

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO

FILED

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

SEP 29 2011

Appellant,



vs.

Case No. 31,020

NEW MEXICO ENVIRONMENTAL
IMPROVEMENT BOARD, AMIGOS
BRAVOS, LEAGUE OF WOMEN
VOTERS FOR NEW MEXICO, and
THE CENTER OF SOUTHWEST
CULTURE,

Appellees,

and,

NEW ENERGY ECONOMY, INC.,

Petitioner-Appellee.

**MOTION TO VACATE ORDER OF REMAND AND
RETURN THIS APPEAL TO THE GENERAL CALENDAR**

Pursuant to the New Mexico Supreme Court's *Writ of Superintending Control* (Exhibit A), Appellee-Petitioner New Energy Economy, Inc. (NEE) is and always was a party in this matter. As such, NEE respectfully requests this Court to vacate its *Order of Remand* (Exhibit B) and return this matter to the general calendar. NEE requests this relief because the *Joint Motion for Remand* (Exhibit C) filed by the New Mexico Environmental Improvement Board (EIB) and the Public Service Company of New Mexico (PNM) was based on three false

premises: (1) that the *Joint Motion* was unopposed; (2) that the *Order of Remand* would divest this Court of jurisdiction by “remanding” this matter back to EIB for “further proceedings”; and that (3) the *Order of Remand* would conserve judicial resources.¹ Because the premises presented by EIB and PNM in their *Joint Motion for Remand* were not correct, this Court should vacate the *Order of Remand*.

ARGUMENT

I. Introduction.

This appeal involves a regulation (Rule 100)² that New Energy Economy, Inc. (NEE) researched, wrote, supported, and ultimately prevailed in persuading EIB to adopt in the administrative proceeding below. Although the proceeding below was a “rulemaking,” it was by law a formal and quasi-judicial proceeding. Pursuant to the New Mexico Environmental Improvement Act (NMSA 1978, § 74-1-1 *et seq.*), the Air Quality Control Act (NMSA 1978, § 74-2-1 *et seq.*), and EIB’s codified Rules of Procedure (NMAC Part 20.1.1), EIB cannot adopt a regulation unless a “Petitioner” such as NEE first proposes a regulation, thus initiating a formal proceeding that includes all the trappings of due process, including notice, hearing, and opportunity to present witnesses. The parties in this formal

¹ The actual title of EIB and PNM’s motion is “*Joint Motion for A 180-Day Remand to the New Mexico Environmental Improvement Board for Further Proceedings and for Stay of Appellate Proceedings.*”

² NMAC Part 20.1.100.

proceeding are the Petitioner, the persons who submitted “notices of intent to present technical testimony,” and all persons who submitted “entries of appearance.” NMAC § 20.1.1.7(K) (defining “parties”). The hearing is recorded and witnesses are sworn and subject to cross examination. NMAC §§ 20.1.1.401 & .403.

In this Court, EIB and PNM succeeded in excluding NEE and other parties below from participating on appeal in a proceeding to which they were already parties. El Paso Elec. Co. v. Milkman, 66 N.M. 335, 337 (1959) (an appeal is a continuation of the same proceeding). Before NEE and these other parties could obtain extraordinary emergency relief from the New Mexico Supreme Court, EIB and PNM successfully requested this Court to stay proceedings so that they could meet in private under the guise of court-sponsored mediation.³ Following their exclusive discussions,⁴ and while the Supreme Court was still determining the proper parties in this appeal, EIB and PNM filed their *Joint Motion for Remand* which this Court summarily granted a few days later.

³ NEE filed its emergency petition for writ of superintending control in the New Mexico Supreme Court on June 20, 2011. EIB and PNM filed their Joint Motion for Remand on July 13, 2011, which this Court granted on July 19, 2011. The Supreme Court issued its writ, ordering this Court to allow NEE and other parties to intervene, on July 28, 2011. EIB’s Rules of Procedure expressly prohibit *ex parte* communications. NMAC § 20.1.1.112.

