

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REPEAL
OF REGULATION
20.2.100 – GREENHOUSE GAS REDUCTION PROGRAM

No. EIB 11-16(R)



**MOTION TO RECUSE BOARD MEMBERS
CASCIANO, FULFER AND PEACOCK**

New Energy Economy (NEE) respectfully requests that Environmental Improvement Board (EIB) members James R. Casciano, Gregory Hugh Fulfer and Debra Peacock recuse themselves. The grounds for this motion are as follows.

Applicable Standard

1. EIB rulemakings are accompanied by virtually all of the same due process protections and formalities as are adjudications.¹ EIB cannot adopt or repeal a regulation unless such action is supported by substantial evidence contained solely in the record that was created in an open, properly-noticed evidentiary hearing. NMSA 1978, § 74-1-9; NMSA 1978, § 74-2-6; NMSA 1978, § 74-2-9; Part 20.1.1 NMAC. Interested persons have the right to become parties to such proceedings, to present testimony and exhibits, to object to other parties' testimony and exhibits, and to file motions. NMSA 1978, § 74-1-9; NMSA 1978, § 74-2-6; and §§ 20.1.1.7(K), 200(B)(3), 303 & 400; *Order Establishing Procedures*. The petitioner has the burden of persuasion. § 20.1.1.302 NMAC. Witnesses testify under oath and are subject to cross examination. § 20.1.1.401 NMAC. In lieu of discovery, the parties must disclose their testimony in advance of the hearing. § 20.1.1.302 NMAC; *Order Establishing Procedures*.

Thus, rulemaking under the New Mexico Air Quality Control Act and Environmental Improvement Act is analogous to formal rulemaking under the federal Administrative

¹ In the proceeding in which EIB adopted Rule 100, for example, EIB refused to allow one of NEE's witnesses to appear telephonically, in part, because the Hearing Officer and EIB members attending the hearing would be unable to assess the witness' demeanor.

Procedures Act (APA). Cf. Part 20.1.1 with 5 U.S.C. §§ 556 & 557 (prescribing same hearing requirements for adjudications and formal rulemakings under the APA); see also N.M. State Racing Comm'n v. Yoakum, 113 N.M. 561, 564, 829 P.2d 7, 10 (Ct. App. 1991) (citing 2 Am.Jur.2d Administrative Law § 350, 162 (1962), for the proposition that “Rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the legislature.”)

2. Consistent with the nature of “formal rulemaking,” EIB members must meet an objective standard of impartiality:

No board member shall participate in any action in which his or her impartiality of fairness may reasonably be questioned, and the member shall recuse himself or herself in any such action by giving notice to the board and the general public by announcing this recusal on the record. In making a decision to recuse himself or herself, the board member may rely upon the Governmental Conduct Act, NMSA 1978, Sections 10-16-1 through 10-16-18, the Financial Disclosures Act, NMSA 1978, Sections 10-16A-1 through 10-16A-8, or any other relevant authority.

§ 20.1.1.111 NMAC; cf. Gila Res. Info. Project v. N.M. Water Quality Control Comm'n, 2005 NMCA 139, 37 (“concepts of fairness and transparency” apply to “administrative proceedings”). The standard established by Section 20.1.1.111 “is in essence a paraphrase of a federal statute governing the disqualification of judicial branch judges, see 28 U.S.C. § 455(a) (1994) (A judge ‘shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned.’), as well as New Mexico’s Code of Judicial Conduct dealing with disqualification of state judges, see NMRA 1997, 21-400(A) (‘A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned’)” City of Albuquerque v. Chavez, 1997 NMCA 54, 16. Under this objective standard:

The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible

temptation to an average man [or woman] sitting as a judge to try the case with bias for or against any issue presented to him [or her].

Id., quoting, Reid v. New Mexico Bd. of Examiners in Optometry, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). Based on the available evidence and the objective standard of impartiality, members Casciano, Fulfer and Peacock should recuse themselves.

