IN THE NEW MEXICO SUPREME COURT

NEW ENERGY ECONOMY, INC.

Petitioner,

vs. No.: 33,074

HONORABLE JUDGE LINDA M. VANZI,
NEW MEXICO COURT OF APPEALS,

Respondent,

PUBLIC SERVICE COMPANY OF
NEW MEXICO and NEW MEXICO
ENVIRONMENTAL IMPROVEMENT
BOARD,

Real Parties in Interest.

SUPREME COURT OF NEW MEXICO
FILED
JUL 22 2011
Kathleen J. Gibson

EMERGENCY MOTION TO VACATE
COURT OF APPEALS' ORDER OF REMAND

Three days before filing this Emergency Motion, counsel learned that the Public Service Company of New Mexico's ("PNM") and the New Mexico Environmental Improvement Board ("EIB") filed a Joint Motion requesting the Court of Appeals to "temporarily remand" PNM's pending appeal back to the EIB. [**Attachment A.**] In its appeal, PNM challenges a regulation, referred to as "Rule 100," that EIB adopted last December. After taking office on January 1st, Governor Martinez completely replaced the members of the EIB. In their Joint Motion, PNM and the newly-appointed EIB "agree that further proceedings before [EIB] may *resolve* [PNM's] appeal" of Rule 100. [**Attachment A at 1-2, ¶ 1**

(emphasis added).] Counsel also learned three days ago that the Court of Appeals entered an Order of Remand, granting the Joint Motion and providing that "this matter is remanded to the [EIB] *for 180 days*." [**Attachment B** (emphasis added).] Both the Joint Motion and Order of Remand were entered in the Court of Appeals while New Energy Economy's Petition for Emergency Writ of Superintending Control ("Petition for Writ") was pending in this Court.

Currently, the only parties in PNM's appeal of Rule 100 are PNM and EIB. The Respondent ruled that the Court of Appeals has no authority to grant New Energy Economy's motion to intervene in PNM's appeal. Through its Petition for Writ in this Court, New Energy Economy hopes to reverse Respondent's ruling. New Energy Economy seeks to intervene in PNM's appeal because, among other reasons, PNM and the newly-appointed EIB are in collusion to circumvent the normal appeal and review process in order to defeat repeal Rule 100. PNM is subject to Rule 100 and regularly appears before EIB on permit matters.

In response to the Order of Remand, EIB did not re-commence the original administrative proceeding that led to PNM's appeal. Instead, PNM along with several other entities filed a new *Petition for Regulatory Change*, thus initiating an entirely new proceeding to which EIB has assigned an entirely new case number—No. EIB 11-16(R).[1] [**Attachment C**.] In its petition, PNM requests the newly-

[1] The case number assigned to EIB's original Rule 100 proceeding was No. EIB 08-19.

appointed EIB to review the decision of the former EIB to adopt Rule 100 and makes several arguments as to why the new EIB should reverse the decision of the former EIB. PNM raises the same arguments in its docketing statement in the Court of Appeals. Thus, in effect, the Order of Remand delegates the Court of Appeals' power of judicial review to the newly-appointed EIB, which has a private agreement with PNM to "resolve" PNM's appeal. *Id.*

The actions of PNM and EIB, as well as those of the Court of Appeals, further demonstrate why a writ of superintending control is needed in this case. New Energy Economy must be allowed to intervene in PNM's appeal of Rule 100, because the existing parties to the appeal are in collusion to repeal the Rule. There is no advocate of the Rule currently in the appeal; the existing parties are simply looking for the most expedient (if not legal) way to remove Rule 100 from the New Mexico Administrative Code. Accordingly, New Energy Economy requests this Court to reverse Respondent and to allow New Energy Economy to intervene in PNM's appeal. In addition, this Court must vacate the Court of Appeals' Order of Remand to protect its own jurisdiction, to uphold the Separation of Powers Doctrine, and to return some basic integrity and predictability to both the rulemaking and the appeals process.

BACKGROUND

1. EIB adopted Rule 100 on December 6, 2010, after a two-year rulemaking process, which included over two hundred hours of scientific, economic, and public testimony.

2. On January 1, 2011, immediately upon taking office, Governor Martinez summarily removed all of the EIB members who had been appointed by Governor Richardson. Evidence already in the record shows that Governor Martinez is a climate change skeptic, campaigned against greenhouse gas regulation, and opposes Rule 100. [Petition for Writ Exhibit D, 6-10 and Exhibit E, 5-6.] The Governor even attempted to stop the Rule from being published in the state register. **New Energy Economy v. Martinez *et al.***, 2011 NMSC 6.

3. On or around January 25, 2011, PNM and six other entities regulated by EIB appealed EIB's decision to adopt Rule 100.[2]

4. On February 14, 2011, PNM filed a Motion for Extension of Time in the Court of Appeals. In its motion, PNM stated that "Governor Martinez has indicated that she does not support Part 100 and is actively considering avenues to secure the repeal or otherwise prevent the implementation of that rule and other related rules." *Petition for Writ* Exhibit D at 7.

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[2] PNM and the other entities filed separate appeals that have not been consolidated. *PNM Response in Opposition to Writ* at 3. If New Energy Economy is allowed to intervene, it will request the Court of Appeals to consolidate all pending appeals of Rule 100.

5. On May 5, 2011, in response to PNM's unopposed motion, the Court of Appeals referred PNM and EIB to mediation and stayed the appeal. *Petition for Writ* Exhibit F. The Court of Appeals also granted PNM's motion to extend the time for filing a docketing statement. *Petition for Writ* Exhibit C.

6. On April 20, 2011, New Energy Economy filed a motion to intervene in PNM's appeal. The Respondent summarily denied the motion on May 13th, but did not serve its order on New Energy Economy until May 23rd. On May 24th, the Respondent entered an Amended Order, holding that Court of Appeals has no authority to grant intervention on appeal.

7. On June 17, 2011, the "mediation directed by the Court of Appeals took place ...." [*PNM's Response in Opposition to Petition for Writ* at 5.]

8. On June 20, 2011, New Energy Economy filed its Petition for Writ in this Court. In its Petition for Writ, New Energy Economy requests this Court to reverse Respondent's Amended Order.

9. On June 29, 2011, this Court asserted jurisdiction over the Petition for Writ and ordered responses to be filed by July 11, 2011.

10. On June 30, 2011, Respondent filed an unopposed motion for extension of time to file a response until July 25th, which this Court granted.

11. On July 11, 2011, "the [EIB] ... consider[ed] a proposed settlement that arose out of the Court of Appeals mediation" with PNM and the other

appellants of Rule 100. [July 11, 2011, *EIB Response in Opposition to Petition for Writ* at 14, footnote 5.]

