

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

ORDER INSTITUTING RULEMAKING
FOR THE PURPOSE OF AMENDING RULES 1201,
1203 THROUGH 1209, 1211, 1212 AND 1220,
IN ACCORDANCE WITH THE RECOMMENDATIONS
OF THE COMMITTEE HERETOFORE APPOINTED
TO REVIEW THE PROCEDURAL RULES
OF THE COMMISSION AND THE DIVISION

2005 APR 28 PM 1 36

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER

April 14th, 2005
Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, April 14th, 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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I N D E X

April 14th, 2005

Commission Hearing: Order instituting rulemaking for the purpose of amending Rules 1201, 1203 through 1209, 1211, 1212 and 1220, in accordance with the recommendations of the committee heretofore appointed to review the procedural rules of the Commission and the Division

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A P P E A R A N C E S

FOR THE COMMISSION:

DAVID K. BROOKS, JR.
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1220 South St. Francis Drive
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* * *

ALSO PRESENT:

ALAN ALEXANDER
FRANKLIN SCHILLER
Burlington Resources Oil and Gas Company
Farmington, NM

ALLETTA BELIN
New Mexico Citizens for Clean Air and Water, Inc.
Los Alamos, NM

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Regulatory Team Leader
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Houston, TX

YOLANDA PEREZ
ConocoPhillips
Houston, TX

* * *

1 WHEREUPON, the following proceedings were had at
2 9:03 a.m.:

3 CHAIRMAN FESMIRE: Good morning. At this time
4 we'll call The April 14th, 2005, meeting of the New Mexico
5 Oil Conservation Commission to order. Let the record
6 reflect that it's 9:03 a.m. I apologize for wasting three
7 minutes of your time.

8 The location of the meeting is Porter Hall in the
9 Oil Conservation Division Office at 1220 South St. Francis
10 in Santa Fe, New Mexico. My name is Mark Fesmire, I'm the
11 Chairman of the Commission.

12 On my right is Commissioner designee Jami Bailey,
13 who's the Commission designee for Patrick Lyons of the
14 State Land Office.

15 Commissioner Chavez will be absent today.
16 Commissioner Chavez is the appointee of the Energy,
17 Minerals and Natural Secretary, Joanna Prukop.

18 To my left is attorney David Brooks. Mr. Brooks
19 will be acting as the Commission counsel today.

20 To Commissioner Bailey's right is Florene
21 Davidson, she's the Commission Secretary.

22 And Mr. Steve Brenner is the court reporter
23 today.

24 Let the record reflect that while not all
25 Commissioners are here, there is a quorum present of either

1 the Commissioners or their designees.

2 The first order of business before us is the
3 adoption of the minutes of the March 8th, 2005, meeting.
4 I'm going to ask Commissioner Bailey if she's had a chance
5 to review the minutes.

6 COMMISSIONER BAILEY: Yes, I have, and I move
7 that we accept them.

8 CHAIRMAN FESMIRE: And I will second that. And
9 with that, all in favor?

10 COMMISSIONER BAILEY: Aye.

11 CHAIRMAN FESMIRE: Opposed? Let the record
12 reflect that the minutes of the Commission meeting on March
13 8th, 2005, have been adopted and will be signed.

14 * * *

15
16 CHAIRMAN FESMIRE: The first matter before the
17 Commission is final action on Cause Number 13,351, the
18 Application of Edge Petroleum Exploration Company to
19 restrict the effect of the special rules and regulations
20 for the Dos Hermanos-Morrow Gas Pool in Eddy County, New
21 Mexico.

22 MR. BROOKS: Well, Mr. Chairman, if I may
23 interrupt, I believe the first item, the way it's listed,
24 is the order initiating rulemaking.

25 CHAIRMAN FESMIRE: You're right.

1 MR. BROOKS: Of course, the Commission has the
2 discretion to take the items in any order they choose, so
3 I'm not raising a point of order.

4 CHAIRMAN FESMIRE: No, the dyslexic Commissioner
5 skipped the first deal. You're absolutely right.

6 And with that, we will take up the matter of the
7 order instituting rulemaking for the purpose of amending
8 Rules 1201, 1203 through 1209, 1211, 1212 and 1220, in
9 accordance with the recommendations of the committee
10 heretofore appointed to review the procedural rules of the
11 Commission and the Division.

