

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

**APPLICATION OF NEW MEXICO
OIL CONSERVATION DIVISION TO
AMEND 19.15.5 NMAC, STATEWIDE**

**CASE NO. 20895
Order No. R-20985-B**

ORDER OF THE COMMISSION

THIS MATTER came before the New Mexico Oil Conservation Commission (“Commission”) on the Petition for Commission to Hold in Abeyance a Final Order filed on January 13, 2020 by Larry Marker, a noticed party. The Oil Conservation Division filed a response to Mr. Marker’s petition. The remaining parties elected not to respond to this petition.

In his petition, Mr. Marker asserts the following alleged deficiencies of the rulemaking proceedings currently before the Commission:

- a. The Commission was unable to hear and consider the totality of testimony and evidence proposed by the parties because a witness noticed by the Independent Petroleum Association of New Mexico (“IPANM”) was ill and unable to attend the hearing and provide testimony at the hearing.
- b. IPANM intended on presenting this witness to testify regarding IPANM’s suggested changes to the proposed rule specifically related to tables of fines.
- c. The Commission stated that it had questions regarding the tables of fines presented by IPANM, but chose to disregard the lack of evidence and testimony.

Mr. Marker also requests that the Commission hold in abeyance a final order pending final disposition of pending court cases in both the District Court and Court of Appeals. In support of this request, Mr. Marker relies heavily on Article IV, Section 34 of the Constitution of New Mexico and related case law. That provision specifically states that, “[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.” This provision applies to administrative agencies and adjudicative proceedings of those agencies. *Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, ¶ 7, 111 N.M. 536, 539, 807 P.2d 234, 237. Mr. Marker asserts that the Commission is bound by law to postpone the enactment of any regulations until final disposition of pending cases to which he is a party.

Because Mr. Marker will have further opportunity to raise any potential issues with the process or the proposed rule in a motion for rehearing to the Commission and a subsequent appeal to the Court of appeals pursuant to NMSA 1978, Sections 70-2-25 and 70-2-12.2, it is unclear whether this petition is appropriate during these rulemaking proceedings. Commission rules

related to rulemaking only contemplate pre-hearing statements from the parties. However, the Chair has reviewed the pleadings pursuant to procedural rule 19.15.4.15(C) NMAC and will rule on the petition pursuant to the same authority. Having reviewed and considered this petition and the response from the Division, the Chair finds that:

1. Mr. Marker is correct that IPANM was unable to present a witness allegedly due to the fact that an illness prohibited the witness from attending. However, at no time either prior to or during the hearing did IPANM request that the hearing be continued or that the record remain open in order for IPANM to present this witness. Mr. Marker is not in a position to assert that the hearing was flawed because another party decided not to present a witness at a hearing. If Mr. Marker wished to present testimony regarding the fine tables referenced in his petition, he was able to do so without limitation.
2. The Commission has the option to keep the record open for written submittals, but does not require that they do so. NMAC 19.15.3.12(A)(2)(g). The Commission may also continue a hearing to a subsequent date if it is not completed on the date it commences. NMAC 19.15.3.12(A)(2)(h). Finally, the Commission may reopen the hearing record, if, during deliberation, they determine that additional testimony or documentary evidence is necessary. NMAC 19.15.3.13(B). Each of these decisions are left to the discretion of the Commission.
3. At no time was there a request to keep the record open or continue the hearing in order for IPANM's witness to provide a written statement or testimony to the Commission. Additionally, the Commission, during deliberations, were permitted to reopen the record in order to obtain additional testimony or documentary evidence. At no time during deliberations did the Commission indicate that this was necessary. Since deliberations regarding this rule will continue at the meeting scheduled for January 16, 2020, the Commission will still have the option of reopening the record should they choose to do so.
4. The hearing and subsequent deliberations were held consistent with Commission rulemaking regulations as well as the Oil and Gas Act and the State Rules Act. Appropriate due process has been afforded to all parties and to the public during this process.
5. With regard to the abeyance request, Mr. Marker previously made a similar request of the Commission by filing a motion to continue the rulemaking hearing until such date as his pending cases concluded. The Chair denied this request as the enabling statute, NMSA 1978, Section 70-2-31, had become effective and authorized the Commission to promulgate rules in accordance with that statute. Furthermore, to date, no court has ordered a stay impacting the effective date of this statute or the Commission's authority to promulgate rules pursuant to it. As the Division points out, it is unlikely that Mr. Marker would be granted a stay as "a court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation. *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 47, 243 P.3d 746, 752.

6. Additionally, Mr. Marker's reliance on Article IV, Section 34 of the New Mexico Constitution is misplaced. Although this constitutional provision applies to administrative agencies, it does not prohibit the actions taken by the Commission in this rulemaking. *See Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, ¶ 7, 111 N.M. 536, 539, 807 P.2d 234, 237 (stating only that the application of a rule was improper because the rule was not yet in effect when the adjudicative proceeding began). Aside from the fact that the proposed rule does not impact the pending legislation in any way, it is also prospective in nature and can only be applied to Mr. Marker and other operators for violations that occur after the effective date. *See Carillo v. My Way Holdings, LLC*, 2017-NMCA-024, ¶ 11, 389 P.3d 1087, 1092 ("Article IV, Section 34 goes hand in hand with the rule that "statutes are presumed to operate prospectively only and will not be given a retroactive effect unless such intention on the part of the Legislature is clearly apparent."")

7. Mr. Marker is a party to pending matters related to the enabling statute of the proposed rule as well as rules promulgated pursuant to NMSA 1978, Section 70-2-14 related to financial assurances required under the act. However, the proposed rule will not have an effect on the rights or remedies of the parties in these matters. Mr. Marker may still obtain the remedy that he seeks in both of those cases and the rule itself will not impact his rights or ability to pursue those remedies. Should Mr. Marker prevail in those matters, it may have a significant impact on the implementation of an adopted rule. However, the converse is not true, the adoption of the proposed rule will not have an impact on Mr. Marker's pending cases.

For the foregoing reasons, the Chair finds that the Petition is not well taken and is hereby DENIED.

IT IS SO ORDERED.

DONE at Santa Fe, New Mexico, on this 15th day of January 2020.

SEAL



**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

ADRIENNE SANDOVAL, M.E., CHAIR