

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

IN THE MATTER OF AN AMENDED APPLICATION)
BY 8 NORTH LLC FOR AN ORDER ESTABLISHING)
A 2,720-ACRE DRILLING AND SPACING UNIT FOR) CAUSE NO. 407
SECTIONS 13, 14, 23, AND 24, TOWNSHIP 2 NORTH,)
RANGE 69 WEST, 6TH P.M. AND SECTION) DOCKET NO. 171000695
18 TOWNSHIP 2 NORTH, RANGE 68 WEST, 6TH)
P.M., FOR HORIZONTAL WELL DEVELOPMENT OF) TYPE: SPACING
THE CODELL AND NIOBRARA FORMATIONS,)
WATTENBERG FIELD, BOULDER AND WELD)
COUNTIES, COLORADO)

**BOULDER COUNTY'S REPLY IN SUPPORT OF ITS EXCEPTION TO HEARING
OFFICER ORDER**

The Board of County Commissioners of Boulder County, Colorado ("the County"), by its undersigned counsel, submits this Reply in Support of its Exception to Hearing Officer Order.

I. The Commission should ignore 8 North's attacks on the County.

The County makes a simple request of the Commission—to participate as a party in 8 North's DSU application covering lands where the County owns both surface and mineral interests and has land use jurisdiction. Had the County been allowed to participate in the process as of right from the outset, no additional hearings or exceptions would have been necessary and the matter could have been heard as scheduled on April 30.

8 North responded to the County's Exception by asserting that the County's effort to participate is a delay tactic, that it is confused about how to apply the law or make sound legal arguments, that its desire to participate is based on some motivation other than presenting meaningful or viable objections, that it is trying to "circumvent the rules," that it has "detracted from cooperative and productive communications that . . . should be occurring with engaged citizens," and that it has abused the process. These accusations are not relevant to the underlying legal issue of the County's proper participation in proceedings before the COGCC, and the Commissioners have made it clear that they discourage unnecessarily vitriolic filings. (*See, e.g.* Commissioners' comments during various dockets at the April 30-May 1 meeting).

Accordingly, the County responds below only to those points that have a bearing on the relief requested in the Exception.

II. The County raises legal and procedural issues; no factual determinations are involved.

The Exception asks that the Commission reconsider the County's ability to intervene in this docket on two grounds: (1) the County's legal arguments that the Second Protest was timely

filed as a new protest under the rules or, in the alternative, was timely filed as an amendment to its first protest; and (2) the Hearing Officer's failure to consider and make a reasoned determination on the County's request for leave to file the Second Protest if such leave was necessary. These are legal matters and the Hearing Officer's determination of the one issue and lack of determination of the other was, as 8 North recognizes, a legal conclusion that is not subject to the deference given to hearing officers' factual determinations.

The Order is not a final agency determination, because a timely exception was filed. *Cf. Western Colo. Congress v. Dept. of Health*, 844 P.2d 1264, 1266 (Colo. App. 1992) ("any decision made by a hearing officer . . . is an initial decision, which becomes final only if no exceptions . . . are submitted within the allotted time"). A hearing officer's determination of an "ultimate fact," which in practice is virtually synonymous with a conclusion of law, is not binding on the agency body reviewing that determination. *See Blair v. Lovett*, 582 P.2d 668, 672 (Colo. 1978) (hearing panel's determination whether legal standards had been met was an "ultimate fact" that was not binding on the board with the final authority over the personnel matter); *see also Garcia v. Dept. of Highways*, 713 P.2d 420, 421-22 (Colo. App. 1985) (same). The applicable standard of review for hearing officer determinations of "ultimate facts" is essentially *de novo*—whether the hearing officer's determination was a correct application of statutes and rules to the underlying facts. *See Bennett v. Univ. of Colo. Health Sciences Center*, 851 P.2d 258, 261 (Colo. App. 1993). For all the reasons stated in the Exception, the County requests that the Commission review the Hearing Officer's Order and find that it did not correctly apply and interpret applicable law.¹ The County believes it sufficiently laid out its legal arguments supporting its right to participate in the Exception and looks forward to answering further Commissioner questions at a hearing on the Exception.

