IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CONTINENTAL OIL COMPANY
AMERADA PETROLEUM CORPORATION
PAN AMERICAN PETROLEUM CORPORATION
SHELL OIL COMPANY
THE ATLANTIC REFINING COMPANY
STANDARD OIL COMPANY OF TEXAS
HUMBLE OIL & REFINING COMPANY,

Petitioners-Appellants

vs. No. 6830

OIL CONSERVATION COMMISSION OF
NEW MEXICO, Composed of John
Burroughs, Member and Chairman,
Murray Morgan, Member, and A. L.
Porter, Secretary;
TEXAS PACIFIC COAL & OIL COMPANY,
A Foreign Corporation;
EL PASO NATURAL GAS COMPANY,
A Foreign Corporation;
PERMIAN BASIN PIPELINE COMPANY,
A Foreign Corporation;
SOUTHERN UNION GAS COMPANY,
A Foreign Corporation,

Respondents-Appellees

OIL CONSERVATION COMMISSION OF
NEW MEXICO,

Cross-Appellant

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF MAILING

The undersigned, one of the attorneys for petitioners-appellants, certifies that on this 6th day of January, 1961, he mailed a copy of Appellants' Reply Brief to all opposing counsel of record at their respective post office addresses.

/s/ Jason W. Kellahin
JASON W. KELLAHIN

I N D E X

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REPLY TO APPELLEES' ANSWER TO APPELLANTS' POINT I, PARTS A AND B.

At the outset of Appellees' Answer to Parts A and B of Point I, Appellees cite Ferguson-Steere Motor Company v. State Corporation Commission, 60 N.M. 114, 228 P.2d 440, 442. Replying on that case, they assert that Appellants cannot take advantage of the failure of the Commission to make the findings on which the validity of the Commission action depends. Appellants had anticipated such a contention and pointed out in their Brief in Chief (at page 33) the reasons that the case is inapplicable in the present situation. Appellants, by their Motion for Rehearing, directed the Commission's attention to the deficiencies in Order R-1092-A. The following portions of Appellants' Motion for Rehearing before the Commission are here pertinent: (I Ct. 31-33).

> "(d) That Order No. R-1092-A is invalid in that even though it be assumed, as found by the Commission, it has been proved "there is a general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the gas in place under the tracts dedicated to said wells", said finding provides no basis authorized by the statutes of New Mexico for modification of the pre-existing acreage formula for proration of gas produced from said pool.
>
> "(e) That the Commission has considered factors not permitted by the statutes of New Mexico in arriving at its decision which was the basis of Order No. R-1092-A. It is apparent from said Order that it was predicated in part upon (1) a finding that the inclusion of a deliverability factor in the Jalmat Gas Pool proration formula would result in the production of a greater percentage of the pool allowable, and (2) that such inclusion of a deliverability factor would more nearly enable various gas purchasers to meet the market demand for gas in the Jalmat Gas Pool. Neither of said considerations provides any legal basis for the allocation of production under the statutes of New Mexico.

> "(h) That the Order No. R-1092-A is invalid in that the Commission would have authority to change its existing proration order for the Jalmat Gas Pool only upon proof by the applicant in this case, Texas Pacific Coal & Oil Company, by a preponderance of the evidence, that either (1) waste would be reduced or eliminated, or (2) correlative rights of the owners in the Jalmat Gas Pool would be protected to a greater degree by the inclusion of deliverability as a factor in said proration formula. The burden of proof so assumed by Texas Pacific Coal & Oil Company as such applicant was not discharged by it."

Later in their Answer Brief Appellees concede that: "The very purpose of a rehearing is to point out any alleged errors, including improper findings, that the agency may have committed." (Appellees' Answer Brief, page 11.)

Thus Appellants pointed out the deficiencies in the findings which the Commission had made and the findings required for a valid order changing the allocation formula in the Jalmat Pool. Nothing more than this is required even if the doctrine of the Ferguson-Steere case is applicable in the case at bar. Actually the case has no applicability in view of the Corporation Commission order adopting the Rules of Civil Procedure of District Courts which require requested findings. No such order had been promulgated by the Oil Conservation Commission and the submission of requested findings was not contemplated or permitted by its procedures.

There is one paragraph of Appellees' Answer Brief with which Appellants are in complete agreement, and tested by the standard of Appellees own statement in that paragraph the Commission's orders are fatally defective. At page 8 of their brief, Appellees say:

> "The proration formula is the most important factor in determining whether an owner is being afforded an opportunity to produce his just and equitable share of the gas in the pool. Thus, it is the Commission's obligation to determine the amount of recoverable gas

> under each property in a pool, insofar as it can be practicably determined, and then establish a proration formula which will allocate production to each well on the basis of such determination."
> (Emphasis supplied.)

Yet in changing the long time formula for allocating allowable in the Jalmat Pool, and substituting deliverability for acreage as the major factor in the formula, the Commission wholly failed in the words of Appellees, "to determine the amount of recoverable gas under each property in a (the) pool, insofar as it can be practicably determined and then establish a proration formula which will allocate production to each well on the basis of such determination."

This is the obligation imposed by the statute through the statutory definition of correlative rights. This is the action which applicable principles of administrative law required of the Commission and further required findings by the Commission evidencing that such action had been taken, and this is the obligation which the Commission wholly failed to discharge, as pointed out in Point I of Appellants' Brief-in-Chief.

As there pointed out, in lieu of discharging the obligation which Appellees here recognize, "to determine the amount of recoverable gas under each property in a (the) pool, insofar as it can be practicably determined," the Commission made findings and promulgated orders on the basis of measurements of "reserves" and not recoverable gas under each property.

Apparently Appellees now admit that the Commission did not base its order upon a determination of the amount of recoverable gas in place under each property in the pool as required by the statute. (Answer Brief, page 8). They suggest, however, that this was done "indirectly", by considering the deliverability of the wells in the pool, as one of six or more factors which the statute provides may be considered in protecting correlative rights. (Section 65-3-13(e), N.M.S.A., 1953). Apparently Appellees contend that because this statute includes deliverability, it

constitutes a statutory basis for finding a "general correlation" between deliverability of wells and recoverable gas in place and, on that basis, for making deliverability the major factor in the formula. But Appellees overlook the fact that this statute mentions deliverability, and the other factors which it includes, as possible considerations in protecting correlative rights, not in measuring them. They are measured by the statute, and by the statute alone as being the opportunity to produce an amount of gas "substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable *gas in the pool **."

It is admitted (Appellees' Answer Brief, page 8), and is inescapable, that it was the obligation of the Commission to determine, so far as it practicably could be done, the amount of recoverable gas underlying the individual tracts in the Jalmat Pool as a basis for testing the proposed deliverability formula. By the same token it was Appellees obligation to present evidence as to such recoverable gas in place. It did not do so. Appellees testimony, on the basis of which the Commission acted, was not as to such recoverable gas under the tracts but as to the "reserves" as defined by the witness Keller. Mr. Keller himself admitted (Appellants' Brief-in-Chief, page 42, et seq.) that these measurements were not the equivalent - nor the near equivalent - of the recoverable gas under the tracts. Instead, they were measurements which penalized a lease that had been drained in the past by assuming that such drainage would continue throughout the life of the pool, and rewarded a lease on which a well had been draining its neighbors, by giving it credit in the determination of its "reserves" for all gas so drained and by assuming that such drainage would continue for the life of the well and constituted part of the reserves of the well. (5 OCC 476). By accepting such "reserves", as a measure of recoverable gas in place, the Commission in-

sured a continuation, for the life of the pool, of all drainage which had occurred throughout its past history, both before and after prorationing was begun. And this was done in the face of the statute, which affirmatively requires the Commission, insofar as practicable, to "prevent drainage between producing tracts in a pool which is not equalized by counter drainage." (Section 65-3-13 (c), N.M.S.A., 1953.)

It appears quite likely that it was this situation as regards the proof, and the Commission's appreciation of the problems inherent in it, that resulted in the deficiencies in the Commission's findings which Appellees now seek to justify in their Answer Brief. They contend that the findings of the Commission are adequate in that the basis of the Commission's decision is "clearly disclosed and unambiguously stated." They misapprehend Appellants' position and attack on these findings. Appellants do not suggest that the basis on which the Commission acted is not clear. On the contrary, the findings make it crystal clear; crystal clear that the Commission wholly ignored the statute defining correlative rights and substituted instead Appellants computation of well "reserves", thereby perpetuating all drainage which has occurred in the life of the pool; crystal clear that the facts required by the statute to exist as a prerequisite for a valid allocation of allowable between wells have not been found, and in fact do not exist, insofar as the deliverability formula is concerned; crystal clear that the Commission based its action upon considerations having no application under the standards prescribed by the statute.

As their first defense of Finding No. 6 of Order R-1092-A, which predicated the order, at least in part, on considerations wholly foreign to the statute, as pointed out in Appellants' Brief-in-Chief (pages 25-26), Appellees assert that this finding is not subject to attack because it appeared only in the original order of the Commission, R-1092-A, and

not in Order R-1092-C, which was issued following the rehearing on Order R-1092-A. It is difficult to follow such an argument when Order R-1092-C expressly found:

> "(3) That the provisions of Order R-1092-A should remain in full force and effect",

and continued:

> "IT IS THEREFORE ORDERED:
>
> "That the provisions of Order R-1092-A shall remain in full force and effect." (ICt. 40).

In seeking, by this device, to insulate the vulnerable findings of R-1092-A from attack, when the only effect of Order R-1092-C is to order that after rehearing Order R-1092-A "shall remain in full force and effect," Appellees are on thin ice indeed. It is quite clear that the effect of Order R-1092-C was to continue in effect Order R-1092-A, and to decide against Appellants on each and all of the grounds of attack in the Petition for Rehearing and the rehearing itself. Any other construction of Order R-1092-C does violence to the English language and requires more than a trace of clairvoyance.

In a further effort to support Finding No. 6 of Order R-1092-A, Appellees invoke the provisions of other statutes relating to functions of the Commission not here involved. In so doing, Appellees seem tacitly to admit the contention of Appellants that the Commission, in fact, did base Order R-1092-A on considerations other than those specified by the statute, considerations which have no relation to the protection of correlative rights as defined by the statute. Yet Appellees themselves admit the Commission's obligation in this regard. (Appellees' Answer Brief, page 8.)

The statute provides that having limited the production of a gas pool to a total which is less than the pool could produce if unrestricted, "the Commission shall allocate the allowable production amount the gas

wells in the pool delivering to a gas transportation facility upon a reasonable basis and recognizing correlative rights." (Section 65-3-12, N.M.S.A., 1953.)

The protection of correlative rights is an affirmative requirement of the statute. It cannot be met by protecting the interest of pipe line companies in meeting market demand, or in obtaining the entire pool allowable. Those are considerations primarily affecting gas purchasers - not gas producers. This provision purports, and obbiously is intended, to protect the correlative rights of producers. Absent such protection, an order is invalid and cannot be made valid by a finding such as No. 6. Similarly, if it appears that the order was based on considerations other than protection of correlative rights and that such considerations adversely affect such rights, as in the case at bar, invalidity of the order is the inevitable result.

Provisions of the common purchaser statute as to the fixing of pool allowables and market demand and discrimination as between pools do not relate to the protection of correlative rights in the allocation of allowable between operators in a single pool. Such allocation was the sole purpose of the orders here under attack and findings relating to other Commission functions had no place in the order. Neither could they be substituted for findings required by the Commission's obligation to protect correlative rights as provided by the statute.

The authorities cited by Appellees in an effort to support the findings of Order R-1092-A are considerably wide of the mark. Appellants, in their Brief-in-Chief, were not complaining as to the language of the findings or as to any lack of "nicety" as suggested by the quotation from Thurston v. Hobby.

The deficiency is far more basic and destructive of the order than these superficial considerations. The fatal deficiency is the failure of

the order to find facts on which the order is dependent for its validity. They are, as pointed out in Appellants' Brief-in-Chief, (page 29, et seq.) requirements of the statute applicable to the Commission whenever it undertakes to allocate allowable production between producers in a pool. They become essential, as in the Louisiana case of Hunter v. Hussey, 90 So.2d 429, 6 Oil and Gas Reporter 1172 (1956) when the contention is made by parties opposing the proposed action that their correlative rights are not being protected.

The Hunter case is squarely in point in the case at bar and Appellees have failed to distinguish it. Appellees say that in the Hunter case the Commissioner's authority could be exercised only to protect correlative rights and hence that a finding that waste would be prevented would not support the order. In the case at bar, the statute requires that when the Commission allocates allowable between wells it recognize and protect correlative rights and that it, so far as practicable, prevent drainage between producing tracts not equalized by counter drainage.

In the Hunter case, Appellees concede, "Thus the court had no finding showing that the legislative standard had been met" and admit that the order was invalid. But where is the finding in Order R-1092-A which shows that the legislative standards here have been met? On what basis can this court conclude that the new formula will, so far as practicable, prevent drainage between producing tracts not equalized by counter drainage? Where is the finding that the Commission has determined the recoverable gas in place under each of the tracts and that the new formula more nearly allocates production in proportion thereto than did the old? They are just as non-existent as in the Hunter case and their absence is equally fatal to the validity of the order.

Appellees suggest, in the words of Justice Frankfurter from a dissenting opinion, that to require such findings is "marching the King's

men up the hill and then marching them back again." City of Yonkers v. United States, 320 U.S. 685, 64 S.Ct. 327, 88 L.ED 400. But the majority in that case did not so consider. Speaking through Justice Douglas they said:

> "The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safe guarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.
>
> "***
>
> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act." (Emphasis supplied).

