BAILEY: Okay.

11 COMMISSIONER CHAVEZ: I think the Director needs  
12 the flexibility --

13 (Laughter)

14 COMMISSIONER CHAVEZ: -- in the market for labor  
15 and everything, to be able to select people to hear the  
16 cases that are proper there.

17 I did have a question, and it may be petty, I  
18 think, but we have used the word "counsel" and "attorney",  
19 even "attorney of record" and "counsel of record" in these  
20 Rules already. Two different expressions. I know it's the  
21 same thing. Is there a difference? And now we're -- this,  
22 I think, is our first reference to "lawyer" in these Rules  
23 in the 1200 series. Is it of any significance to at least  
24 re-use "counsel" and "attorney", "licensed attorney",  
25 "licensed lawyer"? Is there any significance in that,

1 or --

2 MS. LEACH: There's no significant difference in  
3 the U.S. between "attorney" and "lawyer".

4 COMMISSIONER CHAVEZ: Okay.

5 MS. BADA: But it wouldn't hurt to be consistent.

6 CHAIRMAN FESMIRE: Yes, it's --

7 (Laughter)

8 MS. LEACH: There's a small voice, who I'm sure  
9 isn't testifying for the record, that says that there might  
10 be a reason to be consistent and go back to the concept of  
11 "attorney". How's that?

12 COMMISSIONER CHAVEZ: That's what I was headed  
13 towards. I think "attorney", I don't know, in my  
14 experience somehow sounds nicer than a "lawyer". I don't  
15 know why, but --

16 MS. LEACH: I'm sure it's because people with  
17 those Texas accents say "lawyer" and "liar". I'm not a  
18 liar.

19 (Laughter)

20 CHAIRMAN FESMIRE: I'm going to keep my mouth  
21 shut on that one.

22 MS. LEACH: I can say it, because I was born  
23 there.

24 CHAIRMAN FESMIRE: I don't have one of them there  
25 Texas accents.

1 MS. LEACH: Right.

2 COMMISSIONER CHAVEZ: Well then, is there -- does  
3 anybody make a motion on --

4 COMMISSIONER BAILEY: Weren't we going to work on  
5 having lawyers have at least two years of experience to --

6 MS. LEACH: If you would like to say, "or is a  
7 licensed attorney with at least two years of experience".

8 CHAIRMAN FESMIRE: Well, I think that's a  
9 different issue. I think we ought to -- addressing that  
10 issue, maybe we ought to just, you know, have another one  
11 of those global changes where we change "lawyer" and  
12 "counsel" to "attorney".

13 MS. LEACH: Okay.

14 CHAIRMAN FESMIRE: Is there --

15 COMMISSIONER BAILEY: I move that you do that.

16 CHAIRMAN FESMIRE: It's your idea.

17 COMMISSIONER CHAVEZ: I second the motion.

18 CHAIRMAN FESMIRE: All those in favor, vote  
19 again.

20 COMMISSIONER BAILEY: Aye.

21 COMMISSIONER CHAVEZ: Aye.

22 CHAIRMAN FESMIRE: The motion carries. There  
23 will be a global change throughout these Rules to change  
24 the words "lawyer" and "counsel" to "attorney".

25 Now, back to 1216 where we're talking about

1 whether or not we need attorneys to have at least two  
2 years' experience. It would be nice, but I'm not sure we  
3 could -- we would probably be able to find sufficiently  
4 experienced attorneys, but I'd hate to be shackled by it.  
5 But if you all are that concerned about it, I would  
6 acquiesce.

7 COMMISSIONER CHAVEZ: I'm not. I still think  
8 that the record needs the flexibility to use a person with  
9 a year and a half of experience, one year, to handle some  
10 of the issues, and if the Director is not confident in that  
11 attorney's ability for that particular case, he won't  
12 appoint him to hear it.

13 That's -- So I'd rather just go ahead and just  
14 leave that open, as far as experience for the attorney.  
15 And in some ways I wouldn't be opposed to changing the  
16 requirement of at least two years of experience to leave  
17 that up to the discretion of the Director also, in some  
18 ways, to say that Division Director shall appoint Division  
19 Examiner -- as Division Examiners, Division staff who have  
20 experience, blah, blah, blah, and just leave it like that.  
21 And if the -- because the Director may find somebody who is  
22 very well qualified to hear a case with less than two  
23 years' experience, for whatever reason.

24 So I'd like it even more open. I don't know that  
25 the industry would have any less confidence if we leave it

1 open to the Director's discretion.

2 COMMISSIONER BAILEY: So 1216 would read, using  
3 the Division-suggested language, "The division director  
4 shall appoint as division examiners division staff who are  
5 licensed lawyers, or who have experience in hydrogeology,  
6 hydrology, geology, petroleum engineering, environmental  
7 engineering or a related field and a college degree in  
8 those same fields"?