III. The issues raised in the Second Protest are relevant and important.

The County raises three types of issues in the Second Protest: (1) the effect of the requested DSU on its surface and mineral ownership; (2) the potential for public health, safety and welfare and other land use impacts from the DSU and the development it proposes; and (3) the existence of a lease dispute affecting 8 North's right to form the requested DSU. With respect to the first two categories, the Second Protest supplements the facts presented in the County's First Protest in this docket, in light of the Hearing Officer's dismissal of that protest as factually inadequate. 8 North has shown no compelling reason why the County should be prevented from raising the first two categories of evidence and arguments where COGCC rules clearly contemplate the participation of local governments "as of right." Rule 509.a. The only issue with the Second Protest is the timeliness question, which is presented for the Commission's *de novo*

¹ 8 North argues that an agency's interpretation of its own rules deserves deference, but the issue before the Commission is whether to adopt its hearing officer's interpretation of its rules and other applicable law as the agency's final determination. No deference is applied to a hearing officer's legal conclusions, or determinations of "ultimate facts," at this stage.

review. Moreover, 8 North has demonstrated no prejudice from allowing participation by the County, including with the Second Protest filed more than three months before the scheduled hearing on the docket.

As to the third issue regarding lease terms, the County acknowledges that the Commission does not interpret or enforce leases. However, the Commission has tabled dockets pending the resolution of such fundamental disputes as recently as April 30, 2018, in the Highlands Natural Resources Corporation and Renegade Oil & Gas Company, LLC, combined matters. There, the parties disagreed whether a pooling order applicant had the right to request the order under a disputed contract, and the Commission determined that the contract issue should be resolved separately, before the pooling application was heard. This was a prudent approach to preserve staff and Commissioners' time and resources, but was only possible because the Commission was aware of such a contractual dispute.

Here, the lease terms raised in the Second Protest prohibit 8 North from forming the DSU it seeks in this docket. The County contacted 8 North to determine its position on the lease issues on April 12, 2018, more than a week after the Second Protest first brought the issue to light. As of the filing of this Reply, over a month later, the County has received no substantive reply, demonstrating 8 North's disinterest in discussing or resolving the lease issue.² Therefore, the County must presume the parties dispute 8 North's ability to form the DSU it requests and, given 8 North's silence, the County may seek redress on the issue in court. Because the lease dispute goes to the fundamental right of 8 North to seek the relief it requests from the Commission, the Commission should be aware of the dispute and have the opportunity to table its consideration of this docket or deny the application until the lease question has been resolved.

IV. The relief requested is simple.

For clarity, the Commission does not have authority to deny the Exception itself as 8 North seems to argue. Under Sections 24-4-105(14)(a)(II) and (15), C.R.S., an exception need only be timely filed for this Commission to review the Hearing Officer's Order. The issue before the Commission is simply whether to adopt the Order as a final agency determination on the County's Second Protest or whether to reach a different conclusion.

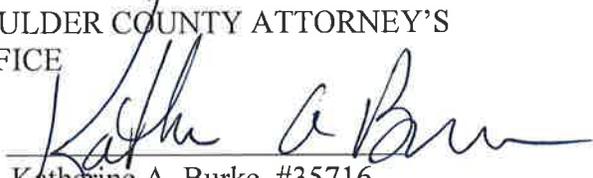
² Moreover, 8 North attempts to use the lease issue as both a sword and a shield, arguing that the County should not be given leave to file the Second Protest because it should have known of the lease issue when it filed its first protest where the "leases have been existence for some time," but also because 8 North would be prejudiced because it was not aware of the lease issue until the County raised it. As the mineral lessee seeking the DSU, 8 North is charged with at least as much constructive notice of the lease issue as the County, and can properly be charged with much more.

For all the reasons stated in the Exception and in this Reply, the County requests that the Commission reverse the Hearing Officer's Order and accept the Second Protest as properly filed, either as of its initial filing or by leave of the Commission per Rule 506(c).

Dated this 17th day of May, 2018.

Respectfully submitted,

BOULDER COUNTY ATTORNEY'S
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**ATTORNEYS FOR PROTESTOR
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **BOULDER COUNTY'S REPLY IN SUPPORT OF ITS EXCEPTION TO HEARING OFFICER ORDER** has been mailed or served electronically this 17th day of May, 2018, to the following entities that require notice of such filing and an original and two copies have been sent or filed with the COGCC:

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