12 Commissioner Brooks -- I mean Counsel Brooks,
13 would you be so kind as to bring us up to speed on this?

14 MR. BROOKS: Thought maybe I'd gotten promoted.

15 Mr. Chairman, Commissioner Bailey, back in
16 November, I believe, of last year, the Commission appointed
17 a committee of attorneys -- I say of attorneys because all
18 but one of them were attorneys; it also included the
19 Commission Secretary, who is very familiar with the
20 Commission's procedure -- to study revision of the
21 Commission's Rules of Procedure, Commission and Division
22 Rules of Procedure.

23 The Committee, as stated to the Commission in
24 previous reports, consisted of myself, co-counsel Gail
25 MacQuesten, attorneys William F. Carr and Thomas Kellahin,

1 and the Commission Secretary, Florene Davidson.

2 We have previously reported a draft to the
3 Commission, which is the draft that is now being proposed,
4 with the exception of one change which was made, which was
5 to add a provision defining what constitutes standing, and
6 that provision, I believe, will be found in subsection C of
7 section 1203, on the third page of the draft. That
8 language there is taken primarily from the court decisions
9 on the subject of standing.

10 Now, I have previously reported to the Commission
11 on the committee's recommendations. Because, however,
12 there are some people present here who were not present at
13 the previous meetings, who have an interest in this issue,
14 I will very briefly, to avoid taking other people's time,
15 summarize what these rules do.

16 And before going into the summary of the various
17 rules, I would say that I believe that there are two areas
18 in which there is going to be some public interest and may
19 warrant some further study by the Commission between now
20 and the time of the hearing if the Commission does, in
21 fact, decide to propose these rules.

22 And those two areas are the questions of
23 representation of organizations before the Commission or
24 the Division by persons who are not licensed to practice
25 law, and the question of standing to be a party before the

1 Division or the Commission.

2 I'll come back to those issues, but first I want
3 to summarize the various provisions that are here. Many of
4 them are very technical, and I won't go into the ones that
5 are merely matters of language. We've talked about them
6 before.

7 The first change is to Rule 1201, and you can see
8 a good bit of red on your drafts there. Most of it is just
9 moving stuff around and re-wording. The only real
10 substantive change in Rule 1201 concerning rulemaking
11 processes is the addition of Section 1201.B, which provides
12 for the filing of written public comments.

13 New Mexico law, unlike federal law, does not
14 require that an agency give people an opportunity to submit
15 written comments in rulemaking proceedings. We have always
16 done so, we've done it by order or notice, but we've not
17 had a rule on the subject. This would establish a rule
18 that would require that written comments be filed one week
19 before the Commission hearing, it would give the
20 Commissioners time to review them prior to the public
21 hearing. The Commission has discretion to extend that
22 time, or the Director has discretion to extend that time.

23 Rule 1203 is basically the same. Most of the
24 changes here are technical except for the standing issue.
25 And again, I will go into the standing question later in my

1 discussion.

2 Rule 1205 is changed only in its title, to make
3 clear that it applies only to adjudicatory proceedings,
4 since the notice provisions to rulemaking are contained in
5 1201.

6 Rule 1207, the notice provisions for specific
7 adjudications, is basically unchanged. The only real
8 change there is that where a person is serving a party by
9 publication, we have required that the publication occur
10 five days before, and that is in subsection B, which is --
11 I don't have my pages numbered, unfortunately, but it's the
12 third page of -- Rule 1207 is a multi-page draft, and it's
13 on the third page there. We require that the publication
14 be published at least five days, which would be one week,
15 the way New Mexico counts days, before the date of the
16 hearing, and that applies only in adjudicatory cases where
17 there's a party to the case that cannot be located and has
18 to be served by publication since the mail service is not
19 possible.

20 Rule 1208 concerns pleadings and prehearing
21 statements. What basically we're doing here is, we will
22 require -- There are two things substantive in this rule.
23 One is that we will require exhibits to be filed
24 prehearing, at least one week prior -- well, the Friday
25 before the hearing, and -- with the prehearing statement.

1 This has usually been required by the Commission in recent
2 years, but it has been required by order in specific cases
3 and has not been a rule. It has not been required at
4 Division Examiner hearings. Under this proposal, it would
5 be required at both Commission and Division Examiner
6 hearings.

7 There is also a change here in terms of what must
8 be done in rulemaking proceedings, because prehearing
9 statements have heretofore not been required in rulemaking
10 proceedings, although we have occasionally required them by
11 order. Under this rule, prehearing statements will be
12 required in rulemaking proceedings if a person wants to
13 present technical testimony. They will not be required --
14 Prehearing statements and prefiling of exhibits will be
15 required if they want to present technical testimony. They
16 will not be required of a party who merely wishes to
17 comment.

