



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 THE PRIOR SWORN TESTIMONY
THAT PETITIONERS' WITNESSES PROVIDED ON
CROSS-EXAMINATION IN EIB CASE NO. 10-04(R)

New Energy Economy, Inc. (NEE) requests the Hearing Officer to admit all of the sworn testimony that the petitioners' witnesses provided on cross-examination to the New Mexico Environmental Improvement Board (EIB) one year ago in EIB Case No. 10-04(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"). All of the petitioners participated in EIB Case No. 10-04(R) and presented numerous witnesses who testified under oath against Rule 350. See, generally, Order and Statement of Reasons for Adopting Regulations (SOR) (EIB No. 10-04(R)) (identifying petitioners as parties). In considering the instant petitions to repeal Rule 350, EIB cannot rationally disregard the sworn testimony that petitioners provided on cross just one year ago, which EIB admitted and considered when it adopted the Rule. 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. In the instant proceeding, petitioners have either provided the same witnesses as they did in EIB 10-04(R) and/or relied on such witnesses' prior testimony. See, e.g. Notices of

Intent to Present Technical Testimony (NOI) submitted by **Tri-State** (re-submitting former witnesses Christy, A. Smith and Cichanowitz; new witness Holmstead incorporates and relies on prior witness Wehrum's testimony); **FEUS** and **City of Farmington** (re-submitting former witnesses A. Smith, Grantham-Richards, and Simms); **PNM** and **SPS** (re-submitting former witnesses Bothwell, Ihle and Forrister); **NMOGA** (re-submitting witnesses Gantner, D. Smith, Knowlton, and Price).

3. Petitioners' witnesses repeat and cite the direct testimony that they provided to EIB in Case No. 10-04(R). Petitioners' witnesses also refer to and criticize the testimony provided by NMED's witnesses in Case. No. 10-04(R), either directly or by taking issue with EIB's SOR, which cites to and relies on NMED's witnesses. See, e.g., Testimony of A. Smith (criticizing NMED witnesses Hausker and Rose and citing her prior testimony); Testimony of Grantham-Richards (criticizing NMED's "White Paper" and EIB's SOR); Testimony of Simms (criticizing NMED witness Sahu and EIB's SOR and citing his prior testimony); Testimony Themig (criticizing EIB's SOR); Testimony of Sheesly (criticizing NMED witnesses Hausker and Rose and supporting prior FEUS witnesses Crawford and Lillywhite); Testimony of D. Smith (resubmitting his prior testimony); Testimony of Price (citing his prior testimony); Testimony of Holmstead (citing former Tri-State witness Wehrum).

4. Petitioners' arguments for repeal of Rule 350 in the instant proceeding are identical to those that they made last year against adoption of Rule 350 in EIB Case. No. 10-04(R). Cf., generally, Petitioners' Closing Arguments in EIB Case No. 10-04(R)¹ with Petitioners' Joint Petition to Repeal Rule 350.

¹ Closing arguments of all parties are available at: [ftp://ftp.nmenv.state.nm.us/www/EIB/June_21_2010_Meeting/EIB_10-04/EIB_10-04_Pleading_Documents_84](ftp://ftp.nmenv.state.nm.us/www/EIB/June_21_2010_Meeting/EIB_10-04/EIB_10-04_Pleading_Documents_84_through_93/) through 93/, which NEE incorporates herein by reference.

5. In arguing against the adoption of Rule 350 in EIB Case No. 10-04(R), petitioners witnesses were subject to substantial cross-examination, under oath, by NMED, by EIB, and by other parties. The Hearing Officer should admit this cross-examination for multiple reasons.

6. The Rules of Evidence do not apply in this proceeding, and therefore, do not bar admission of relevant evidence. NMAC § 20.1.1.400(A). However, even if the Rules of Evidence were applicable, the prior sworn testimony of petitioners' witnesses on cross-examination should be admitted. 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 the prior testimony against the 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 No. 10-04(R) (Procedural History ¶¶ 2, 3, 14, 17, 28, 29, 36); SOR No. 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.

7. The prior sworn cross-examination of petitioners' witnesses is directly relevant to the issues in this proceeding and should be admitted in the interest of fairness and efficiency. It would be unfair and inefficient to allow petitioners and cite to and rely on their direct testimony in a prior proceeding and not also admit the sworn testimony that they provided in the same proceeding on cross-examination. 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.") Similarly, it would be unfair to admit in this proceeding petitioners'

witnesses' critique of NMED's testimony and other evidence in the prior proceeding and not also admit NMED's cross-examination of petitioners' witnesses in that same proceeding.

A. NEE incorporates herein by reference the prior recorded sworn testimony that petitioners' witnesses provided on cross-examination in EIB Case No. 10-04(R), including the excerpts identified below.

WHEREFORE, NEE requests the Hearing Officer to admit all the prior sworn testimony provided by petitioners on cross-examination in EIB No. 10-04(R), including that recorded in Transcript (Tr.) 6² at 1976-2036 (Kappelman), 2036-2083 (Crawford and Lillywhite), 143-222), 2084-2126 (Simms); Tr. 7 at 2346-2406 (Price), 2408-2431 (Knowlton), 2432-2477 (Gantner), 2478-2485 (Nicholson), 2487-2508 (Hasely), 2513-2605 (Bothwell and O'Connell), Tr. 8 at 2624-2674 (A. Smith), 2677-2733 (Christy), 2795-2821 (Nalle); Tr. 9 at 2860-2907 (Cichanowicz), 2908-2943 (D. Smith), 2944-2999 (Bachman), and 3001-3046 (Forrister).

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW
CENTER

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² 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," which NEE incorporates herein by reference.

CERTIFICATE OF SERVICE: I certify that I caused a copy of the foregoing paper to be emailed to Petitioners' attorneys and Stephen Vigil on 10/4, 2011.

RBF

R. Bruce Frederick

