

BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF CHANGES TO THE RULES) CAUSE NO. 1R
OF PRACTICE AND PROCEDURE OF THE OIL)
& GAS CONSERVATION COMMISSION OF THE) DOCKET NO. **1211-RM-04**
STATE OF COLORADO)

**HEARING OFFICER RECOMMENDATION TO COMMISSION
ON COGA AND CPA MOTIONS TO STRIKE EXHIBITS AND MOTIONS *IN LIMINE*
TO EXCLUDE EVIDENCE OF COLORADO ENVIRONMENTAL COALITION ET AL.
AND WESTERN COLORADO CONGRESS ET AL.**

BACKGROUND

On January 3, 2013, the Colorado Oil and Gas Association (COGA) and the Colorado Petroleum Association (CPA) filed motions to strike exhibits and motions *in limine* to exclude evidence submitted by the Colorado Environmental Coalition et al. and Western Colorado Congress et al. Motions to join in COGA's and CPA's motions were filed by Bill Barrett Corp., APC, Noble, PDC, Encana, the Colorado Cattlemen's Assn., the Colorado Farm Bureau and the Colorado Assn. of Homebuilders. Opposition to the motions of COGA and CPA were filed by Colorado Conservation, Earthworks Oil and Gas Accountability Project, High Country Citizens Alliance, Natural Resources Defense Council and San Juan Citizens Alliance (collectively, the Conservation Group) and Western Colorado Congress, Grand Valley Citizens Alliance, and NFRIA-WSERC Conservation Center (collectively, the Community Group).

COGA and CPA contend that virtually all of the written testimony and exhibits submitted in this rulemaking by the Conservation and Community Groups should be stricken from the record and the vast majority of their witnesses be barred from testifying at the hearing. COGA and CPA believe that under the Colorado Rules of Evidence (CRE) and the Oil and Gas Conservation Commission Rules of Practice and Procedure, none of the evidence they seek to strike or exclude is admissible at hearing and must be expunged from the rulemaking record.

ADMINISTRATIVE PROCEDURE

In administrative proceedings, the rules of evidence are relaxed regardless of whether the proceeding is adjudicatory or quasi-legislative. For example, under the Colorado Administrative Procedures Act (APA), C.R.S. section 24-4-105(7), which applies to agency adjudications, the "rules of evidence" are required to "conform" to the CRE only "to the extent practicable." Commission Rule 519.b.(1) mirrors this concept by stating that the rules of evidence apply unless "the ends of justice will be better served" by relaxing such rules. In addition, "the Commission may receive and consider evidence not admissible under the rules of evidence" to "ascertain facts affecting substantial rights of the parties" where such evidence has probative value to the

reasonable and prudent person. Commission Rule 519.b.(2). Any informality in an agency proceeding “will not invalidate any Commission order, decision, rule or regulation. Commission Rule 519.b.(3).

This lack of evidentiary formality in quasi-judicial agency proceedings is even more pronounced when the proceedings are quasi-legislative. Under the rulemaking provisions of the APA, the agency is first directed to “afford interested persons an opportunity to submit written data, views, or arguments.” C.R.S. section 24-4-103(4)(a). The agency further is directed to “consider all such submissions.” *Id.* This provision, rather than erect impediments to agency review of evidentiary submissions, mandates that all such submissions be accepted and considered by the agency.

To ensure that there is no procedural ambiguity, the APA not only identifies which documents the agency must consider, but also identifies which documents must be included in the agency rulemaking record. The APA specifies that, *inter alia*, the record “shall contain” copies of any portion of the “agency’s public rule-making docket” that relate to the rule and “[a]ll written petitions, requests, submissions, and comments received by the agency as of the date of the hearing on the rule” and any other materials the agency considered in adopting the rule. C.R.S. 24-4-103 (8.1)(II);(III).

The Commission rule governing agency rulemakings similarly requires the Commission to “afford any person an opportunity to submit data, views or arguments,” and encourages broad public participation. Commission Rule 529.f.; g. Under this rule, the Commission has full authority to ensure its hearings proceed in an orderly manner, including imposition of time limits on testimony and public comment as well as prohibiting “repetitive, irrelevant, or harassing testimony.” Commission Rule 529.f.

ANALYSIS

COGA and CPA misapprehend the fundamental distinction between an administrative rulemaking proceeding and a civil action. Strict compliance with the CRE in the context of an agency rulemaking is antithetical to the applicable provisions of the APA and the Commission rules. Those provisions focus on procedural flexibility and evidentiary inclusiveness. COGA and CPA argue that a CRE catchall provision for “special statutory proceedings,” mandates compliance with the CRE in this rulemaking. See CRE 1101(e). That CRE provision, however, applies only when “matters of evidence are not provided for in the statutes which govern the procedures” at issue. *Id.* Under the APA and Commission rules relating to rulemaking proceedings, evidentiary matters are addressed to the extent necessary to conduct agency business in a less formalistic environment. Thus, CRE 1101(e) is inapplicable to this proceeding.

This rulemaking was initiated in an effort to address some of the nuisance impacts associated with existing setbacks for oil and gas operations that are affecting the public’s welfare and quality of life. See Amended Notice of Rulemaking. Much of the testimonial evidence submitted by citizens was not proffered as expert testimony but rather as personal statements about the impact (whether real or perceived) that oil and

gas development is having on their lives. Such testimony is relevant and has probative value to the reasonable and prudent Commissioner striving to understand and address these impacts in the context of this rulemaking hearing.

Similarly, submissions proffered by attorneys or other party representatives or members who lack the credentials to qualify them as scientific, medical, public health or other experts, still retain probative value by providing the Commission with insight into the bases of dissatisfaction with the existing setback rules and proposals for improvement. The Commission, using a common sense approach to evaluate this evidence, is fully capable of assessing the credentials and credibility of each witness and affording the testimony the weight it is due. The Commission can perform the same analysis as to the exhibits to determine the appropriate weight they should be afforded.

RECOMMENDATION

The Hearing Officer therefore recommends that COGA's and CPA's motions to strike or exclude the testimony and exhibits of the Conservation and Community Groups be denied. Specifically, the Hearing Officer recommends that the request by COGA and CPA to strike and exclude certain evidence because it contains improper lay opinion, hearsay, abusive, harassing, irrelevant, or cumulative testimony, or is irrelevant, duplicative, unauthenticated, or incomplete should be denied. Finally, the Hearing Officer recommends that no written qualification be attached to any testimony or exhibits submitted by the Conservation and Community Groups and that such evidence be admitted into the administrative rulemaking record for this matter.

Dated: January 6, 2013.

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By: /s/ Casey Shpall
Casey Shpall, Hearing Officer