9 COMMISSIONER CHAVEZ: I wouldn't be opposed to  
10 that, just dropping the two years. I think that's the type  
11 of flexibility the Director is going to need to -- very,  
12 very soon.

13 CHAIRMAN FESMIRE: Unfortunately, I think he's  
14 right.

15 COMMISSIONER BAILEY: I can go with that  
16 suggestion.

17 CHAIRMAN FESMIRE: "have experience"?

18 COMMISSIONER BAILEY: Uh-huh.

19 CHAIRMAN FESMIRE: Okay. The Chair would  
20 entertain a motion that 1216 read, "The division director  
21 shall appoint as division examiners division staff who are  
22 licensed lawyers -- licensed attorneys, or who have at  
23 least two years of experience in hydrology, hydrogeology,  
24 geology, petroleum engineering and environ- -- "

25 MS. LEACH: Take -- I thought they wanted to take

1 out the "two years".

2 CHAIRMAN FESMIRE: You're absolutely right,  
3 you're absolutely -- I was so worried about getting  
4 hydrogeology and geology in the right order. Let me start  
5 that again.

6 The Chair would entertain a motion that 1216  
7 read, "The division director shall appoint as division  
8 examiners division staff who are licensed attorneys or who  
9 have experience in hydrogeology, hydrology, geology,  
10 petroleum engineering, environmental engineering or a  
11 related field and a college degree in geology, engineering,  
12 hydrology or a related field."

13 COMMISSIONER CHAVEZ: I so move.

14 COMMISSIONER BAILEY: Second.

15 CHAIRMAN FESMIRE: All those in favor?

16 COMMISSIONER BAILEY: Aye.

17 COMMISSIONER CHAVEZ: Aye.

18 CHAIRMAN FESMIRE: Motion carries. 1216 shall  
19 read, "The division director shall appoint as division  
20 examiners division staff who are licensed attorneys or who  
21 have experience in hydrogeology, hydrology, geology,  
22 petroleum engineering, environmental engineering or a  
23 related field and a college degree in geology, engineering,  
24 hydrogeology or a related field."

25 And then the sentence -- the last sentence shall

1 be carried over, "Nothing in this section shall prevent any  
2 commission member from serving as a division examiner. The  
3 division director may refer any matter or proceeding to a  
4 division examiner for hearing in accordance with these  
5 rules."

6 Okay, 1224.A. And I don't know -- under "Ex  
7 Parte Communications". Oh, this is the one where we  
8 advocate "as opposed" to "oppose" or -- "In an adjudicatory  
9 proceeding, except for filed pleadings, at no time after a  
10 party files an application for a hearing shall any party,  
11 interested participant or his representative advocate any  
12 position -- advocate any position with respect to the  
13 issue -- " Just add the phrase "any position with respect  
14 to" after the word "advocate", was the proposal.

15 And I think this was yours, Frank, I'm not sure.

16 COMMISSIONER CHAVEZ: I don't know where it came  
17 from, but I move that we accept that.

18 COMMISSIONER BAILEY: Second.

19 CHAIRMAN FESMIRE: All those in favor?

20 COMMISSIONER BAILEY: Aye.

21 COMMISSIONER CHAVEZ: Aye.

22 CHAIRMAN FESMIRE: The motion carries, so that  
23 1224.A shall read, in pertinent part, "In an adjudicatory  
24 proceeding, except for filed pleadings, at no time after a  
25 party files an application for a hearing shall any party,

1 interested participant or his representative advocate any  
2 position with respect to the issue the application  
3 involves".

4 And last but not least, 1226. And this, I think,  
5 was probably covered in business days.

6 MS. LEACH: The business days portion is covered  
7 by the last sentence, so if you wanted to delete the last  
8 sentence you probably could do that. The rest of it you  
9 still need.

10 CHAIRMAN FESMIRE: I don't see any -- Do you  
11 think we need to delete the last sentence?

12 COMMISSIONER CHAVEZ: I don't see any reason to  
13 delete it.

14 COMMISSIONER BAILEY: I don't see that.

15 CHAIRMAN FESMIRE: Okay. This question is of the  
16 Commission: Is there anything else that we need to cover  
17 in this?

18 COMMISSIONER CHAVEZ: No.

19 CHAIRMAN FESMIRE: Okay --

20 MS. LEACH: Just one other thing you might let  
21 staff consider, or actually Ms. Bada brought it up at the  
22 very first of the hearings in cross-references, some other  
23 things that might need to be corrected. And I'd say unless  
24 somebody had a real problem with the references that Ms.  
25 Bada brought out then, that staff be allowed to make those

1 as it finals out the draft.