⁴ It was “exclusive” in the sense that only PNM and other “Industry Group” opponents of Rule 100 were allowed to meet with EIB in private.

NEE respectfully requests this Court to vacate the *Order of Remand* and to return this appeal to the general calendar. NEE requests this relief for three reasons. First, EIB and PNM did not serve their *Joint Motion for Remand* on NEE or the other proper parties to this appeal, and therefore, these parties were never afforded notice or opportunity to oppose the *Joint Motion for Remand*. This Court thus summarily granted the *Joint Motion* on the false assumption that it was unopposed. Second, EIB and PNM misled this Court into believing that a “remand” was proper and that “further proceedings on remand” would occur. In fact, on “remand” from this Court, EIB and PNM commenced a proceeding that PNM characterizes as “entirely separate” from the matter on appeal. Third, to the extent that EIB and PNM sought only to stay this Court’s proceedings, a stay is not proper under the law and will not conserve judicial resources.

II. EIB and PNM failed to serve their *Joint Motion for Remand* on NEE and other proper parties to this appeal, and therefore, this Court entered the *Order of Remand* on the false assumption that the *Joint Motion* was unopposed.

The Supreme Court ordered this Court to “allow [NEE], which had been granted party status in the underlying proceeding before the [EIB], to participate in [this Court’s] proceedings as an appellee” Exhibit A (*Writ of Superintending Control*). As parties, NEE and the other appellees in this proceeding are entitled to service of all motions and an opportunity to respond. NMRA 12-309(B). EIB and PNM failed to serve NEE and the other appellees with their *Joint Motion* and thus

denied them due process of law. As a consequence, this Court granted the *Joint Motion for Remand* on the false assumption that all proper parties in this appeal supported it. In fact, had EIB and PNM served their *Joint Motion* on NEE, NEE would have filed a response in opposition to the *Motion*. Therefore, NEE requests this Court to vacate the *Order of Remand*.

III. EIB's and PNM's *Joint Motion for Remand* was misleading, because it stated incorrectly that "this matter" would be "remanded" back to EIB for "further proceedings."

In their *Joint Motion for Remand*, EIB and PNM represented to this Court that "further proceedings before the [EIB] may resolve this appeal." *Joint Motion for Remand* at 1-2, ¶ 1. They advised the Court that:

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.

Id. at 2 ¶ 2. In using such terms of art as "remand" and "vesting jurisdiction," EIB and PNM convinced this Court that the contemplated "further proceedings" would be a continuation of same "the matter" on appeal. In response to what purported to be an unopposed request from remand, this Court summarily ordered that "this matter is remanded" to EIB. Exhibit B.

However, on the purported "remand" to the EIB, PNM contradicted the representations it and EIB made to this Court:

On July 15, 2011, the Industry Groups⁵ filed a petition to repeal Rule 100. The petition initiated a new proceeding, separate from the prior rulemaking that had resulted in the promulgation of Rule 100.

[Industry Group's] Response to NEE's Motion to Recuse Members Casciano, Fulfer and Peacock at 4 ¶ 16 (Exhibit D). The “rulemaking that had resulted in the promulgation of Rule 100” is the very rulemaking that led to the instant appeal. Thus, EIB and PNM persuaded this Court to issue the *Order of Remand* by making a false assertion, i.e., that this Court should divest itself of jurisdiction by “remanding” this matter for “further proceedings.” In actuality, EIB and PNM apparently intended to commence a “new” and entirely “separate” proceeding from the matter on appeal in this Court. Accordingly, because its underlying premise was false, this Court should vacate the *Order of Remand*.

IV. Proceedings in this Court should not be stayed.

Although they did not cite any authority supporting a stay and expressly requested a “remand” of “this matter,” EIB and PNM concede now that the *Order of Remand* only stayed this Court’s proceedings. See also Exhibit E (Supreme Court *Order* characterizing this Court’s *Order of Remand* as a “discretionary abatement of ... proceedings”). Because a stay is not justified under the law or facts of this case, the Court should vacate the *Order of Remand* and return this case to the general calendar.