Argument

3. Mr. Casciano should recuse himself, and take no further part in these proceedings, because he testified against Rule 100, Rule 350, or both Rules less than a year ago in the proceedings in which EIB adopted these Rules. Exhibit A at 3. Moreover, contrary to the substantial evidence submitted in the prior proceedings, it appears that Mr. Casciano may have already made up his mind that greenhouse gas regulations reduce the availability of jobs in New Mexico and “add to business uncertainty.” Exhibits A, B and C.

4. Mr. Fulfer should recuse himself, and take no further part in these proceedings, because he testified against Rule 100, Rule 350, or both Rules less than a year ago in the prior proceedings in which EIB adopted these Rules. Exhibit D at 5. On information and belief, Mr. Fulfer also voted as a Lea County Commissioner to oppose Rule 100, Rule 350 or both Rules. In addition, Mr. Fulfer is the son-in-law of Senator Carroll Leavell. Id. Senator Leavell was one of the plaintiffs who attempted to stop EIB from considering Rule 100 in a law suit that violated the Separation of Powers Doctrine established by the New Mexico Constitution. New Energy Econ., Inc. v. Shoobridge, 2010 NMSC 49. Senator Leavell also sponsored SB 190, which sought to repeal Rules 100, 300, 301, and 350. Exhibit E.

5. Ms. Peacock should recuse herself, and take no further part in these proceedings, because she engaged in *ex parte* communications with the petitioners on the matters now

pending before EIB. See Exhibit F (*Motion to Vacate Court of Appeals' Order of Remand*).

Pursuant to EIB's regulations:

At no time after the initiation and before the conclusion of a proceeding under this part, shall the department, or any other party, interested participant or their representatives discuss *ex parte* the merits of the proceeding with any board member or the hearing officer.

20.1.1.112 NMAC. An appeal is a continuation of the same proceeding. El Paso Elec. Co. v. Milkman, 66 N.M. 335, 337 (1959). EIB's attorney admitted during oral argument before the Supreme Court in *New Energy Economy v. Vanzi* (No. 33,074) that Chairperson Peacock participated in *ex parte* mediation with petitioners in their pending appeals of Rules 100, 300, 301 and 350. As a direct result of this *ex parte* communication, the substance of which Chairperson Peacock ultimately conveyed to the entire EIB in executive session, EIB and petitioners jointly moved the Court of Appeals to "remand" the appeals back to EIB so that EIB could "resolve" petitioners' pending appeals. Exhibit F at 1-3, 6. On information and belief, Chairperson Peacock and the entire EIB opposed NEE's entry into the pending appeals, contrary to law, so that Chairperson Peacock could engage in mediation with petitioners outside the presence of NEE or other supporters of greenhouse gas regulations. Finally, EIB's decision to conduct a hearing on the instant petitions was not made in public; rather it was made in private pursuant to an undisclosed settlement between Chairperson Peacock and petitioners. *Objections to Order Establishing Procedures* at 1-3.

6. NEE expressly reserves the right to object to the bias of other EIB members, both before EIB and on appeal, as new information comes to light. NEE further reserves the right to raise any issue regarding a members' bias for the first time on appeal if it appears that raising the issue before EIB will be futile.

WHEREFORE, because "the impartiality or fairness" of members Casciano, Fulfer and Peacock "may reasonably be questioned," NEE requests that these members recuse themselves and take no further part in these proceedings.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW
CENTER

By: 

R. Bruce Frederick
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Santa Fe, NM 87505
(505) 989-9022
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Attorneys for Petitioner New Energy Economy, Inc.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing paper to be emailed to the attorneys of petitioners, Western Resource Advocates, and the Board on August 31, 2011.



R. Bruce Frederick

CONFIDENTIAL CANDIDATE QUESTIONNAIRE

PERSONAL INFORMATION

1. Please provide your full name, county of residence, birthplace, social security number, marital status, and list all places of residence by street address and community for the last 5 years. If you were born outside the United States, please provide the basis for your citizenship or permanent residency in the United States. If you are married, please list your spouse's full name and occupation.

Answer 1:

James R. Casciano

Bernalillo County

Born: Bellville, NJ

SS#: [REDACTED]

Married to: Deanne H. Casciano, housewife

Have resided at [REDACTED]

2. Please list all of the schools you have attended, beginning with high school(s), and include the approximate dates of attendance and degrees earned.