18 This aligns our procedure with that of most, or
19 at least many of the other administrative agencies of the
20 State of New Mexico, including the Water Quality Control
21 Commission which, because I practice before it
22 occasionally, I have some more familiarity with it. And
23 they and many other commissions require a prehearing
24 statement in rulemaking if a party is going to present
25 technical testimony.

1 There is a difference in rulemaking in that in an
2 adjudicatory proceeding the prehearing statement and
3 exhibits must be served on opposing parties. That is not
4 required in a rulemaking proceeding for the reason that you
5 don't really know who the parties are in a rulemaking
6 proceeding, you don't have a set of pleadings to define who
7 the parties are.

8 We have also adopted in Rule 1208 a provision
9 regarding motions for continuance that says that motions
10 for continuance must be filed on or prior to the date that
11 the prehearing statement is due, unless the grounds for the
12 continuance arise subsequent to that date. We have had
13 several issues arise with last-minute continuances in the
14 Division level recently, and that has resulted in that
15 recommendation.

16 Rule 1211 has been amended to provide a
17 prehearing procedure. We have never really had a
18 prehearing procedure. At the Examiner level there is a
19 statutory provision that gives the Examiner control over
20 all matters relating to the hearing, but the provisions
21 have been less satisfactory in the case of the Commission.

22 This provision would give the Director of the
23 Division the power to handle prehearing matters in
24 Commission cases, which he could do either by hearing them
25 personally or by appointing an Examiner. However, there is

1 a provision here that if it's a *de novo* case and the
2 Director appoints an Examiner to hear prehearing matters,
3 that it must be an Examiner who was not previously involved
4 in the case.

5 There is also a provision here -- well, that's in
6 1220.

7 1212, rules of evidence and exhibits, that is the
8 matter here that we talked about, about exhibits being
9 prefiled.

10 Rule 1212.C deals with *pro se* appearances, which
11 I will come back to.

12 And then there are no more real changes until
13 over in Rule 1220 on the next-to-the-last page. Rule 1220
14 deals with stays of Division orders. The provision
15 regarding stays of Division orders is merely a
16 clarification of the language and is intended to mean the
17 same thing. It's a little unclear what the existing rule
18 actually does mean, but it's intended to mean the same
19 thing that we have understood the existing rule to mean.

20 But there is a new provision. There has been no
21 provision regarding stays of the Commission orders. Of
22 course, that issue has come up recently, and this is a
23 recommendation that would allow either the Commission or
24 the Director to stay the Commission's orders. If the
25 Director entered a stay, then it would -- a stay order,

1 then the Director's order would remain in effect until the
2 Commission acted on the stay, and the Commission could
3 either continue the stay in effect or countermand it, if
4 and when it came up for consideration at a Commission
5 meeting.

6 That is a review of the technical
7 recommendations. Now, let me talk briefly about the *pro se*
8 issue and the standing issue.

9 At one time the Attorney General's Office issued
10 an opinion that stated that the rules of representation by
11 attorneys in courts would apply to administrative agencies,
12 including this Commission. That was a considerable time
13 ago -- in fact, I believe the date of that opinion is 1958
14 -- however, it has not been withdrawn or superseded.

15 In the meantime those rules, as they apply to
16 courts, have been somewhat clarified by 1998 decision of
17 the Supreme Court of New Mexico, which held that at least
18 in judicial proceedings an entity other than a natural
19 person cannot appear *pro se* in court.

20 The application of that to administrative
21 agencies is not totally clear, however there is certainly
22 significant room for concern about it, at least in
23 adjudicatory cases. The extent to which that applies to
24 rulemaking proceedings is much less clear.

25 The approach taken in this rule --

1 CHAIRMAN FESMIRE: Proposed.

2 MR. BROOKS: -- in this proposed rule, good
3 point, Mr. Chairman.

4 The approach proposed in this rule is that -- in
5 this proposed rule, is that *pro se* appearances by entities
6 would be prohibited if they involved offering testimony of
7 witnesses other than the person speaking or cross-examining
8 opposing witnesses, but that in rulemaking proceedings
9 anyone would be allowed to make a statement, and in
10 adjudicatory proceedings, representatives of other
11 governmental agencies -- state, federal, local, tribal --
12 would be allowed to make statements of position.

13 The concern that -- Well, let me then go and talk
14 about standing. The two issues are related, because an
15 individual, if that individual is a party, has certainly a
16 constitutional right to appear *pro se*. In an adjudicatory
17 proceeding there is definitely a rule of law that in order
18 to be a party to a proceeding, one must have some sort of
19 standing. And I believe the definition that the committee
20 has proposed for standing is in line with the case law on
21 the subject.

