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

IN THE MATTER OF THE PROMULGATION AND ESTABLISHMENT OF FIELD RULES TO GOVERN OPERATIONS IN THE MAMM CREEK FIELD, GARFIELD COUNTY, COLORADO	CAUSE NO. 191 DOCKET NO: 1010-SP-37

ANTERO'S CONSOLIDATED MOTIONS IN LIMINE

I. INTRODUCTION

1. On November 12, 2010 the Board of County Commissioners of Garfield County filed a motion for intervention as a matter of right in this application pursuant to Rule 509(a).(2)B. based on issues related to public health, safety, welfare and the environment.

2. At the prehearing conference of November 23, 2010, the parties agreed to bifurcate the hearing; Phase 1 to deal with the technical spacing issues and Phase 2 devoted to the public health, safety, welfare and the environment issues.

3. The Pre-Hearing Conference Report ("Report"), dated November 26, 2010, at page 2 states, "that Garfield County: . . . would be at liberty to present *technical testimony* on environmental, health, safety and welfare matters, consistent with the purposes of its intervention in part two of the hearing." (emphasis added). The Report further allowed Garfield County to supplement its pleading by December 3, 2010. *Id.*

4. On December 3, 2010, Garfield County filed its Amended Motion for Intervention. Listed therein are 22 "Citizen" witnesses each of whom may be called to "present his [or her] opinion concerning impacts of greatly increased natural gas drilling in the close proximity to his [or her] residence." Amended Motion, pp. 5 – 9, ¶¶ 13-34. The Amended Motion also lists as a witness, "Unknown technical experts," at p. 9, ¶ 35.

5. A second prehearing conference was held on December 15, 2010. In the Commission's Second Prehearing Conference Report and Order ("Second Report"), dated December 20, 2010, Director Neslin notes that nine of the "Citizen" witnesses listed in the County's Amended Motion "previously commented on Antero's Application at the October hearing." Second Report, page 3.

6. Director Neslin framed the issue in Phase 2 of the hearing as "whether Antero's Application will result in adverse impacts to the public health, safety, welfare and the environment that cannot be adequately prevented or mitigated through application of Commission Rules coupled with site-specific conditions of approval imposed during the location approval and well permitting process as necessary and appropriate." Second Report, page 4.

7. In presenting evidence at the hearing on this Application, Director Neslin called the parties attention to Rules 510, 519 and 528, along with C.R.S. § 24-4-105(7). Director Neslin further specifically admonished the parties that, "[w]itnesses providing opinion testimony will be required to be qualified to render such opinions." Second Report, page 5.

8. Garfield County filed its Intervenor's Expert Witness List, Lay Witness List, and Request for COGCC Rule 519.c. Administrative Notice on January 4, 2011.

9. Antero submits the following Motions in Limine for the Commission's consideration:

A. Motion in Limine to Preclude Expert Testimony Pursuant to C.R.E. 702 & 703.
B. Motion in Limine to Preclude Lay Witness Testimony Pursuant to C.R.E. 401 & Rule 528.f.
C. Motion in Limine to Exclude 519.c. Administrative Notice Documents Pursuant to C.R.E. 402 & 404.

II. ARGUMENT

A. Motion in Limine to Preclude Expert Testimony of Garfield County Pursuant to C.R.E. 702 & 703:

1. *General Rule on Exclusion of Expert Testimony*:

The Administrative Procedure Act requires that the "rules of evidence . . . shall conform . . . with those in civil nonjury cases in district court. C.R.S. 24-4-105(7). In Colorado, a Judge has broad discretion in the determination of the admissibility or exclusion of expert testimony pursuant to Colorado Rules of Evidence ("C.R.E.") 702 and 403. *People v. Shreck*, 22 P.3d 68 (Colo. 2001)(en banc). A Court's exercise of its discretion in making this determination will not be overturned on appeal unless "manifestly erroneous." *Masters v. People*, 58 P.3d 979, 988 (Colo. 2002)(en banc).

The Colorado Rules of Evidence govern the admissibility of proposed expert opinion testimony at trial. The facts or data on which the expert bases his opinion are governed by C.R.E. 703. C.R.E. 703 sets forth the type of facts and data upon which an expert may reasonably rely in formulating his opinion.