2 And the draft will be available for you at the  
3 next -- before the next hearing, to make sure -- read  
4 through it for yourself, but just basically give staff the  
5 authorization to do that.

6 CHAIRMAN FESMIRE: Do we need a motion to that  
7 effect?

8 MS. LEACH: That would be nice.

9 CHAIRMAN FESMIRE: Okay.

10 COMMISSIONER BAILEY: I so move.

11 COMMISSIONER CHAVEZ: I second.

12 CHAIRMAN FESMIRE: All those in favor?

13 COMMISSIONER BAILEY: Aye.

14 COMMISSIONER CHAVEZ: Aye.

15 CHAIRMAN FESMIRE: The motion carries. Staff  
16 will be allowed to make the changes they need to for the  
17 cross-referencing.

18 Anything else?

19 MS. LEACH: I'm trying to look back at my notes  
20 on Ms. Bada's other things that we were supposed to look  
21 at, and trying to -- did we get the change in 1211.B on  
22 "intent" versus "extent"?

23 MS. BADA: Actually, I think that what happens,  
24 when I look at this version, right, Sally would type it.

25 MS. LEACH: Okay. Good, because I didn't follow

1 all of this when you were going through them the first  
2 time.

3 Okay, then I think we're fine.

4 CHAIRMAN FESMIRE: Okay. The staff will make the  
5 revisions, I guess, and we will sign the final order.

6 MS. LEACH: I would suggest that you sort of --  
7 since you've gone through and voted through each separate  
8 part, now that you've done that, that you vote up or down  
9 on the entire Rule changes as a package.

10 And it probably would be a good idea to state any  
11 reasons you may have for supporting or opposing the entire  
12 package --

13 CHAIRMAN FESMIRE: Okay.

14 MS. LEACH: -- because technically, this is one  
15 Rule.

16 CHAIRMAN FESMIRE: Right. At this time the Chair  
17 would entertain a motion to adopt the entire proposed Rule  
18 as amended by today's hearing -- as amended at today's  
19 hearing.

20 COMMISSIONER CHAVEZ: I so move.

21 COMMISSIONER BAILEY: Second.

22 CHAIRMAN FESMIRE: All those in favor?

23 COMMISSIONER BAILEY: Aye.

24 COMMISSIONER CHAVEZ: Aye.

25 CHAIRMAN FESMIRE: Aye. All those opposed? Let

1 the record reflect that the adoption was unanimous.

2           Would any of the Commissioners care to put their  
3 reasons on the record?

4           MS. LEACH: It would be good, because we're going  
5 to have to draft a statement of reasons for you, so if you  
6 tell us what you'd like for us to say it would be better.

7           COMMISSIONER CHAVEZ: I think the new Rules will  
8 allow for more effective and efficient operation of the  
9 Division's and Commission's business for hearing, and also  
10 it expresses more clearly what the Commission and the  
11 Division will ask of legal counsel. It also provides the  
12 opportunity, I think, for the public to have a more clear  
13 understanding of their participation in this process. And  
14 ultimately I think it will result in more -- in better  
15 Rules and better processing, better orders.

16           COMMISSIONER BAILEY: I've been on the Commission  
17 for many years, and I have seen the effects of ambiguous  
18 Rules that are interpreted according to which way the wind  
19 is blowing. I think that this work that we did today was  
20 necessary to eliminate that ambiguity where it lay and to  
21 promote a more efficient standard for hearings, both before  
22 the Division and the Commission.

23           CHAIRMAN FESMIRE: The conditions in the oil and  
24 gas field are changing rapidly. The Rules that we had in  
25 place were not sufficient, in my opinion, to provide the

1 flexibility and efficiency that the Oil Conservation  
2 Division and the Oil Conservation Commission need to  
3 effectively regulate the oil and gas industry under those  
4 conditions.

5           The changes that we've made today, I believe, are  
6 a quantum step towards making the changes that will make  
7 the Oil Conservation Commission and the Oil Conservation  
8 Division more flexible, more adaptable and help us more  
9 efficiently regulate the oil and gas industry and more  
10 effectively protect the water resources of the State of New  
11 Mexico.

12           I've lost my script. Where do we go next? We  
13 adjourn.

14           MS. LEACH: I think -- No, I think you do have a  
15 few more cases that you may want to continue.

16           CHAIRMAN FESMIRE: Oh, yes.

17           (Thereupon, these proceedings were concluded at  
18 4:40 p.m.)

19                           \* \* \*

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## CERTIFICATE OF REPORTER

STATE OF NEW MEXICO    )  
                                   )    ss.  
 COUNTY OF SANTA FE    )

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL August 27th, 2005.



STEVEN T. BRENNER  
 CCR No. 7

My commission expires: October 16th, 2006