⁵ PNM is part of the “Industry Groups,” which includes all the appellants of Rule 100.

In the case of Landis v. North American Co., 299 U.S. 248 (1936), Justice Cardozo established the now universal standard for staying proceedings in courts of law:

[The movant] for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.

Id. at 255; Segal v. Goodman, 115 N.M. 349, 356, 851 P.2d 471, 478 (1993)

(citing Landis with approval). The movant's burden is heightened where, as here, a stay in one proceeding is requested pending the outcome of another:

Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Id. In such cases, "if there is even a fair possibility that the stay ... will work damage to someone else," then the stay should be denied unless the movant can "make out a clear case of hardship." Landis at 255. Under this standard, EIB and PNM are not entitled to a stay.

First, the stay "will work damage" to NEE and the other appellees (*i.e.*, other than EIB). NEE was the Petitioner in the proceeding below. That proceeding spanned over two years and included over two hundred hours of sworn testimony, resulting in the adoption of Rule 100. NEE bore the burden coming forward with substantial evidence to meet the standards for adopting regulations under the Air Quality Control Act and other applicable law. NMSA 1978, § 74-2-5(C) (setting

standard of adoption of air regulations). NEE and the other appellees (*i.e.*, other than EIB) are entitled to defend Rule 100 in this appeal, and they should not have to step aside while EIB and PNM carry out an entirely new and arguably invalid proceeding in which EIB will rehear and review the same evidence that the parties presented in the matter that is now on appeal in this Court.⁶

The new proceeding that EIB and PNM commenced will give rise to new rights of appeal in which the same issues will come before this Court, although NEE and the other appellees will almost certainly be the new appellants. At that time, the instant appeal will almost certainly still be pending, because PNM is unlikely to abandon this appeal (involving EIB's adoption of Rule 100—the "First Appeal") until NEE's later appeal (involving EIB's repeal of Rule 100—the "Second Appeal") is finally resolved. Thus, the stay that EIB and PNM obtained on false premises will not conserve this Court's resources. At most it will merely delay resolution of this matter and, in effect, unjustly shift the burden and expense on appeal from PNM to NEE and the other appellees.

PNM opposes this motion. Counsel for EIB could not ascertain his client's position by the time of filing.

⁶ NEE contends that the new proceeding is unlawful and improper for several reasons, including that EIB is not impartial, that there is no new evidence that supports repeal, that PNM and the other Industry Groups are precluded from re-litigating their case, and that EIB has no power to judicially review its past decisions.

WHEREFORE, NEE respectfully requests the Court to vacate the *Order of Remand* and return this matter to the general calendar.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER

By: 

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Douglas Meiklejohn
Eric Jantz
Jon Block
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022 (tel.)
(505) 989-3769 (fax)
bfrederick@nmelc.org

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 parties' attorneys (shown below) and also emailed to them on the 29 day of September, 2011:


R. Bruce Frederick

Stephen A. Vigil/Office of the Attorney General/P.O. Box 1508/Santa Fe, NM 87504-1508 <i>Attorney for Environmental Improvement Board</i>	Richard L. Alvidrez/Miller Stratvert PA/P.O. Box 25687 Albuquerque, NM 87125-0687 <i>Attorneys for Public Service Company of New Mexico and Southwestern Public Service Company</i>
Robin Cooley Earthjustice 1400 Glenarm Place, #300 Denver, CO 80202 <i>Attorney for Amigos Bravos, the New Mexico Pediatric Society, and the League of Women Voters</i>	

L. M. Vanzi
Clerk of the Supreme Court
of the State of New Mexico

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 27, 2011

NO. 33,074

JUL 28 2011

NEW ENERGY ECONOMY, INC.,

Petitioner,

v.

**HON. LINDA M. VANZI,
New Mexico Court of Appeals Judge,**

Respondent,

and

**PUBLIC SERVICE COMPANY OF
NEW MEXICO and