12. On July 13, 2011, pursuant to their settlement agreement, PNM and EIB filed their Joint Motion for a 180-Day Remand to the EIB. [**Attachment A.**] This Joint Motion was not served on New Energy Economy or this Court. Counsel first learned about the Joint Motion and Order of Remand three days prior to filing this Motion.

13. On July 15th, pursuant to their settlement agreement with EIB, PNM and the other appellants of Rule 100 submitted a petition to EIB to repeal Rule 100. [**Attachment C.**] The EIB notes in its Response in Opposition that "should the [EIB] vote to repeal Part 100" in this new proceeding, "then [New Energy Economy] may be adversely affected and have an appeal right." [*EIB Response in Opposition to Petition for Writ* at 14.]

14. On July 19th, while jurisdiction over the Petition for Writ was pending in this Court, the Court of Appeals granted PNM and EIB's Joint Motion and purported to remand PNM's appeal back to EIB. [**Attachment B.**] On remand, EIB did not re-commence the original Rule 100 proceeding. Instead, PNM started an entirely new proceeding by filing a petition to repeal Rule 100. [**Attachment C.**]

15. PNM attached a Statement of Reasons to its petition to repeal Rule 100. [**Attachment D**.] In its Statement of Reasons, PNM makes the same factual, procedural and legal arguments to the newly-appointed EIB that it does in the Court of Appeals.

16. EIB rulemakings are, by statute and rule, conducted like courtroom trials with similar due process requirements. *See* NMSA 1978, 74-1-9; NMSA 1978, § 74-2-6; Part 20.1.1 NMAC (EIB Procedural Rules). EIB may not adopt, repeal or amend a regulation until it conducts a public hearing at which witnesses are sworn and subject to cross examination. *Id.* *Ex parte* communications with EIB members and the hearing officer are strictly forbidden, and EIB members whose "impartiality or fairness may reasonably be questioned" must recuse themselves. § 20.1.1.112 NMAC and § 20.1.1.111 NMAC. At the conclusion of the hearing, the EIB must deliberate and make its decision in an open public meeting, based only on substantial evidence in the record. NMSA 1978, § 10-15-1 (1999) (Open Meetings Act); § 20.1.1.406 NMAC.

17. In deciding whether to adopt a regulation under the Air Quality Control Act, EIB must consider (among other things) the "(1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and (3) technical practicability and economic reasonableness

of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved." NMSA 1978, § 720205(E) (2007).

18. The Court of Appeals has exclusive appellate jurisdiction over direct appeals from EIB rulemakings. On appeal, "the court of appeals shall set aside the regulation only if [EIB's decision is] found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the transcript; or (3) otherwise not in accordance with law." NMSA 1978, § 74-1-9(J); NMSA 1978, § 74-2-9(C).

19. PNM was only one of nearly one hundred parties in the Rule 100 proceeding before EIB. New Energy Economy was the petitioner. Hundreds of members of the public, although not parties, provided comments to EIB regarding Rule 100. Largely because of delays caused by PNM and other opponents of the Rule, the hearing before EIB required two years to complete, from petition to final decision.

ARGUMENT

I. THE COURT OF APPEALS' *ORDER OF REMAND* IS INCONSISTENT WITH THIS COURT'S PENDING JURISDICTION OVER THE PETITION FOR WRIT OF SUPERINTENDING CONTROL.

It is a well-known rule that "the trial court loses jurisdiction of the case upon the filing of the notice of appeal ...." **Kelly Inn No. 102 v. Kapnison**, 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992).

> Once jurisdiction has passed to the appellate court, the trial court has no authority to enter further orders in the case, *nor may the trial court take any other action that would alter the status of the case as it rests before the appellate court.*

5 Am.Jur Appellate Review § 316 (West 2007) (emphasis added). As the Court of Appeals noted in **Murken v. Solv-Ex Corp.**, 2006 NMCA 64, 11, 139 N.M. 625, 136 P.3d 1035, "the policy behind [this] rule is judicial economy -- as a practical matter, it would be inefficient to have two courts working on the same substantive matter at the same time." Pursuant to this same policy, the Court of Appeals cannot take any action in PNM's pending appeal "that would alter the status of the case as it rests before" this Court.

The subject of the proceeding in this Court is the Court of Appeals' Amended Order, which denied New Energy Economy's motion to intervene. Because an "order denying intervention is fundamentally interlocutory," New Energy Economy's Petition for Writ did not completely divest the Court of

Appeals of jurisdiction over PNM's appeal. Murken ¶ 16. However, even though it retained jurisdiction over PNM's appeal, the Court of Appeals could not remand the appeal back to EIB while New Energy Economy's Petition for Writ is pending in this Court.

A true remand divests the appellate court of jurisdiction. *Id.*; **Oliver v. Pulaski County Court**, 13 S.W.3d 156, 160, 340 Ark. 681, 687 (2000) ("remand ends a proceeding before an appellate court, and it has nothing further to do"); *cf.* Black's Law Dictionary (Revised 4th Ed., West 1968) (defining "remand" as "sending the cause back to the same court out of which it came ...").[3] The Court of Appeals could not divest itself of jurisdiction, because this would call into question the Supreme Court's jurisdiction over New Energy Economy's Petition for Writ and thus dramatically change "the status of the case as is rests before" this Court. *See also* 5 Am.Jur Appellate Review § 319 (where order appealed from is interlocutory, lower court can "proceed to hear any matter *not involved in the appeal*") (emphasis added). For the same reasons, the Court of Appeals also could not delegate judicial power to the newly-appointed EIB to reverse the former EIB's decision to adopt Rule 100, although this is exactly what PNM seeks to accomplish "on remand." Therefore, in order to protect its own jurisdiction, this Court must vacate the Court of Appeals' Order on Remand.

[3] A "cause" in this context means a "suit, litigation or action." Black's Law Dictionary (Revised 4th Ed. 1968) (defining "cause").

Furthermore, the sole basis of the Order of Remand was the mediated settlement agreement between "all" the parties to the appeal, *i.e.*, PNM and EIB. However, directly at issue in the instant proceeding is whether "all" the proper parties are indeed before the Court of Appeals. A legitimate "remand by agreement" can only occur if all the proper parties to the appeal are actually present and in agreement. If New Energy Economy is successful in the instant proceeding before this Court, and thus becomes a party to the appeal, it will *not* agree to the remand. The "temporary remand" that PNM and EIB orchestrated is diametrically opposed to New Energy Economy's interests, because it effectively delegates the judicial review function of Court of Appeals to an agency that has colluded with PNM and others to defeat Rule 100.[4] Therefore, the Order of Remand must be vacated, because it is not based on an agreement among all the *proper* parties to the appeal.