Answer 2:

Blair Academy (1974-1976)

West Milford Township H.S. (1976-1977)

Colorado State University (1977-1981) B.S

Colorado State University (1985-1988) M.S

3. Are you a veteran of the armed services and, if so, were you honorably discharged? If not, please explain. Were you ever subject to a court-martial?

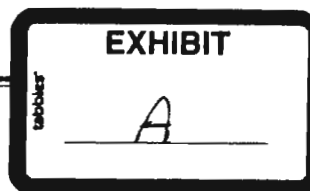
Answer 3: No

4. Have you ever been a candidate for any local, state or federal political office? If so, please list positions and, if elected, dates of service.

Answer 4: No

5. Have you ever been appointed to any paid or unpaid local, state or federal position? If so, please list the position, dates of service and who appointed you.

Answer 5: No



6. Please provide the names, addresses and telephone numbers of three personal references.

Answer 6: Ann Carrozza, [REDACTED]

Nate Gentry, [REDACTED]

Jon Barela, [REDACTED]

LEGAL INFORMATION

7. Have you ever been charged with a DWI or DUI or any other criminal offense, other than a minor traffic violation for which the fine was less than \$300 dollars? If so, when? Please describe the outcome.

Answer 7: No

8. Have you ever been charged, pled guilty to, or convicted of any misdemeanor or felony offense? If so, when? Please describe the outcome.

Answer 8: No

9. Please list any claims of sexual harassment or other workplace misconduct made against you or any employee directly supervised by you, including the resolution of the matter.

Answer 9: No, however, in a wrongful termination case against Intel, I was the department manager, and main target of the plaintiff (but not his direct supervisor). The plaintiff tried to establish that he was entitled to "whistle-blower" status because of his allegations of environmental problems at Intel's Rio Rancho facility. The plaintiff was unsuccessful in his attempt to include environmental concerns in his employment case, and the court ruled against him with a Summary Judgment in Intel's favor (dismissal). The case was covered lightly by print and TV media (but it was covered).

10. Have any civil judgments or liens been rendered against you? If so, please provide details.

Answer 10: No

TAX INFORMATION

11. Have you filed all federal and state tax returns that are now due or overdue, and are all tax payments, fines, penalties and interest been paid in full and/or otherwise finally resolved with the taxing authority? If no, please explain.

Answer 11: Yes

12. Have you or any entity in which you held an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If yes, please explain.

Answer 12: No

EMPLOYMENT INFORMATION

13. Have you ever been discharged, suspended or asked to resign from your place of employment? If yes, please explain.

Answer 13: No

14. In the last ten years, have you ever registered as a lobbyist or other legislative agent to influence legislation or administrative acts in any state or for the federal government? Have you ever received payment for acting as a lobbyist or legislative agent? If so, please supply details.

Answer 14: No

15. Have you ever testified (on your own behalf or on behalf of others) before the New Mexico legislature, or any administrative, investigative or regulatory body of the State of New Mexico? Describe the time period and subject matter of your testimony.

Answer 15: Yes, I appeared as the Intel Environmental Manager in front of NMED for several Air Permitting Hearings between 1997 and 2000. On the same matter, I testified in front of the EIB during two appeal hearings (in the 1999-2000 timeframe). I was a member of the NMED chartered "Corrales Air Quality Task Force" from 2002-2004. The CAQTF directed original health risk study and independent contractor work and found no evidence of air quality problems from Intel.

MISCELLANEOUS

16. Are there any other matters you believe the Governor-elect should be aware of?

Answer 16: Yes, I submitted written comments (personal) to NMED/EIB during the cap and trade hearings in Sept 2010. My comments argued against accepting the proposal based on lack of demonstration of negative impact to the NM environment from CO2, and the negative economic impact from increase electrical rates and decrease in jobs. (More details in attached posted blog comments.)

Items to be Submitted in Separate Document(s):



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State: The Rule-Makers

Meet Martinez' new Environmental Improvement Board

By Marisa Demarco



The horizon was looking a bit apocalyptic for the state's environmentalists a few short months ago.

