

COPY



STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REPEAL  
OF REGULATION

No. EIB 11-15(R)

20.2.350 – GREENHOUSE GAS REDUCTION PROGRAM  
20.2.300 – REPORTING OF GREENHOUSE GAS EMISSIONS  
20.2.301 – GREENHOUSE GAS REPORTING VERIFICATION REQUIREMENTS

MOTION TO ADMIT PRIOR SWORN TESTIMONY  
OF THE NEW MEXICO ENVIRONMENT DEPARTMENT

New Energy Economy, Inc. (NEE) requests the Hearing Officer to admit all of the sworn testimony that the New Mexico Environment Department (NMED) provided to the New Mexico Environmental Improvement Board (EIB) one year ago in EIB Case Nos. 10-04(R) and 10-09(R). The grounds for this motion are as follows:

1. The purpose of this hearing is to assure that the EIB receives relevant. See NMAC § 20.1.1.401(B) (“The hearing officer shall admit any relevant evidence”). NMED persuaded EIB to adopt Rules 300, 301, and 350 by submitting the sworn testimony of several experts in EIB Case Nos. 10-04(R) and 10-09(R). *Order and Statement of Reasons for Adopting Regulations* (SOR) No. 10-04(R) (citing NMED testimony to support EIB’s adoption of Rule 350); SOR 10-09(R) (same as to Rules 300 and 301). In considering the instant petitions to repeal these same Rules, EIB cannot rationally disregard this substantial evidence, which it admitted in the prior proceedings and relied on to support its decisions to adopt the Rules just one year ago. See In re Application of Timberon Water Co., 114 N.M. 154, 156, 836 P.2d 73, 75 (1992) (“For administrative agencies, arbitrary and capricious action has been defined ‘as willful and unreasonable action, without consideration and in disregard of facts or circumstances’) (internal citation omitted).

2. NEE cannot make NMED's prior witnesses available in this proceeding. NMED has refused to make its former witnesses available to testify and they have refused to exercise their right participate in this proceeding in their individual capacity. NMED's former out-of-state experts have refused to participate in these proceedings, are unresponsive to NEE's requests, or are otherwise unavailable. Neither EIB nor the Hearing Officer has subpoena power to compel a witness to testify.

3. The Rules of Evidence do not apply to this proceeding and thus do not bar admission of relevant evidence. NMAC § 20.1.1.400(A). However, even if they did, the prior sworn testimony of NMED's witnesses should be admitted. First, the former sworn testimony of an unavailable witness is admissible in a court of law where:

... the party against whom the testimony is now offered ... had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

Under NMRE 11-804. In the instant proceeding, NEE is offering NMED's prior sworn testimony against petitioners, who were parties and fully participated (or had the opportunity to participate) in the proceedings in which the prior testimony occurred. See, e.g., SOR 10-04(R) (Procedural History ¶¶ 2, 3, 14, 17, 28, 29, 36); SOR 10-09(R) at 1. Petitioners had the same opportunity and motive to develop the testimony in the prior proceedings as they have in the instant proceeding. Second, the "records, reports, statements or data compilations, in any form, of public offices or agencies" are admissible in a court of law under NMRE 11-803(H). NMED's prior sworn testimony describes the agency's activities, investigations and findings that led up to its petitions to adopt Rules 300, 301 and 350. And third, NMED's prior sworn testimony should be admitted under NMRA 11-807, which sets out a catch-all exception to the hearsay rule where there are "circumstantial guarantees of trustworthiness." In this case, the

evidence was provided under oath, is directly probative of the validity of, and need for, Rules 300, 301, and 350, and was admitted by the same Hearing Officer who knows many of the witnesses personally and who has relied on their testimony in prior cases.

4. NEE intends to use NMED's prior sworn testimony to demonstrate the inconsistency of NMED's current position and as a basis for excluding NMED's current testimony consistent with the doctrine of judicial estoppel. See NEE's Motion to Strike or Otherwise Exclude NMED's Pre-Filed Testimony.

5. Finally, admission of NMED's prior sworn testimony, which EIB has already determined is competent and directly relevant to the issues in this proceeding, will save time and expense and avoid needless repetition. See NMAC § 20.1.1.401(B) ("The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is incompetent or unduly repetitious.")

6. NEE incorporates herein by reference NMED's prior recorded sworn testimony, exhibits, and arguments, including the testimony, exhibits, and arguments identified below.

WHEREFORE, NEE requests the Hearing Officer to admit all of NMED's prior sworn testimony, exhibits, and arguments in EIB No. 10-04(R), including:

A. All of the testimony, motions, briefs, closing arguments, and exhibits offered by NMED in EIB Case No. 10-04(R), including that posted at <http://www.nmenv.state.nm.us/eib/pastpleadingshtml.htm>, under the heading "EIB 10-04 (R) Proposed Greenhouse Gas Cap and Trade ~ Pleading Log and Documents," and specifically including EIB 10-04 Pleading Document 18 (NMED Notice of Intent to Present Technical Testimony (NOI)), EIB 10-04 Pleading Document 43 (NMED Response to Motion to Stay), EIB

10-04 Pleading Document 51 (NMED Rebuttal NOI),<sup>1</sup> EIB 10-04 Pleading Document 67 (NMED Witness List), and EIB 10-04 Pleading Document 84 (NMED's Closing Arguments).

B. All of the testimony that NMED provided on direct and cross-examination at hearing in EIB No. 10-04(R), including Transcript (Tr.) 1 at 49-143, 143-222); Tr. 2 at 273-289, 287-600; Tr. 3 at 625-717, 724-891, 907-975; Tr. 4 at 990-1121, 1122-1151, 1154-1361; Tr. 5 at 1381-1491, 1501-1724, 1728-1838; Tr. 6 at 1850-1876, 1879-1972; Tr. 7 at 2208-23-40; Tr. 9 at 3051-3089.<sup>2</sup>

C. All of NMED's testimony, exhibits and argument offered in EIB Case No. 10-09(R), including that referred to or relied on in EIB's SORs.

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 be emailed to Petitioners' attorneys and Stephen Vigil on 10/19, 2011.

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R. Bruce Frederick

<sup>1</sup> NMED's rebuttal testimony is posted at: <http://www.nmenv.state.nm.us/cc/CapandTradeRegulation.htm>, under the heading "August 30, 2010 NMED Submittal."

<sup>2</sup> Transcripts posted at <http://www.nmenv.state.nm.us/eib/pastpleadingshtml.htm>, under the heading "EIB 10-04 (R) Proposed Greenhouse Gas Cap and Trade Provisions, September 20-30, 2010. Transcript of Public Hearings."