The Colorado Supreme Court in *Shreck* announced a four part test for a tribunal to utilize in conducting its inquiry as to the relevance and reliability of an expert's proffered testimony. That four part test is:

> (1) the reliability of the scientific principles,
> (2) the qualifications of the witness, and
> (3) the usefulness of the testimony to the jury.
> (4)"A trial court should apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice.

Masters, 58 P.3d at 988; *Shreck*, 22 P.3d at 77, 79.

The Colorado courts also permits the trial court to make a broad inquiry to consider all of the facts in the particular case. Thus, trial court are no longer required to consider a specific set of factors in every case, as all cases are different. *Id.* at 989.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." C.R.E. 401. Relevancy is the threshold standard which all tendered evidence must meet. "Evidence that is not relevant is not admissible." C.R.E. 402; *see People v. Lowe*, 660 P.2d 1261, 1264 (Colo. 1983). Rulings on the relevancy of evidence are within the sound discretion of the hearing officer and will not be overturned on appeal absent an abuse of discretion. *K.N. Energy, Inc. v. Great Western Sugar Co.*, 698 P.2d 769, 784 (Colo. 1985)(expert opinion based on facts contrary to the evidence should be excluded).

2. *Garfield County Proffered Expert Witness Testimony (Exhibit A) to be Precluded*:

a. Judy Jordan

Antero asks the Commission to preclude the majority of Judy Jordan's proffered expert testimony, as further discussed below. Antero does not ask that her testimony concerning the "geology of the Divide Creek Anticline" be excluded.

Ms. Jordan has been listed to testify that "future contamination may occur in the Silt Mesa/Peach Valley area" as a result of Antero's drilling of one or more gas wells as set forth in Antero's Application. This is nothing more than speculation and is incapable of being supported by any concrete factual evidence. The usefulness of this testimony to the Commission is non-existent. Because this proffered testimony is speculative, it has no probative value and is, therefore, prejudicial to Antero. This testimony should be excluded pursuant to *Shreck*, *supra*, and C.R.E. 403.

Ms. Jordan has also been listed to testify about "contamination from oil and gas activity in west Divide Creek, the Schwartz well, the Arbaney well and other contamination sites in Garfield County; . . ." This proffered evidence is not related to Antero nor is it relevant to Antero's Application and should be excluded. C.R.E. 402.

In addition, pursuant to C.R.E. 404(b), "other acts" evidence is not admissible to prove character of a person (or company) in order to show that he (it) acted in conformity therewith, but may be used for other limited purposes. Ms. Jordan's proffered evidence is not even related to any acts or omissions of Antero concerning this Application, so it may not be admitted pursuant to C.R.E. 404(b) or its limited exceptions. As such, this testimony must be excluded pursuant to C.R.E. 402 because it is not relevant, or in the alternative pursuant to C.R.E 403 as having limited and minimal probative value outweighed by the prejudicial effect on Antero..

b. Roxanna Zulauf Witter, M.D.

Garfield County lists Dr. Witter to testify concerning the "research and drafting of the Health Impact Assessment and may testify regarding her findings. The HIA will be provided. Dr. Witter's resume will be produced as soon as it is available." Antero asks the Commission to preclude the entirety of Roxanna Zulauf Witter, M.D.'s proffered expert testimony pursuant to *Shreck*, *supra,* and C.R.E. 403.

First, Dr. Witter's resume has not been produced. This is an improper expert witness designation, which should preclude the proffered testimony. C.R.C.P. 26(b)(2).