II. THE COURT OF APPEALS' *ORDER OF REMAND* UNCONSTITUTIONALLY DELEGATES ITS JUDICIAL REVIEW FUNCTION TO THE NEWLY CONSTITUTED EIB.

"The function of the judiciary is to construe laws and render judgments in the cases that come before it." **State ex rel. N.M. Judicial Stds. Comm'n v. Espinosa**, 2003 NMSC 17, 13, 134 N.M. 59, 73 P.3d 197; *see also* **Maples v. State**, 110 N.M. 34, 39, 791 P.2d 788, 793 (1990) ("The essence of judicial power

[4] Moreover, if it becomes a party, New Energy Economy should be entitled to review the terms of the settlement agreement between PNM and EIB.

is adjudication -- deciding concrete cases or controversies, resolving people's disputes when those disputes make their way into the court system established by Article VI of our Constitution"). The Court of Appeals has the exclusive judicial power, and duty, to exercise direct appellate review of regulations adopted by the EIB. NMSA 1978, § 74-1-9(J); NMSA 1978, § 74-2-9(C). It cannot delegate this judicial power and duty to an executive agency, yet its Order of Remand effectively (and perhaps inadvertently) did exactly that.

The Order of Remand includes no instructions and no reason for remand other than the agreement between PNM and EIB. [**Attachment B**.] In response to the Order of Remand, EIB did not re-commence the original proceeding in which Rule 100 was adopted. Instead, PNM filed a completely new petition, thus commencing a completely new administrative proceeding. [**Attachment C**.] In this new proceeding, PNM asks the EIB to review the factual, procedural, and legal basis underlying Rule 100 and to repeal the Rule. [**Attachment D**; Background # 13.] In its appeal, PNM seeks the same relief from the Court of Appeals.

PNM's petition to repeal Rule 100 clearly seeks "judicial review" by the newly-appointed EIB. In its Statement of Reasons, PNM argues that the "economic costs [of Rule 100] outweigh its environmental benefits"; that the Rule's "adoption did not adhere to the requirements of the Air Quality Control Act; and that [the Rule] is not authorized under either the Environmental Improvement

Act or the Air Quality Act." [Exhibit D at 7-8, ¶ 10.][5] In effect, PNM asks the newly-appointed EIB to sit as an appellate court for the purpose of reviewing the factual, procedural and legal grounds that the former EIB used to support its adoption of Rule 100. This violates the Separation of Powers required by the New Mexico Constitution providing, N.M. Const. Art. III, and also violates the statutes giving the Court of Appeals exclusive appellate jurisdiction over direct appeals from EIB decisions. Therefore, the Court of Appeals' Order of Remand must be vacated, because it unconstitutionally delegated appellate review power to an executive agency.

III. THE COURT OF APPEALS' ORDER OF REMAND CONFLICTS WITH PROPER APPELLATE PROCEDURE AND WILL LEAD TO INEFFICIENT JUDICIAL REVIEW AND ABSURD RESULTS.

An important purpose of the Rules of Civil Procedure, and presumably the Rules of Appellate Procedure, is "to prevent surprise and to get away from the sporting theory of justice." **State ex rel. State Highway Dep't v. Branchau**, 90 N.M. 496, 497, 565 P.2d 1013, 1014 (1977) (internal citations omitted). However, given the timing of PNM's and EIB's Joint Motion and their failure to provide any notice to New Energy Economy or this Court, stealth and "surprise" appear to be

[5] These are the same arguments that PNM unsuccessfully made to EIB in the original Rule 100 proceeding, and EIB is required by law to consider these arguments and determine its own authority. NMSA 1978, § 720205(E) (2007). PNM is simply seeking a "do over" in front a new EIB with which it has colluded to repeal Rule 100 by agreement.

their tactic of choice. However, perhaps because of their rush, the Joint Motion and the Order of Remand make little sense—at least from the perspective that it is generally good policy to have judicial efficiency and regular and predictable judicial procedures.

Normally, an "appeal is a continuation of the litigation started in the" lower tribunal, Slack v. McDaniel, 529 U.S. 473, 481 (U.S. 2000), and a "remand" divests the appellate court of jurisdiction and sends the litigation back to the lower tribunal. Thus, after an actual remand, the Court of Appeals loses jurisdiction and can only obtain jurisdiction again if another notice of appeal is filed. *See* **Russell v. University of New Mexico Hosp.**, 106 N.M. 190, 740 P.2d 1174, 1177 (Ct. App. 1987) (subjected matter jurisdiction vests in Court of Appeals upon the filing of a notice of appeal). The Joint Motion and Order of Remand are at odds with these basic principles.

First, according to PNM and EIB, PNM remains free "at any time to request to have its appeal reinstated ..." without filing a notice of appeal, thus indicated that the Order of Remand was not an actual remand. [**Attachment A** at 2 ¶ 3.] Second, a temporary "180-day remand" makes no sense if, upon remand, the appellate court loses jurisdiction over the cause. The time limit imposed in the Order of Remand, therefore, makes it seem more like a temporary stay and less like an actual remand. Third, EIB did not recommence the original Rule 100 after

the Court entered its Order of Remand, as normally happens on remand. Instead, PNM initiated an entirely new proceeding before EIB, a proceeding to which EIB assigned an entirely new case number. [Background #10.]

The ambiguity of the Court of Appeals' Order of Remand reflects PNM's and EIB's desire to "have it both ways." On the one hand, they desire a "remand" from the Court of Appeals so that the Court loses jurisdiction over Rule 100 and EIB gains jurisdiction, thus eliminating any argument that EIB lacks jurisdiction to reconsider Rule 100 while PNM's appeal is still pending in the Court of Appeals. On the other hand, PNM and EIB also desire that the Court of Appeals retain jurisdiction over PNM's appeal, apparently as a safeguard if things do not work out at the new EIB or in a subsequent appeal. No known statute, rule or precedent authorizes such an irregular and obviously one-sided process, designed solely with the aim of keeping PNM's options open.

Moreover, the highly irregular process put in motion by the Court of Appeals' Order of Remand has potential to result in multiple administrative proceedings and appeals. If the Order of Remand is allowed to stand, then two opposite decisions of the EIB concerning Rule 100 could be on appeal at same time. The first would be PNM's appeal of the former EIB's decision to adopt of Rule 100; the second would be New Energy Economy's appeal of the newly-appointed EIB's decision to repeal the Rule. This second appeal would involve the

same issues as the first, except that New Energy Economy would also argue that the settlement agreement between the newly-appointed EIB and PNM (and the other regulated entities) manifests predetermination and renders EIB incapable of making a fair, rational and unbiased decision. Moreover, using the Order of Remand as an example, the parties in these appeals could seek similar "temporary remands" if the composition of the EIB shifts in their favor during the pending appeals. Such an irregular and unpredictable process has no basis in law or equity, and therefore, the Order of Remand must be vacated.

