

STATE OF NEW MEXICO  
COUNTY OF LEA  
FIFTH JUDICIAL DISTRICT

SENATOR CARROLL H. LEAVELL,  
SENATOR GAY G. KERNAN,  
REPRESENTATIVE DONALD E. BRATTON,  
NEW MEXICO OIL AND GAS ASSOCIATION,  
DAIRY PRODUCERS OF NEW MEXICO,  
NEW MEXICO RURAL ELECTRIC COOPERATIVE  
ASSOCIATION, EL PASO ELECTRIC COMPANY,  
PUBLIC SERVICE COMPANY OF NEW MEXICO  
TRI-STATE GENERATION AND TRANSMISSION  
ASSOCIATION, INC., NEW MEXICO FARM &  
LIVESTOCK BUREAU, and NEW MEXICO  
PETROLEUM MARKETERS ASSOCIATION

Plaintiffs,

v.

No. D-0506-CV-2010-00050

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

Defendant.

**MOTION TO INTERVENE**

COMES NOW New Energy Economy, Inc. (“NEE”), by and through its attorneys, New Mexico Environmental Law Center, and submits this Motion to Intervene as a co-defendant in this matter. In their *Amended Complaint for Declaratory Judgment and Injunctive Relief* (“Complaint”), Plaintiffs seek to deprive NEE of its statutory rights under NMSA Sections 74-1-9(A) and 74-2-6(A) to petition the New Mexico Environmental Improvement Board (“Board”) to adopt regulations. Given the direct attack by PNM and its powerful allies on NEE’s rights under the law, NEE should be allowed to intervene in this matter, “as of right,” so that it may defend its and every citizen’s right to petition the Government in accordance with law.

## ARGUMENT

### NEE has a right to intervene in this case.

NEE has a right to intervene in this case if a “statute confers an unconditional right to intervene,” NMRA 1-024(A)(1), or if: “(1) it claims an interest relating to the property or transaction which is the subject of the action, (2) it is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, and (3) its interest is not adequately represented by the existing parties to the litigation.” Nellis v. Mid-Century Ins. Co., 2007 NMCA 90, ¶ 8, 142 N.M. 115, 118; NMRA 1-024(A)(2). Intervention of right further requires that the motion to intervene be timely and be “accompanied by a pleading setting forth the claim or defense for which intervention is sought.” NMRA 1-024(C). As to these last two requirements, there can be no reasonable dispute: This Motion is being filed before any responsive pleading to Plaintiffs’ Complaint is due, and is thus timely, and it is “accompanied by” a Motion to Dismiss. NEE can also satisfy all the remaining requirements for intervention of right.

#### 1. NEE has a Right to Intervene under the Declaratory Judgment Act.

The Declaratory Judgment Act confers an unconditional right to intervene on “all persons ... who have or claim any interest which would be affected by the declaration ....” See NMSA 1978, § 44-6-12 (1975); Grain Dealers Mut. Ins. Co. v. Reed, 105 N.M. 586, 588, 734 P.2d 1269, 1271 (N.M. 1987) (holding that Section 44-6-12 requires “mandatory joinder, as parties to the original action, of persons who claim an interest in the subject matter of that action or whose absence would prevent complete relief from being accorded to those already parties.”). NEE’s interests would directly and unequivocally be affected by this Court’s declaration and preliminary injunction. NEE is the “Petitioner” in the administrative proceeding that Plaintiffs

seek to disrupt, and this proceeding was initiated by NEE pursuant to its express statutory right to petition the Board to adopt regulations. Complaint ¶ 1, ¶¶ 34-39; NMSA 1978, §§ 74-1-9, 74-2-9. The regulations being considered in the proceeding before the Board were proposed by NEE. The proceeding was ongoing for over a year (Complaint ¶ 35) before Plaintiffs filed their Complaint, and the Board just entered a scheduling order to govern the proceeding (Complaint ¶ 46). NEE has expended substantial time and money to arrange for expert and lay witnesses to come and testify at the scheduled hearings and it has a clear stake in the outcome of the rulemaking. Accordingly, joinder of NEE is “mandatory” under Section 44-6-12; and therefore, it has a statutory right under the Declaratory Judgment Act to intervene within the meaning of Rule 24(A)(1).