Second, the reliability of the scientific principles utilized in the Draft HIA is in question. The "Health Consultation – Public Health Implications of Ambient Air Exposures as Measured in Rural and Urban Oil & Gas Development Areas – an Analysis of 2008 Sampling Data," prepared by the Colorado Department of Public Health and Environment ("CDPHE"), August 26, 2010, of which the Hearing Officer may take administrative notice pursuant to Rule 519.f., concludes, p.3, **"It cannot currently be determined if breathing ambient air in Garfield County could harm people's health."** (bold in original). Any HIA to the contrary calls into question the reliability of the scientific principles involved, the usefulness of the testimony to the Hearing Officer, its lack of probative value, and its unfair prejudicial effect to Antero's Application. *See Shreck, supra.*

Moreover, the CDPHE has commented with respect to the HIA "that while the draft HIA provides reasonable broad conclusions and recommendations, enhancements to certain sections should be made **before such a document is used to inform decisions involving oil and gas development and its impacts on public health. CDPHE also questions whether an HIA represents an appropriate tool for informing a permit decision involving a single permit applicant**, or whether it is ultimately best used to inform potential changes to air quality, water quality and waste disposal regulations ...." CDPHE letter, dated November 15, 2010, to Jim Rada, Garfield County Environmental Health Manager (Exhibit D, emphasis added). In its letter, CDPHE goes on to list 64 specific issues with the draft HIA.

The expert testimony of Dr. Zulauf's should be excluded, as well as the Health Impact Assessment, pursuant to C.R.E. 402 & 403 and *Shreck*, *supra.*

c. Elizabeth Chandler, D.V.M.

Dr. Chandler is listed as an expert witness to testify to the animal "health conditions she has treated in the area of the proposed drilling, including birth defects and other medical conditions." Antero asks that the Commission exclude the entirety of this proffered expert testimony pursuant to C.R.E. 402 & 403 and *Shreck*, *supra*.

The birth defects and medical conditions of animals in the area of Antero's "proposed drilling" is irrelevant to these proceedings. C.R.E. 401 & 402. In addition, there is no reliability to the scientific principles Dr. Chandler may claim as a link between oil and gas wells and animal birth defects or any other medical conditions. Dr. Chandler is not a forensic scientist who has conducted an epidemiological study purported correlation between oil and gas wells and animal medical conditions, and is not qualified to testify to such matters. Any such testimony is mere speculation and is neither relevant nor probative to Antero's Application. The prejudicial effect of this proffered testimony and its propensity to confuse the issues requires the exclusion of this testimony from Antero's Phase 2 hearing. C.R.E. 403.

The entirety of Dr. Chandler's testimony should be excluded pursuant to C.R.E. 402 & 403 and *Shreck, supra*.

d. Joseph Wezensky, M.D.

Dr. Wezensky is listed as an expert witness to testify to the treatment of a "minor child who resides in the area of the proposed drilling for several medical conditions." Antero asks the Commission to exclude the entirety of this proffered expert testimony pursuant to C.R.E. 402 & 403 and *Shreck*, *supra*.

The medical condition of a minor child living in the area of Antero's "proposed drilling" is irrelevant to these proceedings. C.R.E. 401 & 402. In addition, there is no reliability to the scientific principles Dr. Wezensky, an alternative medicine practitioner, may claim as a link between oil and gas wells and this child's medical conditions. He is not a forensic scientist who has conducted an epidemiological study of any correlation between oil and gas wells and human medical conditions and is not qualified to testify to such matters. Any such testimony is mere speculation and is neither relevant nor probative to Antero's Application. The prejudicial effect of this proffered testimony and its propensity to confuse the issues requires the exclusion of this testimony from Antero's Phase 2 hearing. C.R.E. 403.

The entirety of Dr. Wezensky's testimony should be excluded pursuant to C.R.E. 402 & 403 and *Shreck, supra.*

e. Lindsay George, P.E. and Rob Hykys

The proffered expert testimony from Ms. George and Mr. Hykys is cumulative of the testimony proffered by Garfield County's witness Geoffrey Thyne, PhD., P.G., and would cause unnecessary delay in these proceedings. Thus, both witnesses' should be excluded pursuant to C.R.E. 403 and Rule 528.f.

Antero will stipulate to the admissibility of the map Ms. George has created as well as Mr. Hykys' map.

Accordingly, Antero requests that Garfield County's proffered expert testimony of Ms. Jordan, in part, and the entirety of the expert witness testimony of Dr. Witter, Elizabeth Chandler, D.V.M., Dr. Wezensky, Lindsay George, P.E. and Rob Hykys be excluded in Phase 2 of the Antero Application hearing.

