

COPY

STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

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

No. EIB 11-15(R)



**MOTION TO ESTABLISH PRELIMINARY BRIEFING  
SCHEDULE ON THRESHOLD ISSUES THAT REQUIRE  
DISMISSAL OF PETITION AND DISQUALIFICATION OF  
THE BOARD, INCLUDING: MANIFEST BIAS OF THE BOARD,  
VIOLATIONS OF THE NEW MEXICO OPEN MEETINGS ACT,  
LACK OF ANY NEW EVIDENCE, THE SEPARATION OF  
POWERS DOCTRINE, AND PETITIONERS' PENDING APPEALS,  
AND  
REQUEST FOR HEARING**

There are substantial and serious questions about the legitimacy and appropriateness of this proceeding, as well as the legal ability of the Board to grant the relief requested by Petitioners. Therefore, New Energy Economy, Inc. (NEE), requests this Board to establish a schedule that allows the parties to fully brief and argue threshold issues that may require or persuade the Board to dismiss the Petition, either as a matter of law and for practical considerations. The grounds for this Motion are as follows:

1. **The Board has no authority to “reconsider” or “review” a prior final decision that it made in a separate proceeding:** Petitioners ask the Board to repeal Part 20.2.350 NMAC (“Rule 350”) for three basic reasons: (a) the prior Board did not comply with proper statutory procedures; (b) Rule 350 is beyond the Board’s statutory authority; and (c) Rule 350 is not based on “substantial evidence.” *Statement of Reasons* at 7 ¶ 8 & 12 ¶ 19. NEE contends that this Board has no statutory authority to “reconsider” a final decision that a prior Board made in a separate proceeding; nor does the Board have judicial power to review its prior decisions, especially given Petitioners’ pending appeals. Moreover, Petitioners fail to allege the existence of any new evidence that would justify the Board’s reversal on Rule 350. Accordingly,

the relief requested by Petitioners', if granted, would violate the Separation of Powers Doctrine established by the New Mexico Constitution. It would also violate the Air Quality Control Act and the Board's regulations.

2. **The Board should dismiss or stay the Petition until Petitioners' appeals of Rule 350 are resolved.** All of the Petitioners have appealed Rule 350. The same issues raised in their Petition will be decided by the Court of Appeals, which, unlike the Board, is vested with judicial power to review agency decisions. Therefore, to avoid the expense of a highly questionable and potentially needless administrative proceeding, this Board should dismiss the Petition, or delay consideration, until all pending appeals of Rule 350 have been resolved. There is no emergency requiring this Board to act immediately, because Rule 350 will not go into effect until at least 2013. Moreover, the fact that Petitioners are asking this Board to resolve legal issues instead of the Court of Appeals—in response to a private agreement between themselves and the Board—supports New Energy Economy's argument concerning bias, which is set forth in point #3.

3. **Because of manifest bias and lack of impartiality, the Board is disqualified from considering the Petition.** The Board's regulations provide:

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 (emphasis added); *see also* 20.1.1.107 (B) NMAC ("The hearing officer shall conduct a fair and impartial proceeding"). Under this objective standard, there is substantial evidence from which to reasonably infer that the Board is not impartial on the issue of

global warming or Rule 350. For example, in their appeal of Rule 350, Petitioners represented to the Court of Appeals in public documents that this Board was appointed by Governor Martinez and that the Governor's first priority is to repeal Rule 350. *See, e.g., PNM's Motion for Extension of Time to File Docketing Statement* at 2 ¶4 & 3 ¶7; *IPANM Motion for Extension of Time to File Docketing Statement* ¶¶ 4-5, 7-9. Petitioners further represented to the Court of Appeals that they hoped to "negotiate" a resolution with the Board regarding Rule 350, *id.*, and they did in fact engage in a private mediation with the Board to "resolve" Petitioners' appeals.<sup>1</sup> *See, e.g., PNM and EIB Joint Motion for Remand.* Soon after engaging in this private mediation with Petitioners, on July 11, 2011, the full Board "considered a proposed settlement that grew out of this mediation," *id.*, which was followed immediately by Petitioners' petition to repeal Rule 350. Short of an outright admission, there could hardly be more compelling evidence of substantial bias and grounds for recusal, especially from an "appearance" standpoint. The Board's actions not only show clear bias and lack of impartiality, but also provide evidence that the Board is making public policy decisions through private negotiations with PNM, Tri-State, and other entities that the Board regulates, thus cutting out the public from the process. This would appear to violate the New Mexico Open Meetings Act.

4. **Request for Hearing to Establish Briefing Schedule.** The purpose of this Motion is not to fully brief the issues raised herein, but to request that the Board establish a reasonable schedule that allows the parties to do so. At the request of the same Petitioners in this matter, the prior Board established a similar briefing schedule on the threshold issue of the Board's authority to adopt Rule 350. NEE anticipates that full briefing and oral argument of threshold issues will require approximately two months to complete. However, the Board should

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<sup>1</sup> Both PNM and the Board made a point of informing the Supreme Court, both in open court and in pleadings, that the mediation between them was a private affair and that their discussions could not be disclosed. On the other hand, parties can always waive a privilege to withhold information (assuming any privilege applies in this instance).

allow the parties to file proposed schedules and then establish an appropriate schedule at its next available public meeting.

WHEREFORE, NEE requests that the Board establish a schedule allowing the parties to fully brief and argue threshold issues that may require or persuade the Board to dismiss the Petition. Early dismissal of an illegal or inappropriate Petition will obviate the need to waste further time and expense on this proceeding or on the appeal that will follow when the Board grants the Petition.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW  
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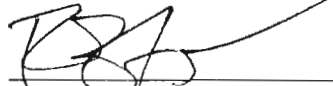
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**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the foregoing paper to be emailed to Petitioners' attorneys and Stephen Vigil on July 29, 2011, and to be mailed to the same on August 2, 2010, at addresses provided in the Petition.

  
R. Bruce Frederick