

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

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**IN THE MATTER OF THE APPLICATION OF
DKD, LLC FOR AN ORDER DIRECTING
GANDY CORPORATION TO SHOW CAUSE,
LEA COUNTY, NEW MEXICO**

**CASE NO. 13686
Order NO. R-12649
DE NOVO**

**GANDY CORPORATION'S RESPONSE TO DKD'S
MOTION TO STRIKE GANDY'S NOTICE OF WITHDRAWAL**

COMES NOW Gandy Corporation, by and through undersigned counsel of record, and in Response to DKD's Motion to Strike Gandy's Notice of Withdrawal states as follows:

1. DKD correctly states in its Motion that Gandy Corporation's withdrawal of its request for a *de novo* hearing was not a motion or a stipulation. No NMAC section requires an aggrieved party to submit either a motion or a stipulation to withdraw its request for a *de novo* hearing.
2. DKD correctly states that Gandy did not seek DKD's approval. Such approval is not required by any NMAC section.
3. DKD cites to Rule 11-402(B) NMRA for the proposition that prior to dismissal of an appeal, all parties must be in agreement. Rule 11-402(B) is a Rule of Evidence. DKD quotes Rule 12-401(B), which is a Rule of Appellate Procedure, entitled "Dismissal in appellate court." The Rules of Appellate Procedure governing appeals in the New Mexico Court of Appeals are not binding on the Oil Conservation Commission.
4. As is set forth in NMAC 19.15.14.1212, "Hearings before the commission or a division examiner shall be conducted without rigid formality," and in NMAC 19.15.14.1215, "The rules of evidence applicable in a trial before a court without a jury shall not control, but division examiners and the commission may use such rules as guidance in conducting

adjudicatory hearings.” Clearly the New Mexico Administrative Code sets forth that the Rules of Evidence and the Civil Rules of Procedure are guidelines that the Oil Conservation and Commission can follow. They are not formal, binding procedural requirements. The NMAC section pertaining to adjudications before the Oil Conservation Commission does not require the Oil Conservation Commission be bound by the New Mexico Rules of Appellate Procedure.

5. The 1920 case cited by DKD is not binding on the Oil Conservation Commission. The Commission "is a creature of statute, expressly defined, limited and empowered by the laws creating it." *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (S.Ct. 1962). The statutes do not require the Commission to follow the New Mexico Rules of Appellate Procedure, nor do they require that the Commission's approval be granted for an aggrieved party to at any time withdraw a request for a *de novo* hearing.
6. Section 39-3-14 NMSA is more appropriate to this situation. That Rule is found in the statutory section titled "Judgment, Costs and Appeals." That section states that "In all causes appealed, or in any other manner brought from any inferior court to any superior court, the party appealing, or so bringing said suit into the superior court, may, in like manner, dismiss his appeal in the same manner as in the preceding section provided; and when said cause is dismissed, as aforesaid, the judgment in the inferior court shall remain and be in all things as valid, as if said cause had never been removed from said inferior court." By Gandy withdrawing its request for a *de novo* hearing, the decision rendered by the Hearing Examiner in Order R-12649 remains in effect. This does not adversely affect DKD.
7. Under Rule 2-305(A)(1) NMRA, Dismissal of actions, An action may be dismissed by the plaintiff without order of the court: by filing a notice of dismissal at any time before service

by the adverse party of an answer or other responsive pleading. Here there was no responsive pleading filed by DKD before Gandy filed its Notice of Withdrawal. DKD did not challenge any aspect of Order R-12649. NMAC 19.15.14.1221(A) is a jurisdictional requirement for the Commission to address matters raised by an affected party. DKD did not timely request the Commission to address any aspect of Order R-12649. DKD did not file any responsive pleading, and under Rule 2-305(A)(1), Gandy can withdraw its request.

8. Filing of a Notice of Withdrawal in this matter is analogous to filing a dismissal of an action in a court. Here, DKD did not challenge any decision made by the Hearing Examiner in Order R-12649. DKD did not file any request for a *de novo* hearing on Order R-12649 that would make DKD "a party affected by an appeal," pursuant to Rule 12-401(B). DKD's reliance on this Rule of Appellate Procedure is misplaced, as it cannot be affected by Gandy's withdrawal.

9. DKD provides no statutory or case-law authority specifically on-point that would require the Commission to hold a hearing on a *de novo* request after a party has withdrawn its request.

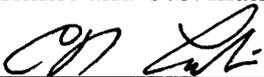
WHEREFORE, Gandy Corporation requests that the Oil Conservation Commission deny DKD's Motion to Strike Gandy Corporation's Notice of Withdrawal.

Respectfully Submitted,



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I hereby certify that a true and correct copy of the foregoing was sent via facsimile and U.S. mail to all parties of record this 9th day of January 2007.



Charles N. Lakins, Esq.