New Mexico's freshman governor, in her first moments of taking office, tried to halt a rule that would curb greenhouse gas emissions. Then, Gov. Susana Martinez fired all seven members of the Environmental Improvement Board, the entity charged with overseeing the standards of food safety, our water supply, air quality, radiation control and more.

The new board she appointed includes two ranchers (one of whom is also a county commissioner in Lea County), two attorneys, the VP of a tech company, the general manager of a salt water disposal company and a manager of the Corporate Environmental Health and Safety program at Intel.

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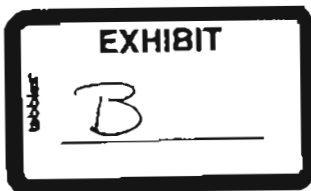
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Alibi A/V Dept.
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 doesn't play live

The Dirty Novels' last
 show is Saturday

That last guy is James Casciano, and we got to speak with the new board member about environmental improvement and public health.

State law mandates that no more than four members of the Environmental Improvement Board can come from the same political party. As such, of the Martinez-appointed newbies, three are Democrats and four are Republicans.

The board has to create a balance between industry and environmental needs, he says. "Do you know what the biggest predictor of health is?" Casciano, a Republican, asks. "Well, it's poverty. ... We're not going to improve the overall health of our communities if people don't have jobs and can't work."

Casciano says the trick is not to think in terms of winners or losers but to find synergy. "We have to look at places where people come together," he says. It requires an open mind: He will evaluate issues on the merits, he says, be data-based and as fair as possible.

He reached out to members of the previous board after they were fired by the governor. He spoke with three of them about how it operated, and whether there was anything they'd have done differently, looking back. "All three of them said, It's a lot of work, and nobody will say thank you."

Members are volunteers, and so far, it's taken about four days out of each month to do the job, he says. They're paid a per diem and for mileage. They're given a good day or two's worth of reading before each meeting and more before a hearing.

The first meeting was in March, and there were a backlog of issues that needed to be heard. Incineration rules are on the board's plate, as well as liquid waste regulations. Also coming up this year: three hearings in June about the Clean Air Act and its implementation in New Mexico.

This version of the board wants to be as transparent and open as possible, Casciano says. Members have deliberated publicly, and they've added a section for public comment at the beginning of every meeting.

One of Casciano's primary focuses will be to make sure the regulations are easy to understand. "The public doesn't realize the volume of regulations that are out there."

He says there's no reason to fear the new board will focus less on pollution controls. Those are governed by federal law, and state requirements fall in line with that. "The even application of those laws and making sure they're written clearly, that's most important." Board members are committed environmentalists and conservationists, but since some work in tech industries, there will likely be more questions about science and hard data. "During our interview, that's I what I saw the governor was looking for: experience and expertise."

Since Casciano works for Intel, he'll have to recuse himself from any issues or permitting that come before the board relating to the chip-

"We're not going to improve the overall health of our communities if people don't have jobs and can't work."

"During our interview, that's I what I saw the governor was looking for: experience and expertise."

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manufacturer. "There are rules for that," he says.

And what about those greenhouse gas regulations that the state Supreme Court ruled Martinez couldn't halt? What does Casciano think of them? Well, it's not before the board right now. He says, overall, the greenhouse gas issue has three layers. First, there are the data, the causes and effects. There are regulations, understanding them and enforcing them. "Then you have the politics and the emotion. It's a three-tiered thing that doesn't always receive a healthy debate."

Casciano underlines the diverse background on the board. "These are people who've been out in the working world. We're looking for practical solutions."

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Public Comments

Also in Feature in this issue

V.20 No.16 | 4/21/2011



City: Trading Greenbacks for "Green"
Will changing the city's building requirements be a boon or a bust?

By Christle Chisholm

The City of Albuquerque climbed aboard the sustainability bandwagon a few years ago, declaring victoriously that all new city vehicles would be powered with alternative fuel. In 2005, it even adopted a law requiring some new structures to meet the guidelines of the world's most recognized and respected system.

But on Feb. 7, the City Council unanimously this law, replacing it with older conservation rules. Some green-building advocates worry the move may serve as a bellwether for the city's attitude toward sustainability and speculate about the larger implications of this change.