The underlined portion of this quotation is peculiarly applicable to the case at bar. In this case, and in the Hunter case, supra, the facts to be found were not jurisdictional, but in both cases they were statutory requirements, resulting in the same obligation on the part of the Commission. See also Wichita Railroad and Light Company v. Public Utilities Commission of the State of Kansas, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124, 130; Florida v. United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291.

The necessity for findings to support orders of administrative bodies is considered at length by Davis in Chapter 16 of his Administrative Law Treatise (Vol. 2, page 435). The general statement which opens the chapter follows:

> "By and large, in both federal and state law, the requirements with respect to administrative findings are both more extensive and more exacting than the requirements with respect to findings of trial courts." (Emphasis supplied).

The author then considers at length the necessity for findings of basic facts and of ultimate facts, as well as the sound practical reasons supporting this necessity. He finds little if any difference in the requirements which have been made by state and federal courts. In Section 16.06, at page 451, the following pertinent quotations appear:

> "A court of appeals judge used the customary terminology when he said: 'The decisions require a Commission in a quasi-judicial proceeding to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings'.
>
> "The basic findings are those on which the ultimate finding rests, the basic findings are more detailed than the ultimate finding but less detailed than a summary of the evidence. Judicial language shows broadly what is meant:
>
> "'We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which, administrative orders rest.' Citing Colorado Wyoming Gas Co. v. F.P.C., 324 U.S. 626, 634, 65 S.Ct. 850, 89 L.Ed 1235 (1945).
>
> "'The question is not merely one of the absence of elaboration of a suitably complete statement of the grounds of the commissions determination . . . but of the lack of the basic or essential findings required to support the Commission's order.'" Citing Florida v. United States, 282 U.S. 194, 215 51 S.Ct. 119, 125, 75 L.Ed 291 (1931).
> (Emphasis supplied.)

In the case at bar, the necessity for findings arises particularly out of the fact that the Commission was changing from one formula for allocating allowable, which had been in effect for many years, to a new and radically different formula. Perhaps if this were the first formula ever promulgated in the Jalmat Pool, a somewhat different situation would result, though the statutory requirements would be unchanged. Here, however, because the Commission was deciding a controversy between two groups of interested parties which had resulted in extended hearings,

its duty to clearly set out the basic facts which are the foundation for its decision, and to definitely show that it had met the requirements of the statute in making the change would appear to be beyond question. Its failure to do so is apparent. The finding that "there is a general correlation" between deliverabilities and recoverable gas in place is not a finding that a closer correlation exists with deliverability than with acreage - or other possible factors. Yet it is not conceivable that a valid change of formula could be made under the statute unless (1) the recoverable gas in place under the tracts had been determined, (2) the new formula was found to be more nearly proportionate than acreage to such recoverable gas in place, and (3) the correlative rights of the operators, as defined by the statute, would be better protected under the new formula than the old, and (4) uncompensated drainage would be prevented by the new formula to a greater degree than under the existing one.

Yet there is no finding of any of these essentials. As to the first there is a basic finding that a general correlation exists between deliverability and recoverable gas in place. There is no finding of the existence or non-existence of a correlation as to acreage on which the existing formula was based. Neither is there any comparison of the degree of correlation of one to the other. The next sentence is an ultimate finding, based on the basic finding of the first sentence. It is merely that "a more equitable allocation" will result. As pointed out in Appellants' Brief-in-Chief, the statute specified the standard which must be used and it is not "equitability" as the Commission may choose to define that word. It is the protection of correlative rights as those rights are defined by the statute. On that subject the finding is absolutely silent - as it is silent on the other statutory requirement - prevention of uncompensated drainage.

It is respectfully submitted that the Commission's orders here under attack fail to meet the affirmative requirements of the statute for the protection of correlative rights. They do not contain findings which are essential to the validity of an administrative order, and they were predicated upon findings inadequate to meet the requirements of the statute. As a result, the orders are fatally defective for the reasons set out in Appellants' Brief-in-Chief. They are unlawful and unreasonable and shouldhave been so held by the trial court. The enforcement of orders defective in the respects pointed out deprives Appellants of valuable property rights without due process of law and the judgment of the trial court confirming them should be reversed.

REPLY TO APPELLEES' ANSWER TO APPELLANTS' POINT I, PARTS C AND D.

There is no disagreement between Appellants and Appellees as to the fact, recognized by the legislature, the witnesses in this case, and even counsel, that there is no perfect formula for allocating allowable between wells in a pool. The legislature, however, felt that "insofar as practicable" any formula adopted should protect the correlative rights of operators by the allocation of allowable to operators in proportion to the recoverable gas in place underlying the tracts in the pool. Otherwise there was no occasion for the legislature to define correlative rights as it did and to affirmatively require their protection in the allocation of allowables (Section 65-3-13 (c), N.M.S.A., 1953). It is the failure to meet the requirements of this legislative mandate with which Appellants take issue.

Appellees' Answer to Parts C and D of Appellants' Point I consists of isolated quotations from the testimony of their witness Keller which they urge as constituting "substantial evidence". To determine its

substance, however, it must be measured in the light of the admissions of the witness on cross-examination with reference thereto. When so tested the statements do not provide adequate support for the order.

The basic disagreement between the parties on this question is whether comparison of well deliverabilities to "reserves" as calculated by Keller, constituted substantial evidence to support the finding of "a general correlation", not between deliverabilities and "reserves", but between the deliverabilities of wells and recoverable gas underlying the tracts on which the wells are located as provided by the statute.

Keller at no time contended that his "reserves" or "apparent recoverable gas in place" (7 OCC 166) were the equivalent of recoverable gas in place as provided by the statute. (Appellants' Brief-in-Chief, pages 42-44).

He admitted that the recoverable gas in place under a tract is not proportional to the deliverability of the well on the tract (7 OCC 224):

> "Q. Mr. Keller, in the Jalmat reservoir is the recoverable gas in place under a tract assigned to a well proportionate to the deliverability of that well?
>
> "A. My answer to that is no."

Keller also admitted that neither he, nor anyone else knows whether his "reserves" obtained by extrapolation of the production history of a well is the equivalent of the recoverable gas in place under the tract assigned to the well in a majority of the wells in the Jalmat pool (7 OCC 226):

> "Q. In the majority of the tracts in the Jalmat field, is the volume indicated by your extrapolation of the cumulative production versus pressure curve of a given well that amount of recoverable gas under the tract assigned to such well, in the majority of the cases?

"A. Well, I don't -- it's not possible to evaluate the actual recoverable gas nor what the net migration has been from the pressure gradients, so I honestly can't answer that question.

"Q. You don't know the answer to the question, that in the majority of the cases is the volume indicated by your extrapolation of the cumulative production versus pressure curve of a given well that amount of recoverable gas under the tract assigned to such well? You cannot answer that question, is that correct?

"A. I don't know, no, sir.

"Q. You don't know?

"A. No, sir. Neither does anybody else."

In the succeeding testimony at pages 227-228, Keller contends that his reserves are "representative" but he consistently admitted that migration occurs between leases and that the difference between his "reserves per acre" and recoverable gas in place depends on the amount of migration (drainage) which has occurred. Thus at 7 OCC 222:

"Q. I believe we established early in the hearing that migration does exist between the tracts?

"A. You want me to assume migration in this example?

"Q. Yes.

"A. Then the difference in the reserves per acre and the actual recoverable gas in place that you get under your hypothesis would be dependent upon how much migration took place under those circumstances."

It is interesting to note in this connection when Mr. Liebrock, one of Appellants' expert witnesses, compared Mr. Keller's "reserve" figures with deliverabilities of gas wells in the pool, he found a "general correlation" to exist as to only thirty per cent (30%) of the pool and that none existed as to the remaining seventy per cent (70%) (4 OCC 208), and that further analysis disclosed no relationship whatever

(4 OCC 215).

On the question of whether conclusions as to the recoverable gas under a tract could be drawn from "reserve" figures as computed by Mr. Keller, Henry J. Gruy, an especially qualified expert who has had papers published in this field (6 OCC 115), testified as follows (6 OCC 126-127):

> "Q. Is there in your opinion any fixed or general correlation between the recoverable gas in place under the tract assigned to a well and the reserves which may be found by the extrapolation of a curve to be applicable to that well?
>
> "A. The extrapolation of a curve like that, as I tried to demonstrate, reflects only the relative producing rate of that well with reference to its neighbors, and does not reflect the reserves in place. I don't want to say reserves, I want to say gas in place under its unit.
>
> "Q. It is subject to being distorted by various conditions, is it not?
>
> "A. That's right.
>
> "Q. You have read the testimony in this case with reference to the extrapolation of the curves made by Texas and Pacific. Did you note anything in that condition that would have resulted in a distortion of the reserves as computed by them?
>
> "A. Well, they computed their reserves in this manner, and assuming that the wells continued to produce in the same manner, I think the reserves are approximately correct.
>
> "Q. <u>But do they have any relation to the recoverable gas in place under the tract assigned to those wells?</u>
>
> "A. <u>None whatsoever, and I don't think they said they did.</u>"
> (Emphasis supplied.)

It is believed to be a fair summary of the testimony of Mr. Keller quoted in Appellees' Answer Brief to say that Mr. Keller admitted that his "reserves" as computed for the wells in the field included "migrational effect"; that therefore they were not the same as the recoverable

gas in place under the tracts in the pool, but nonetheless he felt that they constituted the "best representation of the distribution of the recoverable gas in place per acre for the various tracts . . ." (Appellees' Answer Brief, pages 19-20). Then he stated that in his opinion there is a definite relationship between deliverabilities and recoverable gas in place, but "there is not a unique relationship." (Appellees' Answer Brief, page 20). He thinks that they are "reasonably related" or "reasonably in proportion" to each other (Appellees' Answer Brief, pages 20-21). In his opinion, the proposed formula is the best he has been able to devise and he thinks it will definitely be an improvement over the existing formula. (Appellees' Answer Brief, pages 21-22).

While the two expert witnesses presented by Appellants disagreed entirely with these conclusions, the right of the Commission to choose which experts views it would accept is recognized. It cannot, however, accept that testimony as standing for more than Mr. Keller himself admitted he was saying on cross examination. This it did.

Mr. Keller admitted that he had presented no testimony as to recoverable gas in place under the tracts in the Jalmat Pool and that all of his computations were of "reserves" or apparent recoverable gas in place. Yet on this basis the Commission found that a general correlation existed - not between "deliverabilities" and "reserves", but between deliverabilities" and the recoverable gas underlying the tracts.

The only testimony as to recoverable gas underlying the tracts was presented by Appellants and clearly established a total lack of correlation. (6 OCC 52 et seq. and exhibit following page 42 of Appellants' Brief-in-Chief.) Yet the effect of the Commission's finding was to accept Keller's testimony as establishing recoverable gas in place when he himself admitted it did not do so and to reject Appellants' evidence

in its entirety when it was the only testimony in the record as to the statutory standard.

We submit that this does not and cannot constitute substantial evidence under the circumstances and that even if it were conceded that the findings supporting Order R-1092-A are adequate, which it is not, that they are not supported by substantial evidence.

> "Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 339-343, 53 S.Ct. 391, 393, 394, 77 L.Ed. 819. Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F.2d 985, 989." National Labor Relations Board v. Union Pacific Stages, Inc., CCA, 9th Cir. 99 F.2d 153 (1938).

REPLY TO APPELLEES' ANSWER TO APPELLANTS' POINT II, PARTS A AND B

It is appellants' contention that the orders of the commission are so imcomplete, vague and indefinite as to deprive appellants of their peoperty without due process of law. This contention is based upon the fact that under the provisions of Order No. R-1092-A, as reaffirmed by Order No. R-1092-C, annual deliverability tests are required "in a manner and at such time as the Commission may prescribe." (I Ct. 26). The term deliverability is not otherwise defined in the orders.

In order to supply this deficiency, the Commission on February 24, 1958, issued its memorandum 6-58, prescribing the manner of taking these deliverability tests, and setting up the procedure for such tests and calculations to be made in determining the deliverability figure to

be used in allocating the allowable production to individual wells in the Jalmat Gas Pool.

Appellees, in their answer, admit the testing procedure prescribed in the Memorandum of February 24, 1958 is essential to a complete, definite, and certain order. At page 24 of their answer brief they state:

> "This deliverability testing procedure became a part of the order itself as much as if the order had contained the test schedule and procedure in the first instance."

Again at page 25 of the Answer Brief, and without citation of any authority to support the procedure followed by the Commission, Appellees' state:

> "Furthermore, since Order No. R-1092-A specifically provided that the Commission would prescribe the testing schedule and procedure at a later date, the memorandum when issued became incorporated into and made a part of the order itself such that no further notice or hearing was required beyond that of the original hearing."

The trial judge, likewise, found it necessary to resort to the memorandum of February 24, 1958 in order to hold that the orders complained of were not vague, indefinite and uncertain. As shown by his letter to Counsel explaining his decision:

> "I am unable to say that the Order of the Commission is vague and uncertain. Implemented by the Directive and Memorandum, it gives a method of determining "deliverability" which is evidently comprehensible to those affected.
> (Emphasis added) (II Ct. 272).

On its face, the Memorandum of February 24, 1958 does not purport to be an order of the Commission (Respondents' Trial Exhibit No. 1). It is nothing more than a memorandum directed to operators of gas wells in the Jalmat Gas Pool. It is not signed, nor does it show adoption by the Commission in compliance with New Mexico statutes. It was not adopted after notice and hearing, nor do Appellees' contend that notice was given

or a hearing held prior to its adoption (II Ct. 168). Rather they assert in their Answer Brief (page 25) that neither notice or hearing are required.