B. Motion in Limine to Preclude Testimony of Garfield County's Lay Witnesses:

Garfield County lists former commissioner Tresi Haupt, three county employees and eight citizen witnesses it may call to proffer lay opinion testimony on a technical issue involving environmental, health, safety and welfare matters. See Intervenor's Lay Witness List, (Exhibit B). Pursuant to Rule 528.f. and the Colorado Rules of Evidence, these lay witnesses, aside from Ms. Haupt, should be excluded from testifying at the hearing in Phase 2.

First, the three county employees, Lou Vallario, Marvin Stephens and Randy Withee are being proffered to provide testimony regarding traffic corridors and road impacts. The COGCC does not have jurisdiction over county roads; its jurisdiction extends only to leasehold access roads. If Garfield County has road issues that it wishes to discuss with Antero, it must do so outside the context of this spacing and well density application, including, but not limited to rig move permits, or an application for local impact assistance (severance tax) funds. The testimony of these individuals is not relevant to this Commission proceeding and should be excluded. To the extent that Ms. Haupt's testimony is directed towards these same road and traffic issues, it should also be excluded.

Further, Garfield County agreed to the bifurcation of this proceeding and further agreed to present "technical testimony on environmental, health, safety and welfare matters, . . ." in Phase 2 of the Application hearing. Report, p.2. The proffered testimony of eight citizen witnesses is not described in Garfield County's Lay Witness List as "technical testimony," nor directed at Antero's specific application. For example, the testimony of Ms. Robinson is described as addressing oil

and gas impacts "on the general public." None of the proffered citizen witnesses, aside from Ms. Strudley (who is 2000' from the existing well), even resides in, or in close proximity to, the application area (see Exhibit E). Thus, this proffered lay opinion testimony is not relevant to the technical factual issue before the COGCC, ¶ I.6. *supra*, and should be excluded pursuant to C.R.E. 402.

Moreover, as Director Neslin notes, many Garfield County witnesses have already provided public comment on the application at the October 2010 hearing. Second Report, p.3. Ms. Fender, Ms. Lloyd and Ms. Pickard have already provided written Rule 510 statements in this matter. Any further testimony from these eight lay witnesses on the same subject is cumulative and would cause undue delay in the hearing. Instead, they should be directed to submit or make Rule 510 statements.

The APA "assures that administrative proceedings are conducted in accordance with due process and will be expedited in the interest of the parties so that no party will be substantially prejudiced thereby." *Weiss v. Dept. of Public Safety, Colorado State Patrol*, 847 P.2d 197, 199 (Colo.App. 1992). Thus, the cumulative and repetitive testimony of these eight lay witnesses should be excluded from the hearing. Rule 528.f.; C.R.E. 403.

The hearing officer in adjudicatory proceedings is governed by the Administrative Procedure Act ("APA"). C.R.S. 24-4-105. The APA requires that the "rules of evidence . . . shall conform . . . with those in civil nonjury cases in district court. C.R.S. 24-4-105(7); *Weiss*, 847 P.2d at 199. Lay opinion testimony is permitted and limited pursuant to C.R.E. 701 to

> . . . those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witnesses' testimony of the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The opinions proffered by these citizen witnesses consists of anecdote, speculation and opposition to drilling "in my backyard" and would not be helpful to a clear understanding of the technical facts at issue. Moreover, nine lay witnesses have already provided substantially similar testimony at the October 2010 hearing pursuant to Rule 510. There would be no benefit to the due process rights of the parties to hear this lay testimony again from eight lay witnesses listed in Garfield County's Lay Witness List, pp. 2 – 4 (Leslie Robinson to Nikki Fender).

Accordingly, Garfield County's lay witnesses should be limited or precluded from testifying as noted above.

C. <u>Motion in Limine to Exclude Garfield County's Rule 519.c. Administrative Notice Documentation Pursuant to C.R.E. 402, 403 & 404:</u>

Garfield County asks this Commission to take administrative notice pursuant to Rule 519.f. of two types of documents; (1) COGCC files related to five (5) contamination incidents in Garfield County, none of which are related to Antero; and (2) "All Notices of Alleged Violations, NOAVs, issued by the COGCC to Antero Resources for activity occurring in Garfield County." Both categories of documentation should be excluded from admissibility at Antero's Application hearing pursuant to C.R.E. 401, 402, 403, and/or 404.