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National: 25 by 25

Sen. Udall tells the country to get with the program—New Mexico's program

By Marisa Demarco

Sen. Tom Udall has a nickname for his bill: 25 by 25. "We're talking about 25 percent renewable electricity by 2025." Along with his cousin and fellow senator, Mark Udall (D-Colorado), he introduced a measure in early April that aims to set a standard nationally. Utilities around the country would have to use sources such as wind, solar, biomass or geothermal for a quarter of their supply.

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Also by Marisa Demarco



"She Loved Strong"

The life of Tera Cordova Chavez

Tera Cordova Chavez was 26 when she died. Her husband, police officer Levi Chavez, reported that he found her body on Oct. 21, 2007, after she'd shot herself with his department-issued weapon. But questions arose. Police Chief Ray Schultz announced Levi's

termination this week.

News reports haven't focused much on Tera as a person. This is her story.

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National: 25 by 25

Sen. Udall tells the country to get with the program—New Mexico's program

Sen. Tom Udall has a nickname for his bill: 25 by 25. "We're talking about 25 percent renewable electricity by 2025." Along with his cousin and fellow senator, Mark Udall (D-Colorado), he introduced a measure in early April that aims to set a standard nationally. Utilities around the country would have to use sources such as wind, solar, biomass or geothermal for a quarter of their supply.

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V.20 No.15 | 4/14/2011



Making Sausage

Legislative Smackdown

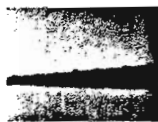
This column's name, Making Sausage, is a reference to a quote widely attributed to Otto von Bismarck, Duke of Lauenburg. "Laws are like sausages. It's better not to see them being made." From the view in the press box in Santa Fe, running a state looks arduous and frustrating. Lawmakers volley back and forth, nitpick over details, argue, dissect, and wheel and deal. And a 60-day session doesn't come cheap: lawmakers voted to spend a max of about \$8.3 million on this one.

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V.20 No.13 | 3/31/2011



Talking Points

Prison or Processing Center?

An Immigrant detention facility in southern New Mexico faces sharp criticism from the ACLU

In the remote area southeast of Las Cruces lies an unincorporated region called Chaparral. About 15,000 people live scattered throughout, according to the 2010 census.

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V.20 No.12 | 3/24/2011



Making Sausage

Playing Chicken With Millions

Senators battled as the final moments of the 2011 legislative session ticked away

If an eye for an eye makes everyone blind, a bill for a bill leaves our roads messed up and our senior centers unfunded.

During the legislative session, most measures are passed in the final days, hours and even minutes. As the clock wound down on Saturday, March 19, lawmakers threw a wrench in the works to force one of the governor's priorities through. But it didn't work, and in the end, Gov. Susana Martinez' "social promotion" education bill got left behind—and so did millions for improvements around the state.

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V.20 No.11 | 3/17/2011



Making Sausage

Like sands through the hourglass, so are the days of the 2011 legislative session. It's slated to adjourn on Saturday, March 19,

at noon. The brunt of the work usually happens during the last hours, and lawmakers debate well into the final nights. Here's what's happened so far.

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V.20 No.10 | 3/10/2011



Punk Is Whatever We Made It to Be

An interview with bassist Mike Watt

Mike Watt's latest album, *Hyphenated-Man*, is not about the past. "It's kind of a meditation on me in middle age," he says.

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U.S. EPA Mandatory Greenhouse Gas Reporting Rule: Challenges for Electronics Manufacturing

Jim Casciano/Tim Higgs
Intel Corporation
SEMICON West

July 12, 2011

EXHIBIT

C

Summary- Air Permitting for GHG's

- Tailoring rule adds complexity to air permitting for semiconductor Fabs above the thresholds for GHG emissions
- EPA Guidance will be needed for applying PSD and Title V permits to semiconductor industry
- Significant time and resources need to be devoted to adjusting to new rules
- Adjustment will add to business uncertainty

CONFIDENTIAL CANDIDATE QUESTIONNAIRE

PERSONAL INFORMATION

1. Please provide your full name, county of residence, birthplace, social security number, marital status, and list all places of residence by street address and community for the last 5 years. If you were born outside the United States, please provide the basis for your citizenship or permanent residency in the United States. If you are married, please list your spouse's full name and occupation.

