

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2, THE COPPER MINE RULE,

No. WQCC 12-01(R)

New Mexico Environment Department,
Petitioner.

**ATTORNEY GENERAL'S RESPONSE TO FMI'S MOTION TO WITHDRAW
TESTIMONY AND FILE SUBSTITUTE TESTIMONY**

Freeport-McMoRan, Inc. ("FMI") filed its Notice of Intent to Present Technical Testimony on February 22, 2013 in accordance with the Procedural Order in this matter. Included in that notice was the direct testimony of John Brack, President of Freeport-McMoRan Chino Mines Company and Freeport-McMoRan Cobre Mining Company, and Vice-President of Freeport-McMoRan Tyrone Inc. On March 15, 2013, FMI filed a Motion for Leave to Withdraw Testimony and Re-file Substitute Condensed Testimony for Mr. Brack. On March 22, 2013, FMI filed Written Testimony of John D. Brack. The Attorney General objects to the late filing of Mr. Brack's direct testimony on the following grounds:

1. The Procedural Order required the full direct technical testimony of all parties be filed by February 22, 2013, and that rebuttal testimony be filed by March 15, 2013. Procedural Order, §§ 301, 302.

2. Although FMI states that no new information is presented in Mr. Brack's March 22 Written Testimony, FMI's late filing is prejudicial because the parties must nonetheless review and prepare their case based on the new filing, that is over 20 pages and includes eight exhibits. The hearing is only two weeks away, and the Attorney General has no additional time between now and the hearing to spend reviewing and preparing for late-filed direct testimony.

3. Moreover, the parties cannot now file rebuttal testimony to the newly filed direct testimony, as allowed for all other direct testimony, and are prejudiced in that manner. And, even if permitted, the Attorney General does not have sufficient time to prepare rebuttal at this point in time.

4. While the Attorney General is prejudiced by the late filing, FMI has not shown good cause for filing so late. Mr. Brack is a top executive for the three FMI mines in New Mexico. Presumably, the filing of his direct testimony in this matter was a priority for him and his companies, and presumably FMI counsel had direct access to him. FMI gave as its reason for filing late that the original testimony was not sufficiently “vetted or referenced,” and that the testimony is “inconsistent with the professional standards” of the company and Mr. Brack. FMI Mot. for Leave to Withdraw Testimony, p. 1. That the testimony is not up to par -- after having adequate notice of the due date and abundant resources to prepare -- is not good cause for filing so late.

5. Furthermore, the original testimony was signed by Mr. Brack, and filed with a pleading signed by FMI counsel. The original testimony was vetted. FMI had full opportunity to figure out if the testimony met its standards or not *before* filing. If the original testimony were not to FMI’s liking, the testimony should not have been filed in the first instance or, minimally, it should have been filed as soon as possible after direct testimony was due. The Attorney General likely would not have objected to a late filing had the testimony been filed close in time to when direct testimony was due.

6. Finally, FMI gives no good reason, after notifying the parties on March 15 that the testimony would be withdrawn, for taking an additional week to file substitute testimony.

FMI does not explain its leisurely pace for substituting testimony that only condenses the original testimony and does not add new information.

7. FMI's filing is one month after direct testimony was required to be filed and even one week after rebuttal testimony was required to be filed.

8. The Procedural Order, § 302.C, states that the "Hearing Officer *shall* enforce Section 302.A [the deadline for filing direct testimony] through exclusion of technical testimony or exhibits, as applicable." (Emphasis added.)

9. According to the Guidelines for *Water Quality Control Commission Regulation Hearings*, the Hearing Officer has authority for the fair and impartial consideration of issues arising in proceedings. *Guidelines*, § 104.B.

10. The Procedural Order and fundamental fairness require that FMI's motion be denied.

For the foregoing reasons, the Attorney General respectfully requests denial of FMI's substitution of Mr. Brack's late-filed testimony.

Respectfully submitted,

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Certificate of Service

I certify that the following were served with the foregoing pleading by email on March 25, 2013:

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