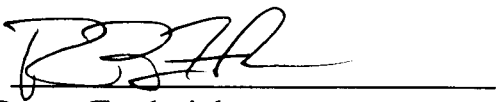
CONCLUSION

The Court of Appeals' Order of Remand must be vacated. The sole basis of the Order is an agreement between PNM and EIB, who are in collusion to defeat Rule 100. The Order of Remand is inconsistent with this Court's pending jurisdiction over New Energy Economy's Petition for Writ, it is inconsistent with the Separation of Powers Doctrine, and it sets in motion an irregular and manifestly unjust review process that has no basis in law or equity.

WHEREFORE, New Energy Economy respectfully requests that this Court vacate the Court of Appeals' Order of Remand, order the Court of Appeals to allow New Energy Economy to become an appellee in PNM's pending appeal, and to award such other relief as this Court may deem appropriate.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER

By: 

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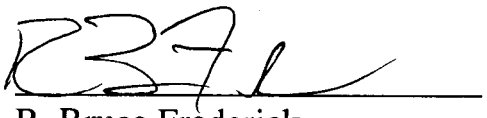
CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing paper to hand-delivered to the Gina Maestas (Chief Clerk, Court of Appeals) at the Supreme Court Building, 237 Don Gaspar Ave., Santa Fe, NM 87501, and to be emailed and mailed, first class, to the Richard L. Alvidrez, Miller Stratvert PA, P.O. Box 25687, Albuquerque, NM 87125-0687 (counsel for appellant), and Stephen A. Vigil, Office of the Attorney General, P.O. Box 1508, Santa Fe, NM 87504-1508 (counsel for appellee) on the 20th Day of June, 2011.



R. Bruce Frederick

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

vs.

No. 31,020
EIB 08-19(R)

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,

Appellee.

JOINT MOTION FOR A 180-DAY REMAND TO NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD FOR FURTHER PROCEEDINGS AND FOR STAY OF APPELLATE PROCEEDINGS

The parties, appellant Public Service Company of New Mexico ("PNM") and appellee New Mexico Environmental Improvement Board ("Board"), having participated (along with appellants in other related appeals) in a Court-sanctioned mediation of the above-referenced matter, and having agreed to a 180-day remand period to the Board for further proceedings, jointly move for such remand and a stay of proceedings in the above-captioned appeal. As grounds for this motion, the parties stipulate as follows:

1. The parties agree that further proceedings before the Board may

Attachment
A

resolve this appeal. The parties therefore request that the remand period be for 180 days from the date on which the Court grants this motion.

2. Vesting jurisdiction in the Board will allow further proceedings permitted under the Board's procedures that may cause the issues in this appeal to become moot and this appeal to be dismissed.

3. Upon completion of applicable Board actions and proceedings, or at the end of the 180-day remand period, whichever first occurs, the parties will report to the Appellate Mediator advising him of, among other things: (a) the current status of the Board's actions and proceedings; and/or (b) whether an extension of the remand period is necessary and, if so, for what additional period of time. PNM, as the appellant, may at any time request to have its appeal reinstated on the Court's docket for decision or to be dismissed.

4. The parties request that, during the period of the remand, all appellate proceedings continue to be stayed, including the preparation or filing of the transcript of proceedings and the record proper.

WHEREFORE, the parties request that this Court remand this matter to the Board for 180 days for further actions and proceedings, stay this matter and for such other relief as described in this motion.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW MEXICO

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ENVIRONMENTAL IMPROVEMENT BOARD

By: _____

Stephen A. Vigil, Asst. Atty. General
NM Attorney General's Office
P.O. Box 1508
Santa Fe, New Mexico 87504-1508

CERTIFICATE OF SERVICE

This will certify that a copy of the Joint Motion for a 180-day Remand to New Mexico Environmental Improvement Board for Further Proceedings and For Stay of Appellate Proceedings was served by regular mail or by electronic mail on this 13th day of July, 2011 on the following persons:

Stephen A. Vigil, Asst. Atty. General
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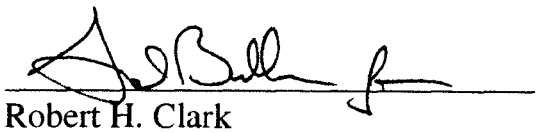
Santa Fe, New Mexico 87504-1508
svigil@nmag.gov
Representing the Environmental Improvement Board



Robert H. Clark

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

To Bruce Frederick

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

vs.

No. 31,020
EIB 08-19 (R)

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
JUL 19 2011

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,

Appellee.

IN THE MATTER OF THE PETITION TO ADOPT NEW REGULATIONS WITHIN 20.2 NMAC, STATEWIDE AIR QUALITY REGULATIONS, TO REQUIRE GREENHOUSE GAS EMISSIONS REDUCTIONS.

ORDER OF REMAND

This matter came before the Court on the joint motion of El Paso Electric Company and the New Mexico Environmental Improvement Board for remand to the Board for further proceedings.

It is hereby **ORDERED** that this matter is remanded to the New Mexico Environmental Improvement Board for 180 days. The appeal proceedings shall be stayed pending the remand. The parties shall report to the Appellate Mediator in accordance with paragraph three of their motion.

MICHAEL D. BUSTAMANTE, Judge

Attachment
B

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE PROPOSED REPEAL OF REGULATION,
20.2.100 NMAC - *Greenhouse Gas Reduction Program*

No. EIB 11-16 (R)

PETITION FOR REGULATORY CHANGE

Tri-State Generation and Transmission Association, Inc., New Mexico Oil and Gas Association, Public Service Company of New Mexico, Southwestern Public Service Company, Independent Petroleum Association of New Mexico, the City of Farmington and the Farmington Electric Utility System, and El Paso Electric Company (together, the "Petitioners") hereby jointly petition[1] the Environmental Improvement Board ("Board") to repeal 20.2.100 NMAC – *Greenhouse Gas Reduction Program*, which was adopted by the Board on December 6, 2010. The rule is scheduled to take effect on the later of January 1, 2013, or "six months after 20.2.350 NMAC is no longer in force." 20.2.100.5 NMAC. Attached is Petitioners' Statement of Reasons supporting this repeal petition. *See* Exhibit A.

Petitioners request that the Board consider this petition at its regularly scheduled meeting on August 1, 2011. Petitioners further request that the Board appoint a hearing officer, establish filing dates for the pre-filing of written direct and rebuttal testimony and exhibits, and schedule a public hearing to begin on or after December 5, 2011. The estimated length of the hearing will depend on the existence and number of any additional parties, but it is likely that one week will

[1] Petitioners are filing this petition jointly for the administrative convenience of the Board. In the event that the Board decides to grant this petition, Petitioners, which are represented by numerous different counsel, intend to participate separately in the proceeding, including the filing of testimony and the examination and cross-examination of witnesses. This joint filing should not be construed as a waiver of Petitioners' rights in this regard.