2. NEE has a Right to Intervene under Rule 1-024(A)(2).

NEE also has a right to intervene under Rule 1-024(A)(2), because it has “a direct rather than contingent interest in this litigation” and this “interest will automatically be harmed should Plaintiff[s] prevail ....” Nellis v. Mid-Century Ins. Co., 2007 NMCA 90, ¶9, 142 N.M. 115, 118 (internal quotes omitted). If Plaintiffs’ prevail, although admittedly unlikely, NEE’s statutory right to petition the Board will have been utterly frustrated. Plaintiffs will have accomplished through this Court’s intervention what they repeatedly tried but failed to accomplish in the proceeding before the Board: Summary dismissal of NEE’s Petition without any hearing on the merits. The time and money NEE has expended to counter PNM *et al.*’s relentless, albeit unsuccessful, motion practice before Board (*see, e.g.*, Complaint ¶¶ 40-44) will have been wasted. Similarly, the time and money NEE and its allies have expended to prepare for hearing will also have been wasted. Given the direct impact on NEE’s rights, NEE’s ability to protect its interests will, “as a practical matter,” be impaired and impeded unless it can participate in this

litigation. Therefore, NEE should be allowed to intervene in this matter as of right under NMRA 1-024(A) (2).

3. NEE's Interest is not Represented.

NEE's interest is not "adequately represented" by the Board, which is the only existing defendant in this case. Id. Although an applicant to intervene must show more than a "general interest in the litigation" at issue, Chino Mines Co. v. Del Curto, 114 N.M. 521, 523, 842 P.2d 738, 740 (Ct. App. 1992), it "need only show the *possibility* of inadequate representation." WildEarth Guardians v. United States Forest Serv., 573 F.3d 992, 996 (10th Cir. Colo. 2009). As already shown, NEE has a concrete interest and a direct stake in the outcome of this case, since Plaintiffs' success in this Court will effectively destroy NEE's statutory rights and prevent it from arguing the merits of its case to the Board. Although the Board presumably has an interest in protecting the integrity of its proceedings and preventing unconstitutional intrusions by other branches of government, its interests are different than NEE's.

First, it is the statutory right of petition under NMSA 1978, Sections 74-1-9 and 74-2-9 that Plaintiffs seek to destroy, and this right belongs to NEE, not the Board. Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995) ("Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public") (*quoting* 3B Moore's Federal Practice, Par. 24.07[4] at 24-78 (2d ed. 1995)). Second, it is NEE's proposed regulations that Plaintiffs seek to defeat, not the Board's, and NEE thus has a clear stake in defending its proposed regulations. And third, Plaintiffs' Complaint hinges on statutory interpretation, and NEE will not necessarily agree with the Board's interpretation of the statutes at issue, nor will it necessarily approach the issues with the same perspective as the Board. Therefore, given the divergent interests of the Board and

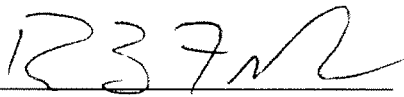
NEE, there is no reason to believe that the Board will adequately represent NEE (Id.); and accordingly, NEE should be allowed to intervene as of right.

NEE's attorney sought the concurrence of the attorneys for the other parties prior to filing this Motion. As of the time this Motion was prepared for filing, none of the other attorneys had responded to NEE's inquiry.

WHEREFORE, NEE respectfully requests the Court to grant this Motion to Intervene and to allow the filing of NEE's Motion to Dismiss and Memorandum in Support of Motion to Dismiss, both of which accompany this Motion to Intervene.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW  
CENTER

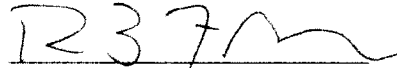
By: 

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Attorneys for New Energy Economy, Inc.

**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the foregoing paper to be mailed, first class, to the following persons pursuant to NMRA 1-005 on the 5<sup>th</sup> day of February, 2010:

  
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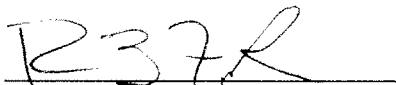
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8. I have emailed opposing counsel to inquire as to available dates and have had no response. I am available on the following dates: **March 22-26, March 31, April 19-23, April 26-30.**

Respectfully submitted:

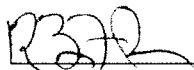
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Attorneys for New Energy Economy, Inc.

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I certify that I caused a copy of the foregoing paper to be mailed, first class, to the following persons pursuant to NMRA 1-005 on the 2<sup>nd</sup> day of February, 2010:

  
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NEW ENERGY ECONOMY, INC.

Defendant-in-Intervention.

### **NOTICE OF HEARING**

The above matter (regarding New Energy Economy, Inc.'s Motion to Intervene) will be heard before the Honorable William Shoobridge, at the Lea County Courthouse, at \_\_\_\_\_.M., on the \_\_\_\_\_ day of \_\_\_\_\_, 2010, with \_\_\_\_\_ allocated for hearing.

Trial court administrative assistant

Notice of hearing mailed to: R. Bruce Frederick  
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(505) 989-9022

Attorney for New Energy Economy, Inc.

on the \_\_\_\_ day of \_\_\_\_\_, 2010, by:

\_\_\_\_\_

*PLEASE ACKNOWLEDGE RECEIPT IN WRITING WITHIN THREE (3) DAYS.*

*RECEIPT ACKNOWLEDGED:* \_\_\_\_\_,

*BY* \_\_\_\_\_.