(1) *COGCC Files Related to Five Contamination Sites in Garfield County* :

These five COGCC files related to contamination sites in Garfield County have nothing to do with Antero's application. These five "contaminated" sites do not have any relationship to the determination of Antero's Application, nor does the existence of these five contaminated sites make it any more or less probable that Antero's Application site will become contaminated. As these five files are not related to Antero, Antero's circumstances, or Antero's Application, they are not relevant to this Application and should not be admitted into evidence at the Phase 2 hearing. C.R.E. 402. The Commission should not take judicial notice of their existence in the Antero Application hearing.

If the Commission determines that these five files are relevant pursuant to C.R.E. 401, they should, none-the-less, be excluded pursuant to C.R.E. 403, as the minimal probative value of the five files is far outweighed by the prejudicial effect each will have in the determination of Antero's Application. *People v. Carlson*, 712 P.2d 1018, 1021 (Colo. 1986).

(2) *Antero's Prior NOAV's in Garfield County*:

Counsel for Garfield County asks the Commission to take administrative notice of all NOAV's issued by the COGCC to Antero in Garfield County pursuant to Rule 519.f. This broad and unfettered request is not limited by either time or reason for the issuance of the NOAV. These documents should be excluded pursuant to C.R.E. 404(b).

C.R.E. 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admitted for other purposes, such as motive, opportunity, . . .

The Colorado courts have permitted the admissibility of such "other acts" evidence only if (1) the evidence relates to a material fact; (2) the evidence has logical relevance in that the evidence adds to the probability that the material fact is true; (3) the logical relevance of the evidence does not depend on an intermediate inference that the litigant has a bad character which would be employed to support a further inference that the litigant acted in conformity with his bad character; and (4) the probative value of the evidence is not substantially outweighed by the evidence's prejudicial impact. *People v. Spoto*, 795 P.2d 1314 (Colo. 1990); *Boettcher & Co. v. Munson*, 854 P.2d 199, 210 (Colo. 1993)(C.R.E. 404(b) *Spoto* test excludes "other act" evidence in civil litigation matters).

Garfield County presumably wants to introduce evidence of NOAV's issued to Antero in Garfield County to show that if the COGCC approves Antero's Application in this case, another NOAV will issue as a result of subsequent oil and gas drilling. Prior issued NOAV's do not relate to any material fact in Antero's Application and do not equate to the alleged likelihood that because Antero was issued a NOAV in the past, an NOAV will be issued if the subject wells are drilled. Inasmuch as this evidence relates entirely to different circumstances and issues, this evidence is being offered by Garfield County solely for its prejudicial effect and not any probative value. As such, it should be excluded from evidence at Antero's hearing. C.R.E. 403

In addition, there is no exception in C.R.E. 404(b) under which this proffered evidence would be admissible. The proffered evidence is not being used to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Thus, the only reason Garfield County is asking the Commission to take administrative notice of Antero's prior NOAV's is for an improper and impermissible purpose. The Commission should not take judicial notice of the existence of Antero's prior NOAV's in Garfield County in the Phase 2 hearing.

Accordingly, the documentary evidence which Garfield County asks the Commission to take administrative notice of pursuant to Rule 519.f. in Phase 2 of the hearing regarding Antero's Application should be excluded from admission into evidence.

III. CONCLUSION

Antero Resources respectfully requests that Garfield County's proffered witnesses be disqualified from testifying in the Phase 2 hearing on the technical issues related to the protection of the public health, safety, welfare and the environment for the reasons set forth herein.

Antero Resources also requests that all of the documentation listed in Garfield County's Rule 519.c. Administrative Notice be excluded from the admission into the record for the reasons set forth herein.

DATED: January 11, 2011.

Respectfully submitted,

BEATTY & WOZNIAK, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of January, 2011, a true and correct copy of the foregoing **ANTERO'S CONSOLIDATED MOTIONS IN LIMINE** was delivered via e-mail and U.S. mail to the following:

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