Attachment
C

be required for witnesses to be presented and cross-examined. At the conclusion of the hearing, Petitioners request that the Board adopt this petition for regulatory change and repeal the regulation as requested herein.

As required by 20.1.1.300(B) NMAC, Petitioners attach a copy of the proposed regulatory change, which would delete the regulation at issue in its entirety. *See* Exhibit B.

Respectfully submitted,

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EXHIBIT A

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE PROPOSED REPEAL OF REGULATION,
20.2.100 NMAC - *Greenhouse Gas Reduction Program*

No. EIB 11-__ (R)

STATEMENT OF REASONS

Tri-State Generation and Transmission Association, Inc. ("Tri-State"), New Mexico Oil and Gas Association ("NMOGA"), Public Service Company of New Mexico ("PNM"), Southwestern Public Service Company ("SPS"), Independent Petroleum Association of New Mexico ("IPANM"), the City of Farmington ("Farmington") and the Farmington Electric Utility System ("FEUS"), and El Paso Electric Company ("EPE") (together, the "Petitioners") submit this Statement of Reasons in support of their petition to repeal 20.2.100 NMAC – *Greenhouse Gas Reduction Program* ("Part 100").

I. STATUTORY AUTHORITY

1. The Environmental Improvement Board ("Board") is authorized to repeal regulations under the Environmental Improvement Act, NMSA 1978, chap. 74, art. 1 (1971, as amended through 2010), and the Air Quality Control Act, NMSA 1978, chap. 74, art. 2 (1967, as amended through 2007). *See* NMSA 1978, § 74-1-9(A) ("Any person may recommend or propose regulations to the board for promulgation."); NMSA 1978, § 74-2-6(A) ("Any person may recommend or propose regulations to the environmental improvement board . . . for adoption."); NMSA 1978, §§ 74-1-9(B), 74-2-6(B) ("As used in this section, 'regulation' includes any amendment or repeal thereof."); NMSA 1978, § 74-2-5(B) ("The environmental

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improvement board . . . shall: (1) adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to . . . prevent or abate air pollution . . . ."); 20.1.1.300(A) NMAC ("Any person may file a petition with the board to adopt, amend or repeal any regulation within the jurisdiction of the board."); 20.1.1.7(P) NMAC ("'regulatory change' means the adoption, amendment or repeal of a regulation").

2. In promulgating or repealing regulations, the Board is required to:

> [G]ive [the] weight it deems appropriate to all facts and circumstances, including but not limited to:
>
> (1) [the] character and degree of injury to or interference with health, welfare, visibility and property;
> (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
> (3) [the] technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

NMSA 1978, § 74-2-5(E).

II. IDENTIFICATION OF PETITIONERS' INTERESTS

3. As identified below, all of the Petitioners are entities whose interests, and whose customers' interests, are directly and adversely impacted by Part 100.

A. Tri-State Generation and Transmission Association, Inc. Tri-State is a not-for-profit, wholesale electric power supply cooperative providing power to 44 member distribution systems that serve customers in a 250,000 square mile territory, including New Mexico, Colorado, Nebraska, and Wyoming. As such, Tri-State is a cooperative of cooperatives. The mission of Tri-State is to provide its member-systems a reliable, cost-based supply of electricity while maintaining high environmental standards. Tri-State serves 12 New Mexico member-systems, 7 of which qualify as small businesses under New Mexico's Small Business

Regulatory Relief Act. These 12 rural electric cooperatives distribute electric power to approximately 159,000 meters at farms, ranches, households, industry, and businesses in New Mexico. Tri-State serves some of the most economically depressed consumer groups and regions of the state and country. Because Tri-State is an electric generation and transmission cooperative, it must pass any costs on to its member-systems and consumer owners. Thus, the citizens of New Mexico who are served by Tri-State must shoulder the burden of higher cost energy that Part 100 causes.

B. New Mexico Oil and Gas Association. NMOGA is a New Mexico non-profit corporation. NMOGA represents over 300 member companies, ranging from independent to major oil and gas producers, pipeline companies, well servicing and field services companies, refineries and processing plants, all doing business in the State of New Mexico. NMOGA represents its member companies before state and federal regulatory agencies, including the Board, as well as before state and federal courts, the New Mexico legislature, and Congress, on matters related to environmental protection, including air quality.

C. Public Service Company of New Mexico. PNM is an electric utility providing service to approximately 504,000 electric customers in New Mexico. PNM owns all or part of ten power generating facilities, nine of which are in New Mexico. PNM's generation facilities utilize a diverse fuel mix, which provides PNM customers with reliable electric energy at reasonable rates. PNM's power plants are fueled by coal (39 percent of total), nuclear power (15 percent of total), natural gas (38 percent of total), and solar and wind (8 percent of total). Any generation needs in excess of PNM's own generation capacity are met through power purchases from third parties. In addition to providing critical energy to New Mexico, these power generating facilities have significant positive economic impacts in the state. They provide

high-paying jobs, pay significant property taxes in their communities, and support local communities through the purchase of materials and supplies. The royalties from the natural gas and coal utilized in these plants also provide a substantial revenue stream for the state that funds a variety of critical needs, including public education. Part 100 will have an adverse impact on rates to PNM's customers and on PNM's ability to procure necessary future generation to meet customer needs.

D. Southwestern Public Service Company. SPS is a New Mexico corporation which operates as a public utility in New Mexico. SPS provides electric service to over 100,000 residential and commercial retail utility customers in New Mexico. SPS has an ownership interest in, and operates, two fossil-fueled electric generating stations in New Mexico that have air quality construction and operating permits. These generating stations include Cunningham Station, a natural gas-fired, 487 megawatt ("MW") electric generation station and Maddox Station, a natural gas-fired, 193 MW electric generation station. Both the Cunningham and Maddox stations are located in Lea County, New Mexico. Additionally, SPS purchases power from Hobbs generation station and operates a 13 MW generating station in Carlsbad, New Mexico. Part 100 has an adverse impact on rates to SPS's customers and on SPS's ability to procure necessary future generation to meet customer needs.