22 It is unclear what application, if any, that has
23 to rulemaking proceedings, that concept of standing has to
24 rulemaking proceedings, and indeed it could be argued that
25 any citizen is a proper party to a rulemaking proceeding.

1 That I don't believe is clear in the decisional law at this
2 point. Because -- for several reasons.

3 Because we have recently become aware of a
4 considerable public interest in this issue of standing and
5 *pro se* appearances, and because I as counsel have not had
6 an opportunity for consultation and would like an
7 opportunity in consultation with the General Counsel and
8 the other members of the General Counsel's staff to be able
9 to fully brief the Commission on the legal ramifications of
10 this issue, and because we're also not briefed at this
11 point on what the practices of other administrative
12 agencies are in this respect, and we believe that the
13 Commission would find that information helpful, I'm going
14 to recommend that if the Commission decides to adopt this
15 order instituting rulemaking, that the Commission will
16 announce a means of allowing the Commission to study this
17 further.

18 The order would set the public hearing for the
19 June 8th Commission meeting, and there will be an
20 intervening Commission meeting on May -- I don't remember
21 the exact date.

22 CHAIRMAN FESMIRE: 12th.

23 MR. BROOKS: May 12th, okay. There will be an
24 intervening Commission meeting at which the matter can be
25 considered again, and I can brief the Commission on the

1 issues that I spoke of, and perhaps the Commission will
2 want to solicit some public input prior to that time so
3 that if the Commission feels it appropriate, they can at
4 that time revise the proposal and it would still be in
5 advance of the public hearing scheduled in June.

6 Otherwise, I believe that on behalf of the
7 committee attorneys and Ms. Davidson who developed this, I
8 would recommend that the Commission propose these rules for
9 adoption and it can proceed with the public hearing
10 process.

11 CHAIRMAN FESMIRE: Okay. If we were to propose
12 these rules for adoption and recommend a stakeholders'
13 group meeting prior to the hearing in June, when would you
14 recommend that that meeting take place?

15 MR. BROOKS: Well, I would hope, if feasible,
16 that we could have it at least a few days in advance of the
17 May Commission meeting so that the Commission could
18 consider the issue of modifying the recommendations prior
19 to that time.

20 But so far as my availability to participate in
21 it, I'm available, as far as I know, at all times between
22 now and the June hearing, except the time when you also
23 won't be available, when you and I will both at the IOGCC
24 in Anchorage.

25 COMMISSIONER BAILEY: Make that three of us.

1 CHAIRMAN FESMIRE: Commissioner Bailey, it would
2 be my recommendation that we schedule a stakeholders' group
3 meeting sometime prior to the May 12th meeting and initiate
4 the rulemaking at this time, propose the stakeholders'
5 meeting and schedule it for final public hearing in June.
6 Is that --

7 COMMISSIONER BAILEY: That's fine with me. In
8 May we need to have it scheduled early enough that we have
9 accurate notice posted on your website so that everyone is
10 aware of what's going on.

11 CHAIRMAN FESMIRE: Counsel, would you have a date
12 that would satisfy that criteria?

13 MR. BROOKS: Well, I think this -- Unfortunately,
14 I don't have a calendar. Does anyone have a calendar?
15 There's a lady in the audience who says she has a calendar.

16 MS. PEREZ: You can have my checkbook calendar.
17 (Off the record)

18 MR. BROOKS: Okay, the first week of May is the
19 week of May the 2nd, and the Commission meeting is on May
20 the 12th. I would suggest sometime during the week of May
21 the 2nd, maybe the 3rd. Monday meetings are not very good
22 as a rule, so...

23 There are some people in the audience who might
24 want to participate. Does anybody have date preferences?

25 MS. BELIN: Yeah, my name is Letty Belin, and I

1 think as you know I represent the New Mexico Citizens for
2 Clean Air and Water, and I have to have a court hearing in
3 Denver the following day, so I'm leaving in the after- --
4 let's see, I'm leaving the afternoon of the 3rd. I guess
5 if it were the first thing in the morning that would be
6 fine, or the Monday would be fine or the morning of the 3rd
7 or the Thursday would be fine also.