The Commission acts only under delegated authority from the legislature, which prescribes the manner in which this authority must be exercised. Section 65-3-20, N.M.S.A., 1953, provides:

> "Except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension theréof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the Commission. The Commission shall first give reasonable notice of such hearing in no case less than ten (10) days, except in an emergency and at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard. * * *"

"Rule" has been defined as "any agency statement of general applicability designed to implement the order." Davis, Administrative Law Treatise, Sec. 5.01. Black's Law Dictionary, Third Edition, defines "rule" as "An established standard, guide, or regulation; a principle or regulation set up by authority, prescribing or directing action or forbearance; * * * "

The trial judge concluded, and Appellees' admit that the memorandum of February 24, 1958, was essential to implement Commission Order No. R-1092-A. Under any definition that might be given to the memorandum, notice and hearing were essential to its validity. The rule is stated in 42 Am. Jur., Public Administrative Law, Sec. 135:

> "There is no question that when a statute requires notice and hearing in reaching an administrative determination, such statutory requisite must be met."

The statutory requisite was not met in the instant case, and there is no claim on the part of appellees' that it was met.

Under the provisions of Order R-1092-A, the deliverability test data obtained is the basis for allocation of seventy-five per cent of the allowable to be assigned to any given well in the Jalmat Gas Pool. (I Ct. 26).

The test, then, is the device whereby any well's participation in the production from the pool is determined, and is the most important part, from the operator's point of view, of the order complained of. An adjustment or change in the testing procedure to be used could readily adjust the net worth of an operator's ownership in the pool -- the value of his property in the pool. For this very reason the Memorandum of February 24, 1958 makes provision prohibiting any variation in the testing procedure without approval of the proration manager (Respondent's trial exhibit No. 1).

It is Appellees' position that issuance of the memorandum of February 24, 1958 was merely a ministerial function of the Commission to supplement and fulfill the prospective portions of Order No. R-1092-A, and they assert that no discretion was exercised in support of this position they cite Texas State Board of Dental Examiners v. Fieldsmith, 242 S.W.2d 213. This was an action to set aside the order of a board suspending a license to practice dentistry, not involving a property right. 42 Am. Jur. Sec. 135 at p. 475. In holding that the act of the board, in holding a hearing, receiving evidence, and entering an order on the basis of this evidence was quasi-judicial, the court said:

> "An act is a ministerial act only when the record is in such condition that there is no discretion to be exercised on the part of the board except to perform a particular act or duty in but one way, as a legal and obligatory duty of his office."
> (Emphasis added).

Here the Commission could have selected from any one of a dozen formulas with infinite variation in the calculation to be made for the

conduct of deliverability tests. It did, in fact, change the procedure from that previously used in the Jalmat Gas Pool for the purpose of gathering information, as admitted by Appellees' at page 27 of their Answer Brief. Thus there was not the condition existing that would turn the action into a purely ministerial function.

Having thus concluded that the issuance of the memorandum was purely a ministerial function, Appellees conclude that no notice and hearing was required, citing Butterfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525, in support of this proposition. The case does not appear to be in point, standing only for the proposition that there is no vested right to import into this country, goods and merchandise from a foreign country, hence no property right was affected. University of Illinois v. U. S., 289 U. S. 48, 53 S. Ct. 509, 77 L. Ed. 1025; Webber v. Freed, 239 U. S. 325, 36 S. Ct. 131, 60 L. Ed. 308; Brolan v. U. S., 236 U. S. 216, 35 S. Ct. 285, 59 L. Ed. 544; Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441. See also 11 Am. Jur., Commerce, Sec. 11.

While Appellees cite no authority for the proposition, they assert that since Order No. R-1092-A specifically provided that the Commission would prescribe the testing schedule and procedure at a latter date, the memorandum when issued became incorporated into and made a part of the order itself.

We do not assert that this procedure could not have been followed. But the essentials of due process require a hearing on an essential part of the order New Mexico statute, Sec. 65-3-20, supra, requires hearing before any "rule, regulation or order, including revocation, change, renewal or extension thereof" can be adopted by the Commission. Certainly it cannot be contended that the formulation of a deliverability testing procedure is not a "rule, regulation, or order". If it were not it would have no force or effect whatever, and the Commission could not deny

assignment of an allowable for failure to file an approved deliverability test, as required by Order No. R-1092-A.

It is contended that Memorandum 6-58 was adopted after the original hearing and issuance of Order R-1092-A, following which a rehearing was held at which no attack was made on the procedure followed. In their petition for rehearing, Appellant Continental Oil Company asserted that provisions of Order No. R-1092-A were vague, indefinite and uncertain (I Ct 34). The contention was again raised before the trial court and argued there. (I Ct. 106, 218) This attack was directed to the order itself.

Appellants, do not, as asserted by Appellees, pretend to be ignorant of the meaning of "deliverability". Rather Appellants defined the word as meaning the ability of a well to produce under specified conditions. The Commission knew throughout the proceedings that the manner of taking and calculating deliverability tests would materially affect their results. This is shown by the otder itself, when it states that tests shall be taken "in a manner and at such time as the Commission may prescribe." (I Ct. 26). It was again recognized by the Commission when it issued its memorandum dated January 30, 1958, advising that "a deliverability testing proceedure will be furnished to all operators in the Jalmat Gas Pool and other interested parties prior to March 1, 1958". (I Ct. 135, 136). This memorandum in effect advised that the testing procedure previously in use would not be utilized to implement Order No. R-1092-A.

The word "deliverability" has essentially the same meaning as "potential", Williams & Meyers, Manual of Oil and Gas Terms, p. 187. The Commission, in its Rules and Regulations, Revised December 1, 1959, at page 4, defines potential as: "The properly determined capacity of a well to produce oil, or gas, or both, under conditions prescribed by the

Commission". (Emphasis added). Without the conditions prescribed, the terms potential and deliverability are meaningless.

While the Oil Conservation statute uses the term "deliverability" without definition, it does not necessarily follow that the Commission may do the same. As a general proposition, where the legislature has delegated an authority to an administrative board or agency, this delegation may be made in general terms, leaving to the agency itself to define the terms to fit the varying conditions found, and accomplish the result indicated by the legislature. Butterfield v. Stranahan, supra; Tobin v. Edward S. Wagner Co., 187 F.2d 977 (C.A.2d).

The case of Joseph Triner Corporation v. McNeill, 363 Ill. 559, 2 N. E.2d 929, cited by Appellees, holds only that the legislature is not required to define words in common or daily use, and that:

> "* * * a statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. (Emphasis added).

As the witness V. T. Lyon testified, in discussing the provisions of Order No. R-1092-A, pointed clearly to the fallacy of Appellees reasoning:

> "Q. Could you, on the face of the information contained in the order, conduct a well test which would give you a deliverability figure?
>
> "A. Yes, sir, but I don't believe that one could be assured that two people reading the order would conduct the test and calculate the deliverability in the same manner.

It is for this precise reason that it was incumbent upon the Commission to prescribe the testing procedure and methods of calculation to be followed. Nothing in the order had a "special meaning well enough known to enable those within their reach to correctly apply them".

In the case of Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A. L. R. 403, after holding that the term "waste" has no meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply it with any reasonable degree of certainty, and pointing out that the order of the Commission created an offense for which a penalty was prescribed by statute, the United States Supreme Court said:

> "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." (L. Ed., at p. 1083).

It is not contended that the Commission could not have validly incorporated a prior existing testing procedure into its Order No. R-1092-A by reference. This it clearly did not do, and by its very language, rejected any such procedure that may have been in use in the past. There was no notice that the testing procedure would be changed, and no hearing every held to determine what changes would be made. The fact that tests had been conducted in the area under a different procedure since 1954 is thus immaterial.

During the course of the trial deliverability was defined as "a term which is used to describe a figure which is a theoretical flow of gas at a given back pressure condition". (II Ct. 96). This leaves much to be desired as a definition. Obviously, as a generality, the term deliverability has meaning to those engaged in the oil and gas producing business. Each company has its own procedures for taking various well tests, and these frequently vary from company to company. A deliverability test is a type of test frequently used, as was testified by the witness F. Norman Woodruff (II Ct. 145). While it is true that the Commission could have prescribed any given set of figures to be used in taking and computing the tests to be made, and thereby achieve uniformity, as argued

by Appellees, various calculations used in computing back-pressures, in adjusting the tests actually made against existing line pressures to a theoretical level that will be uniform, can materially affect the results of the tests, and thereby the right of the operator to produce the gas underlying his lands. Witnesses for Appellees in numerous instances attributed changes in deliverability tests to the line pressures against which the wells were tested. (II Ct. 153, 155, 157, 171). In at least two instances, tests could not even be made in accordance with the Commission's directive because of high line pressures. (II Ct. 179-180).

As pointed out in Appellants Brief In Chief (p. 55) we cannot escape the conclusion that deliverability has no significance unless the flowing back pressure conditions are specified.

Appellees admit that the intent and meaning of the order must be sufficiently clear to apprise the reader of the effect of the order, and then argue that this does not mean one is precluded from going outside of the four corners of the particular order to find the definition of the terms used therein. With this Appellants agree. It is submitted, howeverm that from the contents of Order No. R-1092-A its effect cannot be determined until the term deliverability has been defined. The reader cannot possibly know to what testing procedure he must resort in order to comply with the order. Infinite variations can be made in the preflow period required, the length of the testing period, the time to allow pressure build-up of the well, rate of flow to be used during the test, how pressures are to be calculated, and precisely how, on the basis of all of these variable requirements, and the results of measurements made, the actual deliverability to be assigned to a well shall be calculated. Respondent's Trial Exhibit No. 1 evidences the extreme detail of the testing procedure required by the Commission. If deliverability does

in fact have a meaning generally understood in the oil industry, as Appellees argue, why was this extreme detail required in prescribing the tests to be made? Obviously the detailed requirements are needed to pattern a testing procedure to a particular gas pool, and have no universal application as Appellees would have the Court believe. The same testing procedure is not even used in other gas pools in the State of New Mexico, nor is it the same as the procedure formerly used in the Jalmat Gas Pool for testing purposes. (1 OCC 60).

Appellees assert that the testing procedure found in the memorandum of February 24, 1958 were standards adopted by the Commission itself, and that both the order and the memorandum were "decisions" of the Commission. In no way is it shown that the testing procedure and method of calculating deliverability was a "decision" of the Commission. The memorandum itself shows no adoption by the Commission that would have any force or effect, as a rule, regulation or order. If it be a "decision" it is a decision reached without notice and hearing. It cannot then, legally become the instrument whereby the Commission can govern and control valuable property rights of the owners in the pool.

The legislature, by the adoption of Sec. 65-3-20, N.M.S.A., 1953, clearly made it mandatory that orders, rules and regulations of the Commission be adopted only after notice and public hearing. Appellees have pointed to no provision in the statute that would except the action taken by the Commission from the provisions of this section. They have, as has been shown, admitted that no notice was given or hearing held prior to the adoption of the testing procedure outlined in their Memorandum 6-58. It is not, then, and cannot be a decision of the Commission, as here contended.

REPLY TO APPELLEES' ANSWER TO
POINT II, PART C

Appellants contend that, assuming the orders of the Commission could be properly implemented by the memorandum of February 24, 1958 (Respondents' Trial Exhibit No. 1), its application in the Jalmat Gas Pool has produced such erratic, unpredictable, and inconsistent results, as to amount to a denial of due process of law.

In answer to this contention, Appellees merely attempt to explain the disparities that have been shown in test results. This in no wise cures the defect. The multitude of tests made, without consistent results, regardless of the reason for the inconsistencies, is not a reasonable basis upon which to prorate gas production in the Jalmat Gas Pool, as required by statute. (Sec. 65-3-13 (c), N.M.S.A., 1953.)

Appellees assert that a study of tests and retests on a selected group of wells was presented to the court. The testimony and exhibits, however, clearly show that both a study of wells operated by Continental Oil Company, and all of the wells in the pool was presented to the court. (II Ct. 98-102, 105-119, Petitioners' Trial Exhibits 2-A, through 2-C, inclusive; 3; 4-A through 4-G inclusive; 5 and 6.)

Petitioners' Trial Exhibit No. 3, in particular, shows in mathmetical form, the results of successive deliverability tests, with the percentage of change in test results for each individual well in the pool on which test results were available. The other exhibits show in graphic form the magnitude of the difference in results from these various tests, exhibits 3, 4-A through 4-G, 5 and 6 inclusive covering some 379 wells -- all of the wells in the pool on which consecutive deliverability tests were available. (II Ct. 105).

Appellees state there is substantial evidence in the record to support their contention that the deliverability tests are reasonable and

consistent, yet they point to no place in the transcript or exhibits to support this contention. No such evidence appears in the record. Instead all of the evidence presented by Appellees before the trial court was directed to explaining the discrepancies that exist in successive deliverability tests.

Appellants offered their evidence on this point in the district court in an effort to demonstrate, as they assert here, that the order in its application in the Jalmat Pool under provisions of the Commission's memorandum of February 24, 1958, results in such wide variations that it is wholly reliable, unreasonable, and unpredictable as a basis for allocating gas production in the pool.