E. City of Farmington and Farmington Electric Utility System. Farmington is a municipal corporation of the State of New Mexico and owns and operates the FEUS, a municipal electric utility. The FEUS serves over 45,000 residential and large industrial customers within 1,715 square miles throughout San Juan County, New Mexico. The FEUS generates power from diversified sources—gas combined cycle, hydroelectric, and coal. Any power needs in excess of the FEUS' generating capacity are met through purchases from third

parties. The FEUS, as a municipal electric utility, must supply all customers in its service territory with reliable and economical electric service. Also, as part of the western electric grid, the FEUS must meet mandatory reliability standards of the North American Electric Reliability Corporation ("NERC") and the Western Electricity Coordinating Council ("WECC") or suffer substantial fines. Part 100 will have an adverse impact on Farmington and FEUS' customers and on the FEUS' ability to procure future generation to meet its customers' needs.

F. Independent Petroleum Association of New Mexico. IPANM serves as the voice of over 300 independent oil and gas producers operating in New Mexico. IPANM advances and preserves the interests of its member companies while educating the public, the legislature, and the regulatory bodies on the importance of the oil and gas industry to the state and to our lives. Part 100 has an adverse impact on the members of IPANM, the majority of which are considered "small businesses" under the Small Business Regulatory Relief Act.

G. El Paso Electric Company. EPE is a regional electric utility providing generation, transmission, and distribution service to approximately 377,000 retail and wholesale customers in a 10,000 square mile service area in southern New Mexico and west Texas. EPE owns and operates three generating facilities: the Rio Grande Power Station in Sunland Park, New Mexico; the Newman Power Station in northern El Paso County, Texas; and the Copper Power Station, within the City of El Paso, Texas. EPE also owns an interest in two other generating facilities: the Four Corners Power Plant in New Mexico, and the Palo Verde Nuclear Generating Station near Phoenix, Arizona. All of these facilities contribute power to EPE's 1,699 miles of transmission lines. EPE has seventeen major distribution stations. EPE's Rio Grande Power Station in New Mexico generates a nominal combined 229 MW from three units and the New Mexico high voltage lines carry power from all of EPE's generating facilities. EPE

provides transmission and distribution service to approximately 91,000 retail and wholesale customers in New Mexico, serving Las Cruces, Hatch, Holloman Air Force Base, and White Sands Missile Range, among others. EPE employs approximately 198 people in New Mexico. Part 100 has an adverse impact on rates to EPE's customers and on EPE's ability to procure necessary future generation in New Mexico to meet customer needs.

III. SUMMARY OF PART 100

4. The stated objective of Part 100 is to "establish greenhouse gas emission reduction requirements for sources, as defined herein." 20.2.100.6 NMAC. As explained further below, if triggered, the rule obligates certain electric generating facilities and oil and gas sources to reduce carbon dioxide emissions a certain percentage every year for eight years, or to offset their emissions by purchasing greenhouse gas emission reductions from sources in New Mexico that do not face emission reduction requirements.

5. Part 100 applies to petroleum refining facilities (SIC 2911), gas processing and treatment facilities (SIC codes 1321 and 1389), gas compression facilities (SIC codes 4922, 1389, and 1311), and electric generating facilities (SIC code 4911) located within the Board's jurisdiction[2] in New Mexico that have emissions of carbon dioxide of 25,000 metric tons per year or greater. *See* 20.2.100.7(M), (N) NMAC.

6. Subject to various potential credits, offsets, banking, and borrowing provisions (20.2.100.11 NMAC) and a "carbon dioxide maximum expenditure price" (20.2.100.7(D) NMAC), Part 100 requires existing sources to reduce carbon dioxide emissions by at least three percent each year, beginning one year after the effective date of the rule. *See* 20.2.100.9(B) NMAC. As the rule explains, "two years after the effective date an existing source shall emit no

[2] The Board's jurisdiction does not extend to sources located on tribal lands or within Bernalillo County.

more than 97 percent of its approved baseline emissions, and three years after the effective date no more than 94 percent of its approved baseline emissions." *Id.*

7. Part 100 limits carbon dioxide emissions from new electric generating sources to no more than 0.5 metric tons per megawatt-hour times the expected output per year of the source during normal operating conditions, and requires such new sources then to reduce emissions by 0.015 metric tons each year thereafter. *See* 20.2.100.10(A) NMAC. For new oil and gas sources, Part 100 requires that carbon dioxide emissions be limited to emissions "during normal operating conditions using best available control technology" for the first full calendar year of operation and reduced three percent each year thereafter. *See* 20.2.100.10(B), (C) NMAC.

8. Part 100 provides that:

> a source shall have no further obligation to meet its carbon dioxide reduction requirement in a given year if it has demonstrated to the [New Mexico Environment Department] that: (1) a good faith effort was made to reasonably and effectively either reduce carbon dioxide emissions at the source or obtain offsets; and (2) the amount of direct expenditures on such good faith effort equals or exceeds the carbon dioxide price times the metric tons of carbon dioxide reduction required in that year.

20.2.100.12 NMAC. The rule also provides that "[a] source shall also be excused from compliance in a given year to the extent that the source demonstrates to the [New Mexico Environment Department] that sufficient offset and reduction opportunities do not exist, or that compliance would threaten the financial integrity and continued operation of the source." *Id.*

9. Sources not in compliance with Part 100 are subject to an unspecified penalty or other enforcement action. *See* 20.2.100.14 NMAC.

IV. BASIS AND NEED FOR PROPOSED REPEAL OF REGULATION

10. The proposed repeal of Part 100 is necessary because Part 100 is not in the public interest – its economic costs outweigh its environmental benefits; the rule does not have any

discernible benefit to human health or the environment; its adoption did not adhere to the requirements of the Air Quality Control Act; and it is not authorized under either the Environmental Improvement Act or the Air Quality Control Act.

Economic Reasons

11. Part 100 is not economically reasonable because it leads to significant economic costs to New Mexico as a whole, and to individual sources, if fully implemented. Many of the opportunities to reduce carbon dioxide emissions have already been implemented at existing facilities in New Mexico. For example, as addressed in paragraphs 22 and 23 below, electric generation companies are already taking steps to reduce their overall carbon dioxide emissions, such as developing renewable energy sources (wind and solar). However, no proven commercially available control technologies exist for reducing greenhouse gas emissions at *existing* electric generation facilities, and even if such technologies did exist, it would be impossible to permit and construct such devices on existing sources between now and 2013 when this rule may take effect.

12. Limits on the ability of individual affected facilities to achieve the requisite annual emission reductions will necessarily result in those facilities being required to purchase more offset credits to meet their compliance obligations under the rule. However, there is considerable uncertainty with respect to the availability and cost of offset credits. For example, Part 100 limits offsets to those originating in New Mexico, a limitation that severely constrains compliance options and raises costs. *See* 20.2.100.7(L) NMAC. Furthermore, there is no realistic potential for early action credits in the electric sector because there are no commercially available technologies to reduce greenhouse gas emissions at existing fossil fuel generators. Likewise, the potential for early action credits at oil and gas facilities in New Mexico is limited.