Answer 1:

Candidate Full Name: Gregory Hugh Fulfer

County of Residence: Lea County (Jal), New Mexico

Birthplace: Kermit, Texas

Social Security Number: [REDACTED]

Marital Status: Married, 26 years to Kimberly Kay Fulfer (She is a Co-Owner of Fulfer Oil & Cattle)

Residence for Past 5 Years: [REDACTED]

2. Please list all of the schools you have attended, beginning with high school(s), and include the approximate dates of attendance and degrees earned.

Answer 2:

High School: Jal High School – Graduated 1979

New Mexico Junior College: 1979 – 1980

New Mexico State University – Graduated 1984

Graduated with Bachelor of Science Degree in Electrical Engineering Technology

3. Are you a veteran of the armed services and, if so, were you honorably discharged? If not, please explain. Were you ever subject to a court-martial?

Answer 3:

No.



4. Have you ever been a candidate for any local, state or federal political office? If so, please list positions and, if elected, dates of service.

Answer 4:

Appointed to Lea County Board of County Commissioners for District 5 on May 24, 2007.

Elected to Lea County Board of County Commissioners for District 5 in November 2008 (Term Began 01/01/2009 thru 12/31/2012)

5. Have you ever been appointed to any paid or unpaid local, state or federal position? If so, please list the position, dates of service and who appointed you.

Answer 5:

Appointed to Lea County Board of County Commissioners for District 5 on May 24, 2007 by Governor Richardson. Served until December 31, 2008.

6. Please provide the names, addresses and telephone numbers of three personal references.

Answer 6:

Randall McCormick [REDACTED]
Gary M. Schubert [REDACTED]
W. E. Armstrong [REDACTED]

LEGAL INFORMATION

7. Have you ever been charged with a DWI or DUI or any other criminal offense, other than a minor traffic violation for which the fine was less than \$300 dollars? If so, when? Please describe the outcome.

Answer 7:

No.

8. Have you ever been charged, pled guilty to, or convicted of any misdemeanor or felony offense? If so, when? Please describe the outcome.

Answer 8:

No.

9. Please list any claims of sexual harassment or other workplace misconduct made against you or any employee directly supervised by you, including the resolution of the matter.

Answer 9:

No.

10. Have any civil judgments or liens been rendered against you? If so, please provide details.

Answer 10:

No.

TAX INFORMATION

11. Have you filed all federal and state tax returns that are now due or overdue, and are all tax payments, fines, penalties and interest been paid in full and/or otherwise finally resolved with the taxing authority? If no, please explain.

Answer 11:

Yes. All have been filed except 2010 which in April 2011.

12. Have you or any entity in which you held an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If yes, please explain.

Answer 12:

No.

EMPLOYMENT INFORMATION

13. Have you ever been discharged, suspended or asked to resign from your place of employment?
If yes, please explain.

Answer 13:

No.

14. In the last ten years, have you ever registered as a lobbyist or other legislative agent to influence legislation or administrative acts in any state or for the federal government? Have you ever received payment for acting as a lobbyist or legislative agent? If so, please supply details.

Answer 14:

No.

15. Have you ever testified (on your own behalf or on behalf of others) before the New Mexico legislature, or any administrative, investigative or regulatory body of the State of New Mexico? Describe the time period and subject matter of your testimony.

Answer 15:

Yes. I have testified before the New Mexico EIB in 2010 on behalf of Lea County against the Cap and Trade.

MISCELLANEOUS

16. Are there any other matters you believe the Governor-elect should be aware of?

Answer 16:

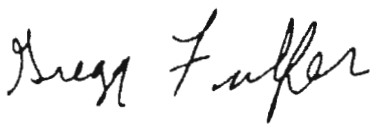
Yes. I am the Son-In-Law of New Mexico State Senator Carroll H. Leavell.

Items to be Submitted in Separate Document(s):

1. Please include an updated copy of your resume.
Resume will follow.
2. Please attach a list of your references (three personal and three professional).
Please See Attached.
3. Please attach any readily available copies articles, columns or publications you have authored, individually or with others that are likely to be controversial.
No Publications.