In an effort to demonstrate this wide variation on a pool-wide basis, the witness V. T. Lyon calculated the percentage change for all of the wells in the pool, whether this change be an increase or a decrease from one test to the next. He then averaged these percentages for the pool as a whole. Apparently the trial judge did not understand the purpose of this calculation, as shown by his letter to counsel (II Ct. 273). The method of computation used by the witness Lyon is a perfectly valid mathematical calculation frequently utilized to arrive at an average precentage of change. From the information contained on Petitioners' Trial Exhibit No. 3 it would be a simple matter to compute the average percentage of change for all wells showing an increase, and another for all of the wells showing a decrease. This calculation, again, would demonstrate that there is a wide variation, throughout the pool, on the tests made of wells from one testing period to the next. Even a casual inspection of Petitioners' Trial Exhibit No. 3 will show, with no calculation whatever, that the order, in its application, produces only results that are wholly unreliable.

It is true that an expert petroleum engineer could make an analysis of each individual well, and come up with an explanation for the change in results from one testing period to the next. But the fact remains that of more than three hundred wells, only six showed comparable results from one testing period to the next. (II Ct. 113).

The only evidence offered in opposition to the testimony of the witness V. T. Lyon was presented by F. Norman Woodruff, and was wholly designed to explain the fluctuations in the tests made, attributing these fluctuations to a large number of factors, which differed from well to well. Matters wholly beyond the control of the operator, such as variations in line pressures against which the wells were tested (II Ct. 157-158) and anomalies in the reservoir, (II Ct. 142), were included. As has previously been pointed out in the brief in chief, other factors such as accumulations of liquids in the well bore, absence of tubing in the well, absence of blow-down lines, work-overs of the well between tests, or cleaning-out jobs had a bearing on test results. (Appellants' Brief-In-Chief 50-52). While the Witness Woodruff concluded that if the operator put his well in proper condition, accurate deliverability tests could be obtained he pointed to not a single instance in the record where this result had been achieved on the more than 300 wells in the Jalmat Gas Pool, and admitted that his own company had been unable to achieve this result (II Ct. 170-171). His conclusion, then, is wholly unsupported by the record.

Any formula that is subject to so many variations is not a reasonable basis upon which to allocate seventy-five percent of the production that will be granted to any individual owner in the pool.

SUMMARY AND CONCLUSION

This appeal from the judgment of the District Court of Lea County, confirming orders R-1092-A and R-1092-C of the New Mexico Oil Conservation Commission provides the first occasion which the Court has had to review action of the Oil Conservation Commission. By the orders appealed from, the Commission changed the proration formula in the Jalmat Gas Pool in Southeastern New Mexico from a formula, which had been in effect since the inception of prorationing in that pool based one hundred per cent (100%) on acreage, to a formula making the deliverability of wells the principal factor in determining the allowable which would be allocated to them.

The statute authorizing the Commission to allocate allowable between wells in a prorated pool provides:

> "The Commission shall allocate the allowable production among gas wells in the pool delivering to a gas transportation facility upon a reasonable basis and recognizing correlative rights * * *." (Section 65-3-13 (c), N.M.S.A., 1953.)

The statute then defines the correlative rights of operators in a pool as:

> "The opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as can be practically obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such peoperty bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy. (Section 65-3-29 (h), N.M.S.A., 1953.)

The statute also includes in Section 65-3-14 (a) an affirmative requirement that thr rules, regulations and orders of the Commission shall afford the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas, which it then defines

substantially as correlative rights are defined above.

In Section 65-3-13, the statute affirmatively requires that the Commission:

> "In protecting correlative rights *** so far as it is practicable shall prevent drainage between producing tracts in a pool which is not equalized by counter-drainage."

In promulgating a new formula, the Commission was required by the statute to adopt a formula which as nearly as practicable would afford each owner an oppertunity to participate in the allowable production of the pool in the same proportion as the gas underlying his tract bore to the gas in the entire pool. It was further required to prevent uncompensated drainage between tracts.

These statutory requirements necessitated a determination by the Commission as to the total gas in the pool and the amount of gas underlying each of the tracts on which producing wells were located, in order that there might exist a standard by which the proposed new formula could be judged.

It further became incumbent upon the Commission, in issuing an order promulgating a new formula, to make necessary findings to support its order from which it could be determined that these steps had been taken and that when tested, as required by the statute, the new formula conformed more closely to the statutory requirements than the existing one. The Commission failed to make such findings.

The evidence presented by Appellees, on the basis of which the Commission acted, did not establish the recoverable gas in place under the tracts. Instead, by a projection of the future on the basis of past production history it produced figures evidencing well "reserves". Such reserves, it was admitted, were not the equivalent of recoverable gas in place because they gave effect to the drainage which occurred throughout

the history of the pool and projected future reserves on the basis that such drainage would continue. The use of these "reserves" as the basis for arriving at a formula for allocating allowable resulted in the Commission allocating allowable in part on the basis of gas drained from other tracts, when the statute requires that the gas underlying each tract shall be the standard. This is directly contrary to both the letter and the intent of the statute in its definition of correlative rights.

On the basis of this testimony, the Commission found that there was a general correlation between the deliverabilities of wells and the recoverable gas in place under the tracts dedicated to the wells. Since the evidence gave effect to drainage, however, it could not support the finding as to a relationship to recoverable gas in place. The inevitable conclusion is indicated that the order of the Commission was invalid for failure to make the findings which would have been required by the statute to support it and for the further reason that the finding on which the order was predicated was not supported by substantial evidence.

The orders are further invalid by reason of the fact that they are so vague, indefinite, and uncertain, as a result of their failure to define the term "deliverability", that they cannot meet the constitutional requirement of due process. Appellees would rely upon a memorandum issued without notice or hearing to remedy this defect, but if it provided an essential portion of the order, notice and hearing was essential to the validity of the memorandum, and none was provided.

Finally, the orders are invalid in that the deliverability test which provided the principal factor governing the amount of gas which each well could produce, obtained results so erratic, inconsistent and unpredictable that it is obvious that they could have no relationship to the recoverable gas in place under the tracts in the pool as required by the statute. The orders, therefore, failed to meet the requirement of the statute and also

had the effect of depriving operators in the pool of their property without due process of law.

The judgment of the trial court holding valid and confirming the orders appealed from was erroneous and should be reversed with instructions to enter judgment holding Orders R-1092-A and R-1092-C of the Oil Conservation Commission to be unreasonable, unlawful, and void.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CONTINENTAL OIL COMPANY
AMERADA PETROLEUM CORPORATION
PAN AMERICAN PETROLEUM CORPORATION
SHELL OIL COMPANY
THE ATLANTIC REFINING COMPANY
STANDARD OIL COMPANY OF TEXAS
HUMBLE OIL & REFINING COMPANY,

Petitioners-Appellants

vs. No. 6830

OIL CONSERVATION COMMISSION OF
NEW MEXICO, Composed of John
Burroughs, Member and Chairman,
Murray Morgan, Member, and A. L.
Porter, Secretary;
TEXAS PACIFIC COAL & OIL COMPANY,
a Foreign Corporation;
EL PASO NATURAL GAS COMPANY,
a Foreign Corporation;
PERMIAN BASIN PIPELINE COMPANY,
a Foreign Corporation;
SOUTHERN UNION GAS COMPANY,
a Foreign Corporation,

Respondents-Appellees

OIL CONSERVATION COMMISSION OF
NEW MEXICO,

Cross-Appellant

APPELLEES' ANSWER BRIEF

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OBJECTION TO APPELLANTS' STATEMENT OF THE CASE

Appellees have only one objection to Appellants' Statement of the Case. Appellants state that the Petitions for Review were filed in the District Court so that certain orders could be reviewed. Appellees take the position that the only order subject to review was Order No. R-1092-C, the final order entered after rehearing.

OBJECTION TO APPELLANTS' STATEMENT OF THE FACTS

Appellees strenuously object to the contents of Appellants' "Statement of the Facts."

In our opinion the Statement is argumentative, incomplete and biased and amounts to nothing more than a resume of evidence favorable to Appellants with extreme emphasis against the court's findings and conclusions.

This Court set forth the purpose and requirements of that portion of a brief known as the Statement of Facts in Henderson v. Texas-New Mexico Pipeline Co., 46 N.M. 458, 461, 131 P.2d 269, when it stated as follows:

> "The Statement of Facts required by the rule is intended to aid the court and counsel in determining, at the outset, through a brief and concise statement, the question or questions at issue, and the appraisal of the facts and disposition of the issues, by the trial court. Ordinarily, and except under certain circumstances, the testimony should not be reviewed at all under this head, and never, of course, with an emphasis against the court's findings and conclusions." (Emphasis added)

In the case of Provencio v. Price, 57 N.M. 40, 46, 253 P.2d 582, this Court again reiterated that,

> "The statement of facts required by rule 15 subd. 14(3), our rules of appellate procedure, to be incorporated in an appellant's brief, if the issue is tried to the court, relate to the ultimate facts found in the decision of the court, Cullender v. Doyal, 44 N.M. 491, 105 P.2d 326, which can possibly be better stated in narrative form rather than merely copying the findings into the brief."

It will readily be noted that Appellants' "Statement of the Facts" does not contain a single reference to the trial court's findings of fact, in narrative form or otherwise.

There are hundreds of decisions in other jurisdictions holding that a statement of facts must be fair and unbiased, that it is not to be argumentative and that it is not contemplated that a resume of the evidence be presented. See e. g. Kritt v. Athens Hills Development Co., Cal.App., 241 P.2d 606; Carver v. Missouri-Kansas-Texas R. Co., Mo., 245 S.W.2d 96; Major v. Kaplan, 113 Ind.App. 486, 48 N.E.2d 82.

The objectionable portions of this Statement of the Facts are interspersed throughout but we shall follow Appellants' presentation, referring when necessary to pages in Appellants' Brief-in-Chief.

At Page 3, Appellants refer to certain exhibits (Operator's Exhibit 10) and testimony before the Commission (4 OCC 253) in which the contention was made that Continental Oil Company would lose 150,000 MCF per month as a result of the change in formula, and that others would gain. While Appellees do not deny that the change adopted by the Commission adjusted inequities which had existed for many years, we point out that at the trial of this matter before the District Court, after the new formula had been in effect for a year, there was considerable testimony relative to Operator's Exhibit 10. Witness Martin testified that the decrease to Continental had been 741,650 MCF during the twelve-month period rather than 1,860,000 MCF as previously anticipated. (R. Vol. II, 197). Similarly, gains by Cities Service were 281 000 MCF per year rather than 250,000 MCF per month, as Appellants' witness had anticipated. (R. Vol. II, 192).

At Page 4, Appellants state that all orders of the Commission, subsequent to January 1, 1954, provided for allocation 100% on the basis of acreage. What they fail to state is

that Order R-368-A, dated November 10, 1953, being Texas-Pacific Exhibit R-15, in addition to providing for 100% acreage calculation, stated:

> "(7) That an adequate gas well testing procedure should be adopted as soon as possible so that operators, purchasers and the Commission can determine the fairness and feasibility of an allocation factor for the pool which employs the factors of deliverability, pressure, or any other factor relating to gas well productivity." (Emphasis added)

At Page 4, the Appellants attempt, as they attempted before the Commission and before the District Court, to create the impression that the "facts" are that by sheer numbers they are entitled to more consideration than are Appellees. Quite obviously, this is not a proper test of equity or law. We point out to the Court that the Petitioners before the District Court (one of which is not a party to this appeal) owned 26% of the gas proration units in the Jalmat Pool, and Texas-Pacific Coal and Oil Co. owned 12½% of the units. (R. Vol. II, 189-190).

At Page 5, the Appellants again, as a part of their "Statement of the Facts" imply that Appellees' testimony is questionable by stating that it was "presented entirely through a single witness". That the credibility or effectiveness of a witness is a matter for the trial court (or the Commission) to judge is elementary. However, in the interest of accuracy we point out the "facts" to be that the witness, Woodruff, appeared as an engineering witness for Appellees both before the Commission and the Court (4 OCC 337-352; 5 OCC 355-432; 7 OCC 239-322; R. Vol. II, 139-185) and on several occasions he confirmed the views of Witness Keller relating to deliverability and recoverable gas in place. (7 OCC 296; 7 OCC 316). Furthermore, throughout the entire proceedings, including seven volumes of testimony before the Commission and one before the District Court, Appellants' Witness Gruy, referred to in the second paragraph, Page 5 of Appellants' Brief-in-Chief, testified

only at 7 OCC 346-366. The facts are that there were two principal expert witnesses on the points involved in this appeal - one for each party - and the Commission, upon hearing and rehearing, and the District Court, upon trial, chose to concur with Appellees' witness.

With regard to the "basic conflict" referred to on Page 5, Appellants have once again completely failed to concisely state the "facts" and have instead presented their own interpretation of a very limited portion of the extensive engineering testimony. This argument of "correlative rights" under the old and new formula is perhaps a proper one with regard to argument under Appellants' Point I-B, I-C, and I-D, but it is not, in our opinion, proper in a so-called "Statement of the Facts". We will present our argument upon this matter in our "Argument and Authorities". This is applicable to all of Appellants' brief from Pages 5 through 7 and the first two lines of Page 8.

Since an independent statement of the facts by an appellee is not contemplated and will not be entertained (Supreme Court Rule 15(3)), we suggest that by reading the trial court's findings of fact (R. Vol. I, 115 et seq.) in conjunction with the court's informative letter to counsel (R. Vol. II, 272 et seq.) the matters which would be contained in a proper statement of the facts can be ascertained.