13. The limited availability of cost-effective control technologies, combined with the cost of purchasing offsets, will result in a heavy financial burden on all affected sectors. This burden will mean that companies will be faced with difficult choices, including investing less in their New Mexico operations or shutting those operations down to meet the reductions required under the rule. Of course, the costs of compliance by the utility sector will be passed back to New Mexico customers. Part 100 will likely result in lost jobs, reduced gross state product, and reduced royalties from oil and gas production on State Trust Lands. In addition, the rule will likely result in lower tax revenue and increased utility rates to New Mexico customers. Because the program is limited to New Mexico, economic leakage increases the penalty to the state economy. ("Economic leakage" refers to the movement of economic activity, jobs, and tax revenues from within New Mexico to neighboring states that do not have similar regulatory programs.) For example, for oil and gas production, the increased regulatory costs in New Mexico will make investment in other states more attractive. New Mexico companies affected by the rule will be at a competitive disadvantage to companies in neighboring states. Companies selling products from neighboring states will have an advantage over New Mexico companies that must absorb the costs of the rule directly, indirectly through increased electric costs, or both. Further, if a source cannot make required reductions or acquire offset credits, but remains obligated under other laws to provide service, *see* NMSA 1978, § 62-8-2, the source may be subjected to large expenses, including potential penalties or other enforcement action that, while costly to the source and its customers, will do nothing to achieve reductions in carbon dioxide emissions.

14. Part 100 contains unrealistic and overly stringent new source emissions limitations. Because of the likely shortage of offsets in the program available in New Mexico, it

may be impossible to build and operate new natural gas-fired power plants in areas of the state that are subject to the Board's jurisdiction. Furthermore, the new source emission standard may be unworkable if utilities are to maintain system reliability. A new source built with best available technology would be required to reduce output by three percent per year or cover the difference with credits, early action credits, or offset credits at the same time that the utility's load is growing and reliance on that generating resource is increasing. It is difficult to conceive of any reason why a utility would build a new resource that it could not use to its fullest capacity and intended purpose, especially when the New Mexico Public Regulation Commission may disapprove any new resource that would decline in usefulness immediately after it was installed. As a result, utilities are likely to build and operate new systems outside of the Board's jurisdiction, which will result in increased transmission costs, movement of jobs for construction and operation of facilities away from New Mexico–all without producing any reduction in overall carbon dioxide emissions.

15. The emission reductions required by the rule have a harsher impact on electric utilities than other sources. Other industries have the option of reducing output when the cost of compliance exceeds the value of that output or relocating those facilities, whereas utilities must provide the electricity demanded by their customers. Under the New Mexico Public Utility Act, utilities have a statutory obligation to provide "adequate, efficient, and reasonable service." *See* NMSA 1978, § 62-8-2.

16. In addition, Part 100 will make it difficult, if not impossible, to expand existing compression for oil and gas production operations in the state. It will be necessary to increase compression for oil and gas production operations to maintain the level of production currently in place because of declining field pressures in oil and gas well fields. This will particularly

affect small independent oil and gas producers, which generally own the lower producing or marginal wells that need additional compression. Moreover, additional compression will be necessary to expand existing operations or to bring new production areas, including shale formations, into operation. With the widespread application of carbon dioxide emission reduction technologies in existing operations, there is little room to reduce greenhouse gas emissions through the implementation of better technology. As a result, it is unlikely that oil and gas operations subject to Part 100 will continue to operate at existing levels or be able to expand production operations in New Mexico. The failure to allow facilities to operate at existing levels or to provide for expanding operations will result in a reduction of tax revenues and royalty payments received by the state.

17. Part 100, if implemented, would negatively impact small businesses either directly through costs imposed by the rule or indirectly through increased energy costs and lost business opportunities. In addition, the smaller producers in the oil and gas sector are particularly affected. First, the small producers suffer the burden of disproving emission levels for newer wells and then determining the additional regulatory costs of adding compression to a marginal well. The increased costs will effectively make wells become unprofitable more quickly, which will result in premature plugging. Second, increased electricity costs impacts levels and costs of compression.

Environmental Reasons

18. New Mexico's greenhouse gas emissions barely register in the context of national and international emissions. The rule applies to less than one-half of one percent of total gross greenhouse gas emissions in the United States. Of that total amount, the total reduction required by the rule is infinitesimal, representing only a minuscule fraction of the total greenhouse gas

emissions of the United States. Because greenhouse gas emissions do not respect state or international boundaries, the decrease in the state's emissions that the rule would achieve will have no perceptible results on climate change, in New Mexico or anywhere else.

19. Part 100, if fully implemented, will not prevent or abate air pollution in New Mexico. The petitioners of Part 100, New Energy Economy, Inc. ("NEE"), in the 2010 proceedings before the Board to adopt Part 100, stated that the rule will not have any effect on climate change in New Mexico or elsewhere. NEE acknowledged, for example, that "the [greenhouse gas] reductions caused by New Mexico acting unilaterally will not, by themselves, achieve the global reductions needed to avoid catastrophe. . . ." Direct Corrected Testimony of Steven Michel at 7 (June 28, 2010) ("Michel Testimony"); *see also* Direct Testimony of Richard Sprott at 11 (July 16, 2010) ("Some will question how singular action by the State of New Mexico provides the necessary results for a global problem. It will not."); Rebuttal Testimony of Richard Sprott at 5 (Aug. 6, 2010) (Opposing witnesses "are correct in so far as unilateral action by any entity would be ineffective.").

Policy Reasons

20. Because climate change is a global issue, it is best addressed at a national or international level. Climate change will not be affected by a single state capping carbon dioxide emissions. Petitioners believe that the federal government is the only entity capable of making decisions that recognize and balance the unique characteristics of each region and the nation's economic, environmental, and energy objectives.

21. Part 100 is not necessary because the U.S. Environmental Protection Agency ("EPA") already regulates greenhouse gas emissions in the United States. Under the federal Clean Air Act, EPA has issued rules establishing mandatory reporting of greenhouse gas

emissions (74 Fed. Reg. 56,260 (Oct. 30, 2009)), standards for greenhouse gas emissions from light-duty vehicles (75 Fed. Reg. 25,324 (May 7, 2010)), and emissions thresholds for large stationary sources to determine when these sources must seek and obtain permits under the Clean Air Act's New Source Review Prevention of Significant Deterioration and Title V Operating Permit programs (75 Fed. Reg. 31,514 (June 3, 2010)). The EPA is also actively considering greenhouse gas control measures for new, modified, and existing power plants and petroleum refineries under Section 111 of the federal Clean Air Act (42 U.S.C. § 7411) and has agreed to take final action by 2012 on those measures. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010) (proposed settlement agreement establishing deadline of May 2012 for final action on power plants; approved by EPA on February 28, 2011); 75 Fed. Reg. 82,390 (Dec. 30, 2010) (proposed settlement agreement establishing deadline of November 2012 for final action on refineries; approved by EPA on March 2, 2011); *see also New York v. EPA*, No. 06-1322 (D.C. Cir. Dec. 23, 2010) (settlement agreement addressing greenhouse gas emissions standards for certain electric utilities); *American Petroleum Institute v. EPA*, No. 08-1277 (D.C. Cir. Dec. 23, 2010) (same, standards for refineries).