8 MR. BROOKS: Thursday would be?

9 MS. BELIN: Yes.

10 MS. MCGRAW: Do you have an Examiner Hearing on
11 Thursday?

12 CHAIRMAN FESMIRE: Yeah.

13 MR. BROOKS: That's true, we would have an
14 Examiner Hearing on Thursday. Maybe Monday would be best
15 after all.

16 MR. FOPPIANO: Monday afternoon? Are you going
17 to have people try to travel on Monday morning?

18 CHAIRMAN FESMIRE: Mr. Carr, would you have --
19 You're not going to be available, so that --

20 MR. CARR: I won't be available. I can send
21 someone.

22 CHAIRMAN FESMIRE: Okay, so we're looking at
23 Monday, May 2nd?

24 MR. BROOKS: Yeah, that would be the date.

25 MS. BELIN: That would be good.

1 CHAIRMAN FESMIRE: Mr. Bruce, would you have an
2 interest in it?

3 MR. BRUCE: I could be present, yes, sir.

4 CHAIRMAN FESMIRE: Mr. Foppiano, is -- Okay.

5 MR. FOPPIANO: OXY is definitely interested.

6 MR. BROOKS: Monday, May the 2nd, at 1:30? We're
7 going to have an afternoon session?

8 CHAIRMAN FESMIRE: Commissioner Bailey, would
9 that --

10 COMMISSIONER BAILEY: That would be fine.

11 MR. BROOKS: Okay. Okay, very good. We'll
12 consider it scheduled then, Monday, May 2nd, 1:30 p.m. If
13 anybody else has this room that day, Florene will just have
14 to bump them.

15 CHAIRMAN FESMIRE: Do we need to consider the
16 issue of notice of the meeting and a copy of the proposed
17 rule?

18 MR. BROOKS: Well, this will not be a meeting of
19 the Commission. Well, maybe it would be best if -- as a
20 workshop it probably should be noticed as special meeting,
21 if both the honorable Commissioners are going to be
22 present, because then it would be a meeting, whether it's
23 designated as such or not, and if it weren't so designated
24 it would be an illegal meeting. So perhaps we should
25 designate it as a special meeting of the Commission,

1 although we would not propose to take any action as a
2 Commission at that time.

3 COMMISSIONER BAILEY: I'm wondering the necessity
4 of an additional Commission hearing, which is what it is.

5 CHAIRMAN FESMIRE: Yeah, I think the committee
6 could probably handle it. I probably wouldn't need to be
7 there.

8 MR. BROOKS: If only one Commissioner was going
9 to be present, or no Commissioners were going to be
10 present, it would not have to be formally noticed; we would
11 just post it on our website and send it to the list, and we
12 wouldn't have to give formal notice.

13 COMMISSIONER BAILEY: I think that would be
14 better.

15 CHAIRMAN FESMIRE: Okay, then it will be a
16 meeting only of the committee and interested stakeholder
17 groups. It will be noticed on the website, a copy of the
18 proposed order placed on the website, and it will be
19 Monday, May 2nd, at 1:30 in the afternoon in this room.

20 MR. BROOKS: Right.

21 CHAIRMAN FESMIRE: And in the meantime, why don't
22 we notify anybody specifically that we think might have an
23 interest or has indicated an interest in the past, in the
24 issue?

25 MR. BROOKS: Okay, yes, Florene has a list of

1 people who we notify of such things, so --

2 CHAIRMAN FESMIRE: Okay.

3 MR. BROOKS: -- we will notify that usual list.

4 CHAIRMAN FESMIRE: Ms. Belin, I'm assuming that
5 your organization can get the word out too, to other folks
6 that might be interested?

7 MS. BELIN: Yes, we'll certainly do that.

8 CHAIRMAN FESMIRE: Okay. Do we need a motion to
9 that effect?

10 MR. BROOKS: Well, we need a motion -- If we're
11 going to adopt the order, we need a motion to adopt the
12 order.

13 COMMISSIONER BAILEY: I move we adopt the order.

14 CHAIRMAN FESMIRE: I second. And all in favor?

15 COMMISSIONER BAILEY: Aye.

16 CHAIRMAN FESMIRE: Opposed? Let the record
17 reflect that the order initiating rulemaking was adopted by
18 the Commission.

19 And we'll proceed to the next order of business.

20 MR. BROOKS: Do you want to sign the order, or do
21 you want to wait and sign all the orders afterward?

22 CHAIRMAN FESMIRE: Has the order been prepared?

23 MR. BROOKS: It has been, yes.

24 CHAIRMAN FESMIRE: Since it's been adopted I'll
25 go ahead and sign it and ask Commissioner Bailey to sign it

1 if she so desires.

2 Let the record reflect that the order has been
3 signed, the order initiating rulemaking has been signed,
4 and we'll proceed to the next order of business, finally.

5 (Thereupon, these proceedings were concluded at
6 9:31 a.m.)

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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 April 15th, 2005.



STEVEN T. BRENNER
CCR No. 7

My commission expires: October 16th, 2006