It is necessary that one additional misstatement be specifically pointed out to this Court. At Page 10 of their Brief-in-Chief Appellants state as follows:

> "At the outset of the trial before the court, Appellants objected to the participation of the Oil Conservation Commission in the trial as an adversary party. The objection was based on the fact that it had been agreed that the case involved only correlative rights of the operators and hence that the Commission had no place as an adversary party in the appeal seeking to uphold its own decisions." (Emphasis added)

No such stipulation or agreement, tacit or otherwise, was ever entered into by any counsel for Appellees. In any event this assertion of fact should be disregarded since it is

not accompanied by any reference to the transcript. Supreme Court Rule 15(6); Gore v. Cone, 60 N.M. 29, 287 P.2d 229. And indeed it is not possible that such a reference to the transcript be made since no such agreement ever existed. The Cross-Appeal brief filed by the Oil Conservation Commission deals at length with this particular point of dispute.

ARGUMENT AND AUTHORITIES

ANSWER TO POINT I, PARTS A AND B

I. THE DECISION OF THE TRIAL COURT IS CORRECT IN THAT IT CONFIRMS ORDERS OF THE OIL CONSERVATION COMMISSION OF NEW MEXICO WHICH ARE REASONABLE, LAWFUL AND WHICH DO NOT DEPRIVE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

> A. The Commission made all findings which are required by the Statutes of New Mexico for a valid exercise of the power to allocate allowable production between wells.
>
> B. The finding of the Commission that there is a general correlation between the deliverabilities of gas wells in the Jalmat Pool and the recoverable gas in place under the tracts dedicated to said wells, and that the inclusion of a deliverability factor in the proration formula would therefore result in a more equitable allocation of the production in said pool, provides a basis authorized by the statutes of New Mexico for the change of a proration formula and affords protection to the correlative rights of the operators in said pool, as defined by the New Mexico Legislature.

Since the subject matter contained in Paragraphs A and B, Point I, of Appellants' brief overlaps, a combined answer to these Paragraphs will, in our opinion, be more understandable.

At the outset, it seems quite appropriate to discuss the functions served by administrative findings of fact and the basic reasons that the courts and/or legislatures frequently require such findings. It should be pointed out at this point that there is no statutory requirement that the Oil Conservation Commission make findings of fact. And it has been held that in the absence of such a legislative mandate, an administrative agency need make no findings of fact. Saporiti v. Zoning Board, 137 Conn. 478, 78 A.2d 741. It has also been held that as to

orders of the Oil & Gas Division of The Texas Railroad Commission the necessary findings of fact will be implied. Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961.

We do not ask the court to adopt such a rule. The Oil Conservation Commission, as well as the other Appellees, recognizes that findings of fact serve certain useful purposes, notwithstanding the fact that some writers do not entirely agree. See Sunderland, "Findings of Fact and Conclusions of Law in Cases Where Juries are Waived," 4 U. of Chi. L. Rev. 218, 221 (1936).

We would point out, however, that the rule laid down by this Court in Ferguson-Steere Motor Co. v. State Corporation Commission, 60 N.M. 114, 288 P.2d 440, 442, relative to findings is that,

> "If findings, or more adequate findings, by the administrative board or commission be desired, a duty rests on the party complaining of their absence to have made a request for them."

It does not seem to us that a general objection to the Commission's findings of fact in the petition for rehearing complies with the above-stated requirement any more than such a general objection to a court's findings, without tendering requested findings, would suffice. Garcia v. Chavez, 54 N.M. 22, 212 P.2d 1052; Teaver v. Miller, 53 N.M. 345, 208 P.2d 156.

It certainly is not an undue burden to expect the petitioner for a rehearing to tender requested findings of fact either in his petition or after the rehearing is concluded. This the Appellants failed to do, and they should not now be permitted to object to the Commission's findings.

Assuming that Appellants met the requirements set forth in Ferguson-Steere Motor Co. v. State Corporation Commission, supra, we would point out that the primary functions served by administrative findings of fact are as follows:

(1) They enable the court to intelligently review the agency decision by ascertaining whether the facts provided a

reasonable basis for the agency's action and they enable the court to determine whether the decision was based on proper legal principles and is supported by substantial evidence.

(2) They apprise the parties as to the reason for the administrative action as an aid in determining whether additional proceedings should be initiated and, if so, upon what grounds. Swars v. Council of City of Vallejo, 33 Cal.2d 867, 206 P.2d 355; Securities Exchange Commission v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626.

Testing the primary findings (No. 2) in Order No. R-1092-C in the light of these purposes, it is perfectly obvious that the basis for the Commission decision is clearly disclosed and unambiguously stated. (Following the outline of Appellants' brief, the issue as to the evidence supporting this finding is discussed in Paragraph C, Point I.)

The question then is whether the finding of fact which served as the basis for the Commission decision is grounded upon proper legal principles.

This finding is composed of both a basic finding of fact and an ultimate finding of fact. See 2 Davis, Administrative Law Treatise, Sec. 16.06 (1958). The basic finding is that the applicant "proved by a preponderance of the evidence that there is a general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to said wells." The ultimate finding, flowing rationally from this basic finding, is "that the inclusion of a deliverability factor in the proration formula for the Jalmat Gas Pool would, therefore, result in a more equitable allocation of the gas production in said pool than under the present gas proration formula."

In determining whether this is a proper finding based upon matters which the Commission can and should consider in gas proration cases, it is imperative that certain New Mexico statutes

be examined, not as isolated provisions but as they are interrelated.

In prorating gas production, i.e., limiting the amount of gas that each well can produce, Section 65-3-14(a), NMSA, 1953 Comp., provides that "the Commission shall, as far as it is practicable to do so, afford to the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas, or both, in the pool..." (Emphasis added.) This Section defines "just and equitable share" as being "an amount, so far as can be practically determined, and so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas or both in the pool, and for this purpose to use his just and equitable share of the reservoir energy." (Emphasis added.)

The proration formula is the most important factor in determining whether an owner is being afforded an opportunity to produce his just and equitable share of the gas in the pool. Thus, it is the Commission's obligation to determine the amount of recoverable gas under each property in a pool, insofar as it can be practicably determined, and then establish a proration formula which will allocate production to each well on the basis of such determination.

A determination of the amount of recoverable gas under a given property simply cannot be arrived at by direct measurement. Such a determination has to be accomplished indirectly by measuring the several factors which tend to indicate the amount of recoverable gas under each tract in a pool.

This principle of indirect measurement is expressly recognized and sanctioned by Section 65-3-13(c), NMSA, 1953 Comp., which provides as follows:

> "In protecting correlative rights the Commission may give equitable consideration to acreage, pressure, open flow, porosity, permeability,

> deliverability and quality of the gas and to such other pertinent factors as may from time to time exist, and in so far as is practicable, shall prevent drainage between producing tracts in a pool which is not equalized by counter-drainage." (Emphasis added)

Each of the above-mentioned factors was fully considered by the Commission before a determination was made that the two best indicia of recoverable gas in the Jalmat Gas Pool are acreage and deliverability. Accordingly, by Order No. R-1092-C, the Commission established a gas proration formula for the subject pool which takes both of these factors into consideration. Each is an important factor in determining recoverable gas in place. And the opportunity given an operator to produce an amount of gas equal to the recoverable gas under his tract is the touchstone of correlative rights.

Thus, we submit that a finding of a general correlation between the deliverability of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to the wells does provide a statutory basis for including a deliverability factor in the gas proration formula.

Appellants object to the Commission's finding that the inclusion of a deliverability factor in the proration formula would result in a more equitable allocation of the production among the wells in the pool. They deplore the use of the word "equitable" and would apparently have the Commission simply parrot the words of the statute defining correlative rights. Yet this same statute (65-3-14) provides that each owner should be afforded the opportunity to produce his just and equitable share. And it seems highly significant to Appellees that the very title of this statute is "Equitable Allocation of Allowable Production - Pooling - Spacing."

Equitable allocation and just and equitable share are fully spelled out in the statute and the Commission simply used the phrase "equitable allocation" rather than quoting the entire statute.

There is no lack of a legislative standard and the Commission's order clearly shows that the legislative standard was met. See State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 67 P.2d 240. In discussing legislative standards and findings in relation thereto, Feller in "Prospectus for Further Study of Federal Administrative Law," 47 Yale L.J. 647, 666 (1938), states as follows:

> "The low water mark was reached in the NRA where (after the Panama Refining case had indicated that findings were necessary) every code began with a parroting of the preamble to the statute without regard to whether the code dealt with coal or candlewick or bedspreads. I doubt whether any agency can now be found with so little sense of discrimination, but too many are still content to paraphrase the language of the statute rather than to give a clear account of the facts which lead to the particular decision."

Appellants cite the Louisiana case of Hunter v. Hussey, 90 So.2d 429, 6 Oil and Gas Reporter 1172, as support for their position. The case involved an order of the Commissioner permitting allowables assigned to certain wells to be transferred to other wells. The Commission's statutory authority in this regard could be exercised only to ensure that each producer was allowed his equitable share of the production, not to prevent waste. Yet the Commissioner's finding was, as the court paraphrased, that the action "will prevent 'waste' in its broadest sense." Thus the court had no finding showing that the legislative standard had been met.

We do not have a comparable situation here. Section 65-3-13(c), NMSA, 1953 Comp., provides that whenever to prevent waste a pool is prorated, the production shall be allocated on a reasonable basis recognizing correlative rights. So in the first instance the Commission always prorates gas to prevent waste. This is the chief consideration. But when the Commission is considering a change in the proration formula for a pool, as was the case here, the most important issue is whether the new formula results in a more equitable allocation of the allowable

production. See Section 65-3-14, NMSA, 1953 Comp. This is the legislative standard, and the Commission unambiguously found that the new proration formula would accomplish this.

Of course, greater ultimate recovery, i.e., prevention of waste, is also a consideration, but in most "change in formula" cases this issue while present, is actually secondary since proration under any reasonable formula will prevent waste.

Appellants also allege that Finding No. 6 in Order No. R-1092-A has no relation to the purpose for which the Commission is authorized to prorate the production of natural gas.

In Finding No. 6 of Order No. R-1092-A, the Commission determined (1) that the inclusion of a deliverability factor in the proration formula for the Jalmat Gas Pool would result in the production of a greater percentage of the pool allowable and (2) that it would more nearly enable the gas purchasers in the Jalmat Gas Pool to meet the market demand for gas from said pool.

Aside from the merits of the Appellants' contention, it should be pointed out that the findings in Order No. R-1092-C, the order entered after rehearing, are the only ones which Appellants can attack in this Court. The very purpose of a rehearing is to point out any alleged errors, including improper findings, that the agency may have committed. See Section 65-3-22, NMSA, 1953 Comp. and Order No. R-1092-C, entered after the rehearing, does not contain the finding to which Appellants object.

Nonetheless, we have no hesitancy whatever in meeting Appellants' contention. Again they are looking at one or two statutes only without recognizing the interrelationship between various enactments of the New Mexico Legislature relative to oil and gas conservation.

The acid test of a proration formula is whether it adequately protects the interests of the various owners in the

pool. The mandate to the Commission to afford each operator in a pool his just and equitable share of the oil and gas in the pool is characterized as "correlative rights".

References to correlative rights are frequent in the New Mexico conservation statutes and the Commission is repeatedly instructed to recognize and protect these rights. However, this guarantee standing alone is an empty and useless thing. If an operator's rights are to be adequately protected, he must also be assured of a fair share of the market since gas cannot be produced unless it is simultaneously sold to a pipeline. Unlike oil, lease storage of gas is generally not feasible.

The Legislature provided this corollary right in the so-called Common Purchaser Act (Section 65-3-15 and 65-3-13(d), NMSA, 1953 Comp.) The latter Section provides that:

> "In fixing the allowable of a pool.... the Commission shall consider nominations of purchasers but shall not be bound thereby and shall so fix pool allowables as to prevent unreasonable discrimination between pools served by the same gas transportation facility by a purchaser purchasing in more than one pool." (Emphasis added)

To proceed one step further, New Mexico Statutes require that the Commission prorate gas production on the basis of market demand. Section 65-3-13 and Section 65-3-3(e), NMSA, 1953 Comp. In actuality, of course, a gas purchaser has a certain demand for gas on an area-wide basis rather than on a pool-wide basis. For example, it has a certain demand for gas from the Permian Basin in Southeast New Mexico and West Texas. This area-wide demand is then divided among the pools in the gas productive area on a ratable basis.

It follows from this that when a pool's allowable is allocated in such a manner that a substantial quantity thereof remains unproduced due to the assignment of allowables to wells incapable of such production, as was found to be the case under the straight-acreage formula in the Jalmat Pool, the net effect

is that such pool is discriminated against by virtue of having a portion of its rightful share of the area-wide market demand for gas diverted to other pools in the area.

Even in the absence of tendered findings of fact by the parties, Appellants would have the Oil Conservation Commission make overly formal findings of fact which, in our opinion, would render the findings superficial and therefore useless.

Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required of trial courts. Swars v. Council of City of Vallejo, supra; Taylor v. Bureau of Private Investigators, Etc., Cal. App., 275 P.2d 579. Nor is it necessary that they be couched in statutory language. American Airlines v. Civil Aeronautics Board, 235 F.2d 845.

As the court stated in Thurston v. Hobby, 133 F.Supp. 205, 209:

> "In review of administrative determinations, the courts recognize findings of fact and conclusions of law made by an Administrator are not done with a nicety such as required of a trial court... and that in construing findings of fact and conclusions of an Administrator the sense thereof should be determined from a consideration of the subject-matter and whole record made before the administrative body."