22. Part 100 conflicts and interferes with other New Mexico state initiatives to reduce greenhouse gas emissions, including requirements imposed by the New Mexico Legislature and the New Mexico Public Regulation Commission on utilities to promote energy efficiency and develop renewable resources with customer cost protections. The Legislature has enacted the Renewable Energy Act ("REA") and the Efficient Use of Energy Act ("EUEA"). The REA, NMSA 1978, §§ 62-16-1 to 62-16-10, requires utilities to meet progressively larger renewable portfolio standards, culminating in the year 2020 when renewable energy is to comprise no less than 20 percent of a utility's total retail sales to New Mexico customers. NMSA 1978, § 62-16-

4. The EUEA, NMSA 1978, §§ 62-17-1 to 62-17-11, requires utilities to undertake cost-effective energy efficiency and load management programs in part to reduce greenhouse gas emissions and regulated air emissions. NMSA 1978, §§ 62-17-5, 62-17-2(5). Consistent with the REA and the EUEA, the New Mexico Public Regulation Commission has also promulgated rules that, among other things, require utilities to prepare, every three years, a twenty-year Integrated Resource Plan to identify the most cost-effective resources to supply customers' energy needs, including a consideration of environmental effects. *See* 17.7.3 NMAC; *see also* 17.7.2 NMAC; 17.9.572 NMAC. The foregoing laws and regulations will already result in greenhouse gas reductions. *See* 17.7.2.9(C)(2)(e) NMAC.

23. Consistent with existing New Mexico law, utilities are already taking many steps to reduce greenhouse gas emissions, such as diversifying their generation portfolios to include natural gas combined cycle plants, wind, distributed solar, energy efficiency, and demand-side resources.

24. Part 100 also potentially conflicts with the obligation of electric utilities under federal law to provide reliable electric service, including with NERC and WECC reliability standards. Fossil fuel generation is a critical component in satisfying the NERC and WECC reliability standards. To satisfy these standards, utilities may need to look for alternatives to building new generating resources within the Board's jurisdiction.

Statutory Authority Reasons

25. When the Board originally considered the petition to adopt Part 100, in 2010, it did so without fulfilling its statutory obligation to consider the economic impacts of the proposed rule. *See* NMSA 1978, § 74-2-5(E). NEE failed to present an economic analysis of the proposed rule, instead providing a cursory analysis prepared by a person who is neither an economist nor a

mathematician. *See* Michel Testimony at 10-11. The Board therefore based its decision to adopt the rule on speculation rather than "substantial evidence" in the record, as it was required by law to do.

26. The Board failed to comply with the Small Business Regulatory Relief Act, which requires the Board to: (a) provide a copy of a proposed rule to the Small Business Regulatory Advisory Commission; (b) consider potential adverse effects of a proposed rule on small businesses; (c) make a determination whether a proposed rule will result in adverse effects; and (d) minimize the adverse effects of the proposed rule on small businesses in New Mexico. *See* NMSA 1978, § 14-4A-4(A), (B).

27. The Board did not have statutory authority to adopt Part 100 because the Board has not yet determined the level of carbon dioxide that constitutes "air pollution" under the Air Quality Control Act. The Board claimed that it relied on its authority under NMSA 1978, § 74-2-5(A), (B) to "prevent or abate air pollution . . . within the geographic area" of its jurisdiction. Environmental Improvement Board, Order and Statement of Reasons for Adoption of Regulation 4 (Dec. 30, 2010). The Act defines "air pollution" as "the emission . . . into the outdoor atmosphere of one or more *air contaminants* in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property." NMSA 1978, § 74-2-2(B) (emphasis added). Because carbon dioxide, the primary gas regulated under the rule is an *essential part* of the air, necessary for life itself, carbon dioxide does not necessarily meet the statutory definition of "air contaminant." *See* NMSA 1978, § 74-2-2(A). But whether or not carbon dioxide is deemed an air contaminant, the Board must nonetheless adopt a standard establishing the "quantity" and "duration" at which carbon dioxide is considered to meet the

definition of "air pollution" before it can promulgate regulations preventing or abating the same. *See* NMSA 1978, § 74-2-2(B). The Board has not adopted a standard establishing the quantity and duration at which carbon dioxide is to be considered "air pollution." Without this benchmark required by the Air Quality Control Act, the Board acted outside the bounds of its authority in promulgating Part 100.

28. In the absence of such an ambient air quality standard, the only other theoretical authority under which the Board could have promulgated Part 100 is the authority to enact technology-based standards. Part 100 imposes standards of performance for new sources based, in part, on potentially available control technologies. Under the Air Quality Control Act, the Board may only adopt standards of performance for new sources that are "no more stringent than federal standards of performance" and apply "only to sources subject to such federal standards of performance." NMSA 1978, § 74-2-5(C)(2). Currently, no such federal standards of performance exist for sources subject to Part 100. In the absence of federal standards of performance for greenhouse gas emissions, the Board is precluded from adopting such standards. *See id.*

V. PETITIONERS' PROPOSED REGULATORY CHANGE

29. As addressed above in paragraph 2, in promulgating or repealing regulations, the Board is statutorily required to "give [the] weight it deems appropriate" to the following considerations:

> (1) [the] character and degree of injury to or interference with health, welfare, visibility and property;
> (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
> (3) [the] technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

NMSA 1978, § 74-2-5(E).

30. Because Part 100 will have no discernible benefit to "health, welfare, visibility and property," the repeal of Part 100 will cause no discernible "injury or interference with health, welfare, visibility and property." *Id.*

31. Petitioners' proposed repeal is in the public interest because the economic harm of Part 100 outweighs the environmental and social benefit and because the federal government, through the EPA, is already addressing the issue.

32. Petitioners' proposed repeal is technically practicable because repealing Part 100 would not impose any additional technical compliance obligations on sources.

33. Petitioners' proposed repeal of Part 100 is economically reasonable because compliance with Part 100, which will not alleviate climate change or its effects, will result in significant increases in the costs of energy in New Mexico. These increased energy costs will have severe and deleterious effects in the state, including potential loss of investment in the state, decreased tax revenue with resulting degradation of state services, loss of employment, and negative impacts on small businesses.