I hereby declare under the penalty of perjury the foregoing is true and correct to the best of my ability.

Print Name: Gregory H. Fulfer

Signature: 

Date: January 27, 2011

Please keep a copy for your records

1. Please include an updated copy of your resume.
2. Please attach a list of your references (three personal and three professional).
3. Please attach any readily available copies articles, columns or publications you have authored, individually or with others that are likely to be controversial.

I hereby declare under the penalty of perjury the foregoing is true and correct to the best of my ability.

Print Name: James R. Casciano

Signature: James R. Casciano Date: January 23, 2011

Please keep a copy for your records

underscored material = new
[bracketed material] = delete

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SENATE BILL 190

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Carroll H. Leavell

AN ACT

RELATING TO STATE RULES; ENACTING A NEW SECTION OF THE STATE
RULES ACT TO REPEAL THE EFFECTIVENESS OF CERTAIN RULES;
DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

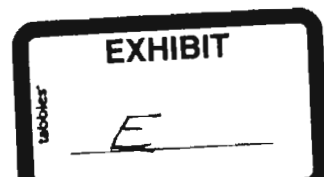
SECTION 1. A new section of the State Rules Act is
enacted to read:

"[NEW MATERIAL] REPEAL OF RULES.--The following rules
filed with the records center and published in the New Mexico
register are repealed:

A. Rule 20.2.100 NMAC adopted by the environmental
improvement board in 2010, which adopted a cap on emissions of
greenhouse gases;

B. Rule 20.2.300 NMAC adopted by the environmental
improvement board in 2010, which adopted requirements for

.184144.1



underscoring material = new
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1 reporting greenhouse gas emissions for a cap-and-trade program
2 dealing with greenhouse gases;

3 C. Rule 20.2.301 NMAC adopted by the environmental
4 improvement board in 2010, which adopted requirements for
5 verification of reports of greenhouse gas emissions for a
6 cap-and-trade program dealing with greenhouse gases; and

7 D. Rule 20.2.350 NMAC adopted by the environmental
8 improvement board in 2010, which adopted a cap-and-trade
9 program dealing with greenhouse gases."

10 SECTION 2. EMERGENCY.--It is necessary for the public
11 peace, health and safety that this act take effect immediately.

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,

SUPREME COURT OF NEW MEXICO
FILED

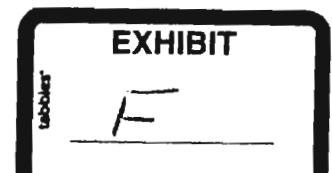
JUL 22 2011

Kathleen J. Gibson

Real Parties in Interest.

**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.

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 it 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.

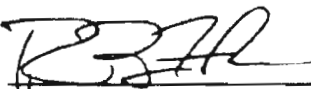
CONCLUSION

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:  _____

R. Bruce Frederick
Douglas Meiklejohn
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
bfrederick@nmelc.org

Attorneys for Petitioner New Energy
Economy, Inc.

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

COURT OF APPEALS NEW MEXICO
FILED

JUL 13 2011

[Handwritten Signature]

**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.

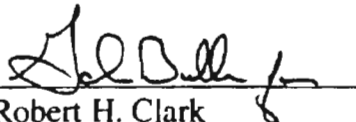
Respectfully submitted,

**PUBLIC SERVICE COMPANY OF NEW
MEXICO**

Patrick V. Apodaca, Sr. Vice President,
General Counsel & Secretary
Carol Graebner, Deputy General Counsel
Alvarado Square, MS 0806
Albuquerque, New Mexico 87158
Telephone: (505) 241-2700

and

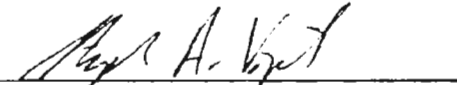
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**ENVIRONMENTAL IMPROVEMENT
BOARD**

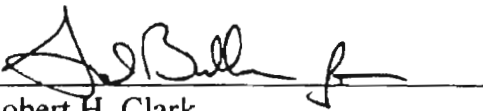
By: 

Stephen A. Vigil, Asst. Atty. General
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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:

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