Even the Federal Administrative Procedure Act requires only that the agency make clear the factual basis on which it has proceeded and that the decision arrived at has a rational basis in those facts. Coyle Lines v. United States, 115 F.Supp. 272. This principle is clearly set forth in the case of Pennsylvania R. Co. v. Department of Public Utilities, 14 N.J. 411, 102 A.2d 618, where the court stated as follows at page 631:

> "The findings need not take any particular form so long as they fairly disclose, as they do in the instant matter, the basic facts upon which the board relies and its ultimate conclusions therefrom within the limits of the controlling statutory provisions and standards."

Where, as in this case, the findings made by the

Commission satisfy the requirements of making intelligent review by the courts possible, apprise the parties of the basis for the administrative action, and are based on proper legal considerations, it would be little more than a gesture to reverse the decision and require that the agency mouth the exact words of all pertinent statutes in its findings. See Little Man's Club v. Schott, Fla., 60 So.2d 624. Such a procedure is what Mr. Justice Frankfurter has called "marching the king's men up the hill and then marching them down again..." City of Yonkers v. United States, 320 U.S. 685, 694, 64 S.Ct. 327, 88 L.Ed. 400 (dissent).

The effect of requiring the agency to parrot the exact language of the statute "might be very like that of the Statute of Uses which has been said merely to have added six more words to every English conveyance." Cousens, "The Delegation of Federal Legislative Power to Executive Officials," 33 Mich. L. Rev. 544 (1935).

The courts must, of course, see that administrative agencies are kept within the domain of and subject to law, but they must also see to it that the agency is not choked by a "morass of technicalities in which the special pleader is at home but the proper beneficiary of the legal order finds little but delay and disappointment." O'Reilly, Administrative Findings of Fact, 11 Fordham L. Rev. 30, 49 (1942).

ANSWER TO POINT I, PARTS C AND D

C. There is substantial evidence in the record to support the finding of the Commission that there is a general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place; and

D. There is substantial evidence that the formula adopted by the Commission will prevent, "insofar as is practicable" drainage between producing tracts not equalized by counter-drainage and will, "so far as it is practicable to do so", afford to the owner of each property in the pool the opportunity to produce his just and equitable share of the gas in the pool, which, as defined by the Legislature of New Mexico, is "an amount, so far as can be practically determined, and

so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable .... gas, ..., under such property bears to the total recoverable .... gas .... in the pool."

At the outset, we call attention to our arguments in our answers to Point I, Part B, in which we point out to the Court the fact that the Legislature of New Mexico, in enacting statutes delegating legislative powers to the Oil Conservation Commission, recognized the fugacious nature of gas in underground reservoirs and the extreme difficulties involved in establishing with certainty conditions in underground reservoirs and the existence and degree of underground drainage as between producing tracts. The Legislature also recognized the practical impossibility of establishing methods of allocating production of gas in such a manner as to completely and absolutely protect correlative rights as defined in the statutes or completely prevent drainage not compensated for by counter-drainage. It seems patently apparent from the statutes that there is no gas proration formula which will completely protect correlative rights and there is no way, short of mining, which will completely identify the amount of recoverable gas in place under a particular tract of land, whether or not any drainage has occurred prior to the time of the effort at determination.

Fully recognizing this situation, the Legislature provided for such obvious conditions in the statutes. Appellants, even in setting out their Point I-D, have refused to accept this fact. They have omitted the clause "insofar as is practicable" with reference to the prevention of uncompensated drainage, and they have omitted the phrase "so far as it is practicable to do so" with regard to the opportunity of each owner in a pool to produce his just and equitable share of the gas in said pool. If the position of the Appellants is correct, which it most certainly is not under the statutes, then we submit that there is no method of prorating gas or oil which will conform to the

statutes. Even the Legislature exhibited more knowledge of the practical aspects of the recovery of gas from underground reservoirs than do the Appellants. The witnesses for both Appellants and Appellees who testified before the Commission and the Court recognized that there is no perfect proration formula. (3 OCC 128; 4 OCC 248; 6 OCC 80; 7 OCC 165; 7 OCC 167; R. Vol. II, 90).

The expert petroleum engineers, and we might add the lawyers, for Appellants and Appellees, both before the Commission and the District Court have consistently engaged in what appears to be a battle of semantics. An example is found in an exchange between one of the attorneys for Appellants and Witness Keller (2 OCC 73 and 74):

> "Q. (by attorney): But that is something different. I'm talking about recoverable gas in place, not recoverable gas in place that is going to be recovered."

These are matters of a technical nature, ones in which a regulatory agency and its staff of experts heard voluminous testimony (961 pp.) and received numerous exhibits, (80 exhibits). The same arguments being presented to this Court concerning interpretation of evidence were presented to the Commission upon hearings and rehearing and to the District Court upon trial. For example, Appellants attached to their Petition for Rehearing before the Commission a single exhibit (Operators R-6) and they now attach the same exhibit as a part of their Brief-in-Chief. This particular exhibit was the subject of extensive rebuttal (7 OCC 202; 7 OCC 265-270). We certainly doubt the propriety of attaching a single exhibit in a lengthy case as a part of the brief where Appellants have tacitly acknowledged that they have not complied with Rule 15, Paragraph 6 of the Rules of this Court.

However, we have no alternative but to attempt once again to point to evidence which in our opinion is most

substantial, that there is a general correlation between deliverabilities and recoverable gas in place in the Jalmat Gas Pool.

At the very first hearing in this matter, on October 17, 1957, Witness Keller offered a detailed presentation of his basic theory, substantiating his opinion, later frequently expressed, that there is a general correlation between deliverabilities and recoverable gas in place in the Jalmat Gas Pool. Texas-Pacific Exhibits 7-A, B, C, and D point out and analyze all of the various factors which control both recoverable gas in place and deliverabilities in any gas pool. (1 OCC 63-70). The purpose of this analysis was expressed by Witness Keller (1 OCC 63 and 64):

> "Q You have recommended an allocation formula by which deliverability will be given consideration and with this in mind and referring to Exhibits 7-A, B, C, and D, would you demonstrate how in your opinion this would more closely permit the recovery of gas reserves under a property in the Jalmat Gas Pool?
>
> A Yes, sir. I believe this can be readily understood by an examination of how these various factors enter into both the deliverability of the various reserves and also into the distribution of the reserves to the individual well, that is, into the distribution of the recoverable gas in place attributable to the various wells."

Witness Keller then pointed out that the straight-acreage formula (1 OCC 70):

> "does not provide protection to correlative rights because it fails to take into account the fact that reserves aren't equally distributed within the field..."

These exhibits and Witness Keller's testimony established that, as a matter of engineering analysis, there must be a relationship between recoverable gas in place and deliverability - or ability to produce. This engineering analysis is outside of the argument raised by Appellants as to whether "reserves" provide a relative measurement of recoverable gas in place, and even standing alone, would constitute substantial evidence.

But Appellees' witnesses went further, with a detailed study of all of the available data as to the Jalmat Gas Pool itself. At the second hearing on November 14 and 15, 1957, Witness Keller presented in detail the results of his study of 300 wells in the Jalmat Gas Pool. (3 OCC 149-164). Again, his conclusion was that in the Jalmat Gas Pool there is a relationship between deliverability and reserves. The Appellants contended that this testimony and the accompanying exhibits "injected new questions into the hearing" and "took the operators by surprise". (3 OCC 174). At their request the Commission recessed the hearing until December 9, 1957.

It was at this hearing that Appellants presented their first evidence in the case - through Witness Liebrock. As Appellants have stated in their Brief-in-Chief, at page 41, et seq., Witness Liebrock testified as to his study of a 58-well area, out of a total of 367 wells in the pool. There was extensive cross-examination of Witness Liebrock by Appellees concerning the basis for his opinion that Witness Keller was in error and that there was no relationship between deliverabilities and recoverable gas in place.

At this same hearing, Witness Keller again set out his understanding of a gas proration formula which will, insofar as it is practicable to do so, protect correlative rights. (5 OCC 435):

> "Now I think we have all pretty well agreed that the perfect formula from the standpoint of furnishing maximum protection to correlative rights would be one that distributed allowables substantially in proportion to the recoverable gas in place under the various tracts."

Then referring to his and to Witness Liebrock's testimony, he said (5 OCC 435):

> "We differ not in the standard but in the engineering calculations designed to evaluate that standard."

It seems that Appellants object to the method of

calculation used by Appellees because it did not establish a "fixed" relationship and gave effect to prior migration of gas. This objection was recognized by Appellees at the rehearing on this matter after the Commission had issued its Order R-1092-A. The rehearing was in March, 1958. At this hearing, Witness Keller testified as follows (7 OCC 166):

> "Q Mr. Keller, as I indicated in my previous question, it has become apparent that one of the objections to your approach in determining recoverable gas in place under the tracts has been the migrational effects. I refer you to what has been identified as Texas-Pacific's Exhibit R-1 and ask you to state what it is and explain it to the Commission with regard to that particular phase of this problem.
>
> A Yes, sir. I would first like to recall the method that I employed to estimate the reserves per acre for the individual tracts, or the apparent recoverable gas in place per acre for the individual tract. You will recall I took the pressure production history for each of the wells, and I have done that now for additional wells that I didn't have data on at the last hearing, and I have plotted that pressure production history for the period 1951 to 1957. I have then extrapolated the pressure data to arrive at a reserve for the tract and divided by the acreage in the tract to get a reserve per acre, or apparent recoverable gas in place per acre.
>
> You will also recall that I previously testified that the reserves per acre, or apparent recoverable gas in place arrived at in that manner included migrational effects, but that in spite of those migrational effects I felt that the reserves per acre was the best representation of the distribution of the recoverable gas in place per acre for the various tracts that could be had in the Jalmat Field. (Emphasis added)
>
> Exhibit No. 1, I think shows why that conclusion is adequately justified..."

Witness Keller then testified extensively on this very matter - which has once again been raised on appeal, (7 OCC 167-177) and he was cross-examined most extensively upon the point. His conclusion is summarized at (7 OCC 176):

> "Q Mr. Keller, is it your conclusion that the

method that you have used for determining reserves per acre is a proper method of calculating in the most practical manner the recoverable gas in place under the properties in the Jalmat Gas Pool?

A Yes, sir, I previously testified that that was so, and I do now testify that the reserves per acre distribution that I have used to test which of the two formulas falls more closely, carries out the statutory requirements, is a valid test and it is the best obtainable."

The witness then presented additional exhibits confirming his position in full recognition of the position taken by Appellants before the Commission and before the District Court (7 OCC 177-238). At one point in his testimony, he said (7 OCC 182):

> "It's been said here that there is no relationship between deliverability and recoverable gas in place. Maybe we're engaged in semantics, but if you were to say there is not a unique relationship between deliverability and recoverable gas in place, I think that would be a true statement, but there is a very definite relationship, it's not unique, but it's there, between deliverability and recoverable gas in place, and the fact that there is a relationship is reflected by this statistical analysis represented by Texas-Pacific No. 5 Exhibit." (Emphasis added)

What could be a clearer expression of expert opinion based upon extensive studies that there is "a general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to said wells"?

This opinion was expressed not only by Appellees' Witness Keller, but was confirmed by Witness Woodruff, a qualified petroleum engineer, when he said in answer to a question by one of Appellants' attorneys (7 OCC 296):

> "Q Now, limiting the coincidental aspects in the Jalmat Gas Pool, is the gas in place under a tract proportional to the deliverability of the well to which that tract is assigned, eliminating coincidental aspects you have just mentioned.
>
> A I think it is reasonably related, yes, sir."

And later at 7 OCC 297, the same witness:

"Q Well, do you choose to answer the question as to if the gas in place under a tract is proportional to the deliverability of the well to which the tract is assigned?

A My answer is, I think it is reasonably in proportion to it."

The brief references above, which are to only a portion of the voluminous testimony in this case, establish that there is substantial evidence to sustain the Commission's finding of a general correlation between deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to the wells.

But, say Appellants, there is no substantial evidence that the new formula will prevent uncompensated drainage and allow each operator the opportunity to recover his just and equitable share of the gas in the pool. As we have pointed out, the statutes do not require a perfect proration formula.

Even Appellants' witness testified there is no proration formula which will met this test (6 OCC 80):

"Q Now, Mr. Liebrock, is there any gas proration formula that will prevent migration between properties so long as there are not impermeable barriers between properties?

A As a practical matter, I don't think it would be possible to devise a formula which would completely eliminate migration..."

Witness Keller presented testimony before the Commission based upon studies of all the wells in the pool, that uncompensated drainage would be reduced under the deliverability formula because the earlier production, based upon acreage only, had resulted in migration from high pressure, high deliverability, high reserve areas to areas of low pressure, low deliverability and low reserves. (7 OCC 172-174; 7 OCC 192).

At 7 OCC 205 Witness Keller summarized his testimony as follows:

"Q Now, Mr. Keller, some concluding questions based on your testimony here, considering the testimony

that has been offered by the Applicants in this rehearing, in your opinion what allocation formula in the Jalmat Gas Pool will provide the most practical method of giving to each owner in the pool the opportunity to recover the gas under his property substantially in the proportion it bears to the recoverable gas in the entire pool?

A Well, sir, as a practical matter, the formula I have recommended of 75 percent credit to acreage times deliverability and 25 percent to acreage is the best one that I have been able to devise to fit those requirements.

Q In your opinion, would the formula you propose come closer to accomplishing this result than the 100 percent acreage formula?

A Yes, sir.

Q In your opinion, what allocation formula will minimize to the greatest extent uncompensated drainage in the Jalmat Gas Pool?

A I think that the 75-25 formula will definitely be an improvement in that respect over the 100 percent acreage."

