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

APPLICATION OF MATADOR PRODUCTON COMPANY FOR A NON-STANDARD OIL SPACING AND PRORATION UNIT, COMPULSORY POOLING, AND NON-STANDARD LOCATION LEA COUNTY, NEW MEXICO.

CASE NO. 15366
ORDER NO. R-14097

MATADOR PRODUCTION COMPANY'S MOTION TO DISMISS APPEAL

Matador Production Company ("Matador") submits this motion to dismiss the appeal filed by Amtex Energy, Inc. ("Amtex") on January 7, 2015 of Division Order No. R-14097 (the "Order"). Matador requests that the Commission only consider this motion to dismiss at the February 11, 2016 hearing, and that the Commission schedule a subsequent *de novo* hearing if the motion is denied.

INTRODUCTION

After holding an evidentiary hearing, the Division entered its Order in Case No. 15366 granting Matador's application pooling of all the mineral interests to form a non-standard 160-acre, more or less, oil spacing and proration unit in the Bone Spring formation, comprised of the W/2 E/2 of Section 16, Township 19 South, Range 34 East, N.M.P.M., Lea County, New Mexico for its proposed Cimarron State 16-19S-34E RN #133H well. Even though it did not appear at the hearing, Amtex filed an appeal of the Order based upon the incorrect assertion that it is a "*party of record*" in this Case. *See* Entry of Appearance (filed Sept. 25, 2015). The Division

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Amtex EX 5

Director in its Order ruled that Amtex's entry of appearance was untimely and, therefore, Amtex is *not* a party of record and lacks standing for its appeal.

The Division correctly decided that the late entry of appearance by Amtex should not be considered, stating:

> (12) The filing of the Entry of Appearance by Amtex was 22 days following the formal hearing of Case No. 15366 on September 3, 2015 Docket. Applicant's Exhibit No. 5 documents three return receipt cards (Article Numbers 7014 3490 001 8089 7522, 7014 3490 001 8089 7782, and 7014 3490 001 8089 7713) addressed to Amtex and returned to the Applicant with an endorsed delivery date of August 12, 2015. Applicant testified that additional attempts to contact Amtex by phone were unsuccessful. Based on the delivery date of the return receipt cards, Amtex received proper notice within the 20-day requirement found in Division Rule 19.15.4.9(B) NMAC. Additionally, Amtex made no effort following notice to enter an appearance to protest or request a continuance of the case to adequately prepare a protest of the application. Therefore, Entry of Appearance submitted by Amtex was not timely and should not be considered.

As a result, Amtex was not made a party of record and the filing of its notice of appeal of the Division's Order is of no effect. Matador asks that the Commission grant its motion to dismiss on the grounds that Amtex is not entitled to the appeal it purports to pursue.

I. AMTEX LACKS STANDING TO SEEK *DE NOVO* REVIEW OF THE DIVISION'S ORDER BECAUSE IT IS NOT A PARTY OF RECORD.

Both NMSA (1978), § 70-2-13 and Rule 19.15.4.23(A) NMAC provide that only a "party of record adversely affected shall have the right to have the matter heard *de novo* before the commission." Amtex is not a party of record. In this case, Amtex waited until 22 days *after* the Division's hearing to file an entry of appearance. The Division properly concluded that the late entry of appearance should not be considered because Amtex received timely notice of Matador's application "and made no effort following notice to enter an appearance to protest or request a continuance of the case to adequately prepare a protest of the application." Order No.

R-14097, ¶ 12. As a result, Amtex was not made a party of record and it cannot now appeal the Division's Order under NMSA (1978), § 70-2-13 or Rule 19.15.4.23(A) NMAC.

Indeed, the intent of the Division's rules would be thwarted if a party who received notice of the hearing fails to timely appear, instead choosing to circumvent the rules by waiting to file an appearance until after the Division holds a hearing on the matter, but is nonetheless permitted to appeal. Under Rule 19.15.4.10(C) NMAC, a party who has not entered an appearance at least one business day prior to the pre-hearing statement filing date "shall not be allowed to present technical evidence at the hearing unless the commission chairman or the division examiner, for good cause, otherwise directs." In this case, Amtex did not enter an appearance at the requisite time before the hearing on the matter, or even show up for the actual hearing, nor did it have good cause for its 22 day delayed attempt to enter an appearance. New Mexico Courts have long-held that statutory and regulatory provisions should not be construed in a way that would render one of the provisions superfluous. *See, e.g., Romero v. Laidlaw Transit Servs.*, 2015 N.M. App. LEXIS 85, *10-11 (N.M. Ct. App. July 31, 2015) (slip opinion). To afford Amtex the opportunity to appeal at this juncture would render Rule 19.15.4.10(C) superfluous. Furthermore, it sets a dangerous precedent as it would afford parties that wish to object to compulsory pooling the chance to circumvent the Division and Commission hearing process and bypass the requirement to present their case at the Division level, and instead present only to the Commission with the added unfair benefit of knowledge of all of the applicant's materials and arguments from the Division hearing. Such an unfair outcome was never the intent of the legislature in establishing a separate oil and gas division and commission, and is contrary to the language and clear intent of the Division's regulations.

The New Mexico judiciary takes a similar stance. New Mexico courts have found that parties who fail to participate in hearings have waived their objections to the case and cannot participate in later re-hearings or appeals. *See, e.g., Rueckhaus v. Catron* (In re Will of Greig), 1979-NMSC-014, ¶ 3, 92 N.M. 561, 562 ("Didama did not enter an appearance or become a party below. Didama joined in this appeal without complying with any of the rules of appellate procedure. We hold that Didama is not a proper party to this appeal."); *Losey v. Norwest Bank, N.A.* (*In re Norwest Bank of N. M., N.A.*), 2003-NMCA-128, 134 N.M. 516, 522 (applying a similar analysis and finding that "'[t]o preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked' . . . . The principal purpose of the rule is to alert the trial court to a claimed error and to give the trial court an opportunity to correct the error. If a decision by the trial court was not properly invoked, this Court will not consider the matter on appeal.") (internal citations omitted). In *MCGEE v. Boren*, 58 Fed. Appx. 436, 438 (10th Cir. 2003), the Tenth Circuit similarly held that the failure to attend a hearing waived any claims a party might raise about the hearing's inadequacy. *See also Hoye v. Sullivan,* 985 F.2d 990, 991 (9th Cir. 1992) (per curiam) (same).

This foregoing logic applies here. Amtex received timely notice and multiple communications concerning Matador's well proposal and the filing of Case 15366. Despite these efforts, Amtex failed to enter an appearance prior to or during the hearing and, therefore, did not present any objections to the Division at the hearing. Under these circumstances, Amtex should not be permitted to delay development of Matador's Cimarron State 16-19S-34E RN #133H well by requesting *de novo* review from the Commission of the Order that Amtex does not have proper standing to oppose.

CONCLUSION

The Division properly determined that Amtex's belated attempt to enter an appearance in this case was of no effect and therefore it lacks standing to seek *de novo* review of the Order. Amtex should not be permitted to thwart Matador's development of the Cimarron State 16-19S-34E RN #133H well. Accordingly, Matador requests that Amtex's application for *de novo* review be summarily dismissed.

Respectfully submitted,

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& SISK, P.A.

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WE HEREBY CERTIFY that a true and
correct copy of the foregoing pleading

was mailed to the following counsel of record this 26th day of January, 2016:

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