After the formula incorporating deliverability as a factor had been in effect for a year, Witness Keller testified before the District Court (R. Vol. II, 211-212):

"Q Mr. Keller, since the issuance of proration orders under the deliverability formula put into effect by Order 1092-C, have you made studies in respect to migration which occurs under that proration schedule as compared to migration that occurred under the prior acreage schedule?

A Yes, sir, I have made such type studies.

Q Does your study indicate that greater or less migration would occur under the Jalmat Pool under the deliverability formula as compared to the acreage formula?

A My studies lead me to the conclusion that the migration in the Jalmat Field would be less under the deliverability formula than it would have been under the 100% acreage formula. In other words, the operation of the July, 1959, proration schedule would be to retard whatever migration was taking place under the acreage formula in existence prior to the Commission Order changing the allocation to the deliverability formula."

The trial court expressed it succinctly and quite properly in its letter to counsel dated July 27, 1959 (R. Vol. II, 272-273):

"There was substantial evidence that the 100% acreage

> formula permitted drainage from strong to weak wells thus denying one group of operators the right to appropriate their share of the gas in place under their tracts to their detriment and to the unjust benefit of the other group. Under such type of allocation, the inefficient operator might be allowed to produce more gas than his prudent and efficient neighbor with equal dedicated acreage, because of factors in the producing strata over which neither could have control. The field produced for years under this program which gave to each operator the right to produce quantities of gas dependent solely on the proportion which his acreage bore to the total field area, without regard to the many other conditions affecting the potential productivity of the tract. This was a simple method of arriving at allocations and required no complicated formula or tests to achieve, but, as I see it, forced inequities and was inherently unfair to some. It may be that allocation of allowable based entirely on the operators ability to produce is the ideal method to follow in fields where output is restricted. The Commission has adopted a compromise between the two methods and, in my opinion, has arrived at a more just and fair division than the former method afforded." (Emphasis added)

To contend that in order to establish or change a proration formula there must be substantial evidence that it will result in recovery in exact proportion to actual gas in place and completely prevent uncompensated drainage is to say that there can be no prorationing. Obviously such a result was not contemplated by the Legislature when it enacted the oil and gas conservation statutes.

ANSWER TO POINT II, PARTS A AND B

THE ORDER OF THE COMMISSION IS COMPLETE, UNAMBIGUOUS AND DEFINITE AND AFFORDS APPELLANTS DUE PROCESS OF LAW.

It is argued by Appellants that the orders of the Commission are so incomplete, vague and indefinite as to deny them due process of law. Their argument, in effect, is that the term "deliverability", as used in Order No. R-1092-A, is undefined and unstandardized and that no deliverability testing procedure is

prescribed. It will be shown that this argument is fallacious, that the orders of the Commission are complete, unambiguous and definite, and that Appellants have been afforded due process of law.

On this point the trial court found that:

> "Oil Conservation Commission Orders No. R-1092-A and R-1092-C are not vague, indefinite or uncertain." Trial Court's Finding of Fact No. 3 (R. Vol. I, 115); Trial Court's Conclusion of Law No. 8 (R. Vol. I, 118). See also Trial Court's Findings of Fact Nos. 2 and 4 (R. Vol. I, 115), Trial Court's Conclusion of Law No. 9 (R. Vol. I, 119), and Trial Judge's letter to counsel (R. Vol. II, 272).

Commission Order No. R-1092-A, issued on January 29, 1958, following the first complete hearing of this case, provided:

> Rule 6(c) - Annual deliverability tests shall be taken on all gas wells in the Jalmat Gas Pool <u>in a manner and at such time as the Commission may prescribe</u>. (R. Vol. I, 26). (Emphasis added)

Then, on February 24, 1958, the Commission issued its Memorandum No. 6-58, Subject: <u>Jalmat Gas Pool Deliverability Procedure</u>, (R. Vol. II, 130, 133), which prescribed the manner and time of taking annual deliverability tests on gas wells in the Jalmat Gas Pool.

Following the issuance of this memorandum the Commission considered Appellants' application for rehearing and on April 25, 1958, issued its final order in Case No. 1327 (Order No. R-1092-C). (R. Vol. I, 39).

From this sequence of events it is readily observed that the Commission's Memorandum of February 24, 1958, fulfilled the prospective portion of Order No. R-1092-A, quoted above, by prescribing the manner and time of taking annual deliverability tests on gas wells in the Jalmat Gas Pool. This deliverability testing procedure became a part of the order itself as much as if the order had contained the test schedule and procedure in the first instance.

It should also be noted that Commission Memorandum

No. 6-58 was issued some three weeks prior to the rehearing in Case No. 1327. Yet no attack on this method was made by Appellants in the rehearing before the Commission, and they did not introduce Memorandum No. 6-58 into evidence. Neither is there any testimony in the record of the rehearing that Order No. R-1092-A is vague, indefinite and uncertain.

Thus, when Order No. R-1092-C was issued after the rehearing providing that the provisions of Order No. R-1092-A would remain in effect, it was issued in view of the fact that a memorandum had been issued which had become incorporated into Order No. R-1092-A and that, subsequent to its issuance, no attack or objection had been made to that memorandum or to its sufficiency.

The issuance of the Commission's memorandum of February 24, 1958, prescribing the testing schedule and procedure was merely a ministerial function of the Commission to supplement and fulfill the prospective portions of Order No. R-1092-A inasmuch as no discretion was exercised other than to prescribe the testing schedule and procedure as an obligatory duty created by the terms of that order. Texas State Board of Dental Examiners v. Fieldsmith, Tex. Civ. App., 242 S.W.2d 213. Since the issuance of the memorandum was merely a ministerial function, no notice and hearing was required. Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525.

In Buttfield v. Stranahan, supra, it was held that there was no denial of due process in failing to give a hearing in establishing standards relating to the importation of tea. The court held that the fixing of standards by the Board of Tea Inspectors in pursuance of the prospective terms of a statute placing the duty on it to do so was merely a ministerial function which required no notice or hearing.

Furthermore, since Order No. R-1092-A specifically provided that the Commission would prescribe the testing schedule and procedure at a later date, the memorandum when issued became

incorporated into and made a part of the order itself such that no further notice or hearing was required beyond that of the original hearing.

Appellants, at pp. 55-56 of their Brief-in-Chief, pretend to be ignorant of the meaning of "deliverability" or of its application as a method of testing and measuring gas wells, and they suggest that its lack of definition in the subject orders rendered them void for vagueness. The trial court found to the contrary in favor of Appellees. Trial court's Finding of Fact No. 4 (R. Vol. I, 115).

In using the word "deliverability" in Order No. R-109[illegible] the Commission simply followed the statutory language of Section 65-3-13(c), NMSA, 1953 Comp., which states in part as follows:

> "In protecting correlative rights the Commission may give equitable consideration to acreage, pressure, open flow, porosity, permeability, deliverability and quality of the gas and to such other pertinent factors as may from time to time exist..." (Emphasis added)

It will be noted that this statute also contains other engineering and geological terms none of which is defined but each of which is understood by persons in the oil and gas industry.

Inasmuch as Appellants have not attacked the constitutionality of the above-quoted statute, they cannot complain of an order incorporating this statutory term. If the statute is sufficient, the order is sufficient.

All of the producers in the Jalmat Gas Pool knew that deliverability was being studied for possible use as a factor in the proration formula for that pool. As early as March 15, 1954, the Oil Conservation Commission issued Orders R-368-A and R-369-A, each of which orders contained the following findings:

> "(7) That an adequate gas field testing procedure should be adopted as soon as possible so that operators, purchasers, and the Commission can determine the fairness and feasibility of an allocation factor for the pool which employs the factors of deliverability, pressure, or any other factor relating to gas field pro[illegible]ivity." (Emphasis added)

These orders were followed by directives requiring all operators to conduct deliverability tests in the very gas pool here involved, which directives set forth in exact detail the manner in which the "deliverability" of a well was to be computed.

The aforementioned directives were consolidated and remained in full force and effect until February 24, 1958, at which time a reprint with minor variations, a purely ministerial function, was distributed to all operators of gas wells in the Jalmat Gas Pool as Commission Memorandum 6-58. (R. Vol. II, 130, 133). In view of the fact that deliverability tests had been conducted on existing wells in the Jalmat Gas Pool beginning in 1954, it can hardly be urged at this late date that the operators in the Jalmat Gas Pool do not fully understand the meaning of the term "deliverability".

While the term "deliverability" is not defined in the subject orders themselves, it has a definite and unequivocal meaning as used in the context of these orders and as generally understood throughout the petroleum industry. In the words of the Appellants' own witness, Mr. V. T. Lyon, the term "deliverability" "... is a term which is used to describe a figure which is a theoretical flow of gas at a given back pressure condition." (R. Vol. II, 96).

Mr. Lyon further testified as follows (R. Vol. II, 95):

"Q Are you familiar with the testing of Continental operated wells in the Jalmat Gas Pool?

A Yes, I am.

Q How did you become familiar with that?

A When the deliverability formula was first proposed, it was necessary for me to become informed on the testing procedure, and during the taking and calculation of tests since that time why I have become more familiar with the procedure."

At R. Vol. II, 129, Mr. Lyon testified:

"Q Are you acquainted, Mr. Lyon, with the

deliverability procedure of February 24th, 1958, to which you have made reference as being, as I understood you, vague and uncertain?

A Well, it isn't vague and uncertain as to how to go about it I don't believe."

In addition, Mr. Lyon identified the manual of procedure for taking the deliverability tests under Rule 401, (R. Vol. II, 121). He testified in detail as to exactly what that procedure was. (R. Vol. II, 130).

Appellees' witness, Mr. F. Norman Woodruff, after testifying in detail as to the deliverability testing procedure, testified in R. Vol. II, 145:

"Q Now, Mr. Woodruff, is the procedure which you have explained generally for the Jalmat Pool the same type of test used in the entire gas industry?

A Yes, sir, it is."

Appellants' objection to the use of the term "deliverability" appears, therefore, to be directed only to the absence of a specified back pressure against which deliverability is to be measured. In answer to this objection it should be sufficient to state that any given pressure prescribed by the Commission would adequately standardize the tests and give meaning to the term "deliverability" and that this was done in the Commission's Memorandum of February 24, 1958. The establishment of this pressure standard is obviously a ministerial act by the Commission which may be done without notice and hearing. Buttfield v. Stranahan, supra.

The standard which the Commission did establish by its memorandum is one widely accepted in the industry. In the Hugoton Field of Oklahoma and Kansas, the Conservation Departments of those states prescribed a "deliverability standard pressure" against which deliverability tests were to be taken which is identical to that prescribed in the Commission's memorandum: "The deliverability standard pressure, which is used

in the Hugoton Field, is a common pressure for comparison of well deliveries and is eighty per cent of the average 72-hour shut-in wellhead pressure of the field." C. W. Binckley, Open Flow and Back Pressure Data and Their Application to the Production of Natural Gas - With Particular Reference to Data Obtained in the Hugoton Field, Phillips Petroleum Company Bulletin (1946).

It is apparent, therefore, that the Appellants knew what was required of them in order to comply with the orders of the Commission. Appellees submit that the subject orders are not incomplete, vague and indefinite, but, on the contrary, are sufficiently complete, clear and definite to give Appellants and all others affected by the orders a sufficient understanding of the orders and of the terms contained therein to correctly apply the same. This meets the test of sufficiency where a statute is attacked as being void for vagueness. Joseph Triner Corporation v. McNeill, 363 Ill. 559, 2 N.E.2d 929, aff'd. 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109. And the principles governing the validity of statutes apply to orders made by an administrative agency. Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424; California Drive-In Restaurant Association v. Clark, 22 Cal.2d 287, 140 P.2d 657.

Another test, more or less to the same effect, is stated in the case of Vallat v. Radium Dial Co., 360 Ill. 407, 196 N.E. 485, 487:

> "In order that a statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them. Such definiteness may be produced by words which have a technical or other special meaning well enough known to permit compliance therewith..."

Certainly the term "deliverability" as used in the context of the Commission's orders has a technical meaning well enough known to permit compliance with those orders.

Another statement of the law in this regard is found in 50 Am.Jur., Statutes, Sec. 473:

> "A statute will not be declared void for vagueness and uncertainty where the meaning thereof may be implied, or where it employs words in common use, or words commonly understood, *** or a technical or other special meaning well enough known to enable persons within the reach of the statute to apply them correctly..."

See also Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800; Joseph Triner Corporation v. McNeill, supra; In re Sidebotham, 12 Cal. 2d 434, 85 P.2d 453; Old Dearborn Distributing Co. v. Seagram - Distillers Corp., 363 Ill. 610, 2 N.E.2d 940, aff'd. 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109; State v. Gee Jon, 46 Nev. 418, 211 Pac. 676.

The tendency of the recent decisions is toward a more liberal construction of the rule requiring certainty in statutes. Smith v. Peterson, 131 Cal.App.2d 241, 280 P.2d 522. And even in the older case of Cochran v. Loring, 17 Ohio 409, 427, the court held:

> "Though a law is imperfect in its details, it is not void unless it is so imperfect as to render it utterly impossible to execute."

Also, orders of administrative agencies should be liberally construed. Railroad Commission v. Ft. Worth & D. C. R. Co., Tex. Civ. App., 161 S.W.2d 560; Gillespie (F. A.) & Sons Co. v. Railroad Commission, Tex. Civ. App., 161 S.W.2d 159.

The law does not require that an order of an administrative agency contain within its four corners the definition of each and every term used therein. Appellees readily admit that the intent and meaning of an order of the Commission must be sufficiently clear to apprise the reader of the effect of the order, but certainly this does not mean that one is precluded from going outside the four corners of a particular order to find the definition of the terms used therein. If this contention were true, even Webster's Dictionary would be unavailable to us.

On page 57 of the Appellants' Brief-in-Chief, the

case of Tobin v. Edward S. Wagner Co., 187 F.2d 977, is cited and quoted to the apparent effect that courts should require more particularity of administrative orders than of statutes. Unfortunately, Appellants failed to quote the sentence next following in that opinion which Appellees believe to state an important qualification. The opinion continues:

> "True, in deciding what they (regulations) do cover, we must not regard their literal terms merely, but must also give much weight to administrative interpretive rulings which have been published and of which the regulated are thus on notice." (187 F.2d 977, 979).

Analogizing the Commission's Memorandum of February 24, 1958, to an administrative interpretive ruling, the quotation above would give much weight to this memorandum of which the Appellants had notice.

On pages 61 and 62 of Appellants' Brief-in-Chief, the case of Hillman v. Northern Wasco County People's Utility District, 213 Ore. 264, 323 P.2d 664, is cited in support of the proposition that an administrative order adopting prospectively the standards to be established by an independent committee does not constitute due process of law. With this Appellees will agree! Where that case differs from the case at bar is that the Commission by its Order No. R-1092-A does not adopt prospectively any committee's standards or procedure as its own. In the case at bar the Commission's order provides for the adoption prospectively of a schedule and testing procedure such as the Commission itself might prescribe. (Rule 6(c), Order No. R-1092-A; R. Vol. I, 26; Appellants' Brief-in-Chief, p. 54). The schedule and testing procedure that were adopted by the Commission in its memorandum of February 24, 1958, were not standards of an independent committee - they were standards adopted by the Commission itself. Inasmuch as the order with its prospective provisions and the memorandum fulfilling that order were both decisions of the Commission and not of an independent body, the requirements of

due process were fully met.

In summary, it is submitted that Appellants knew what was required of them by the Commission's orders. As a matter of experience as well as by the terms of the orders and memoranda issued by the Commission, Appellants were fully aware of the deliverability concept in gas prorationing and of its incident testing procedures. They should not be heard to complain of non-existent technical deficiencies in the orders when, as a matter of fact, they understand in detail what is required of them.

As stated by the judge of the trial court in his letter to counsel explaining his decision:

> "I am unable to say that the Order of the Commission is vague and uncertain. Implemented by the Directive and Memorandum, it gives a method of determining "deliverability" which is evidently comprehensible to those affected." (R. Vol. II, 272).

It is evident, therefore, that the Commission's orders were sufficiently complete, unambiguous and definite to afford Appellants and all concerned due process of law.

ANSWER TO POINT II, PART C

THE DELIVERABILITY TEST SPECIFIED BY THE COMMISSION IS FAIR, REASONABLE AND ACCURATE AND AFFORDS APPELLANTS DUE PROCESS OF LAW.

Appellants argue that the deliverability test prescribed by the Commission's Memorandum of February 24, 1958, Subject, Jalmat Gas Pool Deliverability Procedure, has produced inconsistent, unpredictable and erratic results and therefore constitutes a denial of due process of law.

Appellees submit that the deliverability test is reasonable and that it has produced predictable, consistent results. The trial court agreed with this position in its Finding of Fact No. 2 (R. Vol. I, 115) and in its Conclusions of Law Nos. 5, 9 and 10 (R. Vol. I, 118, 119).

The only evidence presented by the Appellants in support of their contention was the testimony of Mr. V. T. Lyon to the effect that a study of tests and retests on a selected group of wells showed their results to be somewhat disparate (R. Vol. II, 98-102 105-111). In this study the results were tabulated in such a manner as to unduly emphasize the disparity. The judge of the trial court, in his letter to counsel explaining his decision, stated (R. Vol. II, 272-273):

> "One witness (Mr. Lyon) asserted that the large discrepancies in deliverability test results taken at different times made it manifest that it was not possible to make accurate tests using the new formula. The validity of the method of testing was not challenged from an engineering or mathematical view point, and no reason was given for the failure of one test to approximate the result to another test. But, when it is remembered that the new program has been in effect less than two years, and that the potential capacity of a well to produce varies from time to time because of numerous factors, some governable by the operator and some due to natural or fortuitous changes in conditions, the apparent discrepancies become understandable. And, as was done, to add all the "plus" percentages for one column and all the "minus" for another, and assert that computation of the result shows an average total discrepancy between tests of more than 40%, is to present an absurdity, apparent on its face, and which proves nothing of value." (Emphasis added)

Thus, the trial court completely discredited Appellants' evidence on this point and there remains no substantial evidence on which Appellants can base their appeal on this point. Even if the Appellants were in the position of being Appellees, there would be no substantial evidence to support their position.

On the other hand, there is substantial evidence in the record to support Appellees' contention that the deliverability tests are reasonable and consistent.

Appellants made no attempt to demonstrate to the court what caused the variation in deliverability tests. Instead, they asked the court to assume that the variation was solely the result of the prescribed deliverability test. They tendered no proof that the fluctuations were the result of the tests

themselves. The true explanation of the variations and fluctuations came in the cross-examination of the Appellants' witness, Mr. Lyon, and in the direct and cross-examination of Appellees' witness, Mr. Woodruff. (R. Vol. II, 146). Mr. Woodruff testified:

> "Q Now, Mr. Woodruff, an operator complying with the directive and complying with the other rules and regulations of the Oil Conservation Commission in getting his wells in the proper condition, and those wells being in the proper condition, would any two tests on the same well, would they be approximately the same?
>
> A Yes, sir, they would be approximately the same.
>
> Q If any change were made, Mr. Woodruff, in the condition of a well between two deliverability tests such as a workover, added tubing, cleaning out job, or such as that, would the results of the tests be different?
>
> A You would expect them to be.
>
> Q Is the method that is outlined as to how to take the deliverability test as in that directive, is that clear to you?
>
> A Yes, sir, it is.
>
> Q Is it clear to the El Paso Natural Gas Company?
>
> A Yes, sir, it is."

At R. Vol. II, 148, he testified:

> "Q All right, Mr. Woodruff, if an operator put his well in the condition that that directive calls for, and it was in that condition prior to a test, would the result of the test be more indicative of the true deliverability of the well than a test on a well where the operator had not complied with that directive?
>
> A I would expect it."

At R. Vol. II, 150, he testified:

> "Q All right, Mr. Woodruff, are those wells you do have personal knowledge of where the operators have complied with the directive, will you tell us where they have complied with the directive and with the rules and regulations

of the Oil Conservation Commission with reference to keeping the wells in condition, whether the deliverability of those wells has increased?

A Normally, those wells have had little or any change because the operators complied with the Commission's directive and rules and regulations during both tests. However, I have found that in instances where there was compliance during one test evidenced and apparent non-compliance during another test that there has been a variation in the deliverability data reflected --

THE COURT: Just a minute, Mr. Woodruff. I don't know if I understand you or not. You say, "apparent non-compliance". Are you assuming that, when you find a variation, that there was no compliance or did you ascertain first that there was no compliance and then discover there was a variation?

THE WITNESS: I studied the data on the well and found there was evidence that conditions existed which would not have existed had the rules and regulations and directives of the Commission been followed.

THE COURT: But you got that information other than from the result of the deliverability test, I take it?

THE WITNESS: Some of the information was from other than some of the data of the deliverability test, yes, sir.

THE COURT: All right."

Starting at Page 153 (R. Vol. II, 153), Mr. Woodruff reported on a well by well study he had made of 63 wells in which fluctuations between the 1958 and 1959 tests were encountered. He explained to the court the engineering or mechanical factors which in his opinion caused the fluctuations.

Mr. Woodruff's testimony made it clear that it was not the prescribed deliverability test or the formula which caused

the fluctuations, but rather the failure of the operator to comply with the directives of the Commission in putting his well in proper condition for testing or changes which the operator himself created due to reworking the well thereby changing the equipment used and/or the characteristics of the reservoir. Outstanding examples of this are shown at R. Vol. II, 154, where Mr. Woodruff described the conditions found with respect to wells coded as Nos. 21, 22, 23 and 26 on Appellants' Exhibit No. 3.

On cross-examination, Mr. Woodruff summarized his position as follows, (R. Vol. II, 170):

> "Q It is your opinion then that tests taken at that interval in accordance with the memorandum of the Commission will result in accurate figures as to the deliverability of the well?
>
> A Yes, sir, I think so."

Generally speaking, the Appellants' witness, Mr. Lyon, on cross-examination agreed with the witness, Woodruff, that a number of factors (R. Vol. II, 128) such as liquids in the well, (R. Vol. II, 124), presence or absence of tubing, (R. Vol. II, 126), water fracing, (R. Vol. II, 127), the installation of blow-down lines, (R. Vol. II, 127), switching from high-pressure lines to low-pressure lines, (R. Vol. II, 127), and removing sand, (R. Vol. II, 129), would affect the deliverability test of a given well. (R. Vol. II, 130-131).

Inasmuch as Mr. Woodruff's testimony was in no way successfully impeached on cross-examination or refuted by other evidence, it remains the only substantial evidence in the record on this point.

It requires no citation of authority to state that Appellants are not entitled to reversal in the face of this substantial evidence sustaining the trial court's decision in favor of Appellees.

The only evidence before the trial court accounting for the variation between the 1958 and 1959 deliverability test was that this was a result of either the failure of the Operator before one test or the other, to place a well in proper condition for the test or the changes created by the Operator in the well and/or reservoir between tests. The testimony was that such variations were the result of changes made by an Operator, such as workover, installation of tubing, or draw-down lines, blow off of liquids or other similar changes in the well or its equipment between the two tests. These were conditions over which the Operator had control. In fact, the rules of the Commission require the operator to place his well in condition for testing, such conditions being in accordance with prudent operation. (R. Vol. II, 148, 169).

Section 65-3-14, supra, of the New Mexico statutes provides that the Commission shall:

> "... afford to the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as such can be practically obtained without waste, substantially in the proportion that the quantity of the recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas or both in the pool..." (Emphasis added)

It is respectfully submitted that this statute contemplates that only that portion of gas which is recoverable under each tract with respect to the total gas recoverable in the pool is to be prorated. If the wells are in such condition that they are incapable of recovering or producing that gas, then this inability to recover the gas will be reflected in the deliverability tests, and if variations and fluctuations appear they would be due to such condition of the wells and not the fault of or attributable to the deliverability tests or the formula.

Witness Keller testified, (R. Vol. II, 211):

"Q Are you the same Mr. Keller who made a study of -- I believe the record in the case reflects 322 wells in the Jalmat Gas Pool and testified concerning your study before the Oil Conservation Commission in this case?

A Yes, sir.

Q Mr. Keller, since the issuance of proration orders under the deliverability formula put into effect by Order 1092-C, have you made studies in respect to migration which occurs under that proration schedule as compared to migration that occurred under the prior acreage schedule?

A Yes, sir, I have made such type studies.

Q Does your study indicate that greater or less migration would occur under the Jalmat Pool under the deliverability formula as compared to the acreage formula?

A My studies lead me to the conclusion that the migration in the Jalmat Field would be less under the deliverability formula than it would have been under the 100% acreage formula. In other words, the operation of the July 1959 proration schedule would be to retard whatever migration was taking place under the acreage formula in existence prior to the Commission order changing the allocation to the deliverability formula."

No formula prorating gas would be perfect because of its nature and ability to migrate. No one can see the exact conditions under the ground. Ohio Oil Company v. Indiana, 20 S.Ct. 576, 177 U.S. 190. But even if we agree that the deliverability formula is not perfect, it is better than the previous straight-acreage formula because the deliverability formula more nearly protects correlative rights. The testimony of experts in this highly technical field was before both the Commission and the trial court. As correlative rights are better protected under the new formula, no one can complain of the Oil Conservation Commission's or trial court's action in upholding such new formula.

Appellants at p. 66 of their Brief-in-Chief cite the case of Anderson-Prichard Oil Corp. v. Corporation Commission, 207 Okla. 686, 252 P.2d 450 to the effect that deliverability is unreliable as a basis for allocation of production. That case merely held that the Oklahoma Commission might validly refuse to adopt deliverability as such a basis in view of evidence showing its unsuitability in a particular field.

Appellees make no claim that deliverability should be made a factor in prorating all pools because it is obvious that in some instances it would be impracticable. This is why there are numerous prorated gas pools in New Mexico where deliverability is not a factor in the proration formula. Deliverability is a proper factor only when it is established that there is a general correlation between the deliverabilities of the gas wells in the pool and the recoverable gas under the tracts dedicated to the wells. Such a correlation was shown in this case and, accordingly, in this particular pool, the Jalmat Gas Pool, deliverability is a proper factor to be considered in allocating production. If the Anderson-Prichard case is at all pertinent to this point, it is so only to the extent that it grants to the administrative body the discretion to determine in each instance the reasonableness of including deliverability as a factor in the allocation of production.

Appellees submit, therefore, that the deliverability test specified by the Commission is fair, reasonable and accurate and affords Appellants and all concerned due process of law.

CONCLUSION

Based upon the reasons and authorities set forth in this Answer Brief, the decision of the trial court in upholding Order No. R-1092-C of the Oil Conservation Commission should be affirmed by this Court.

Respectfully submitted,

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I hereby certify that a copy of this Answer Brief was mailed to opposing counsel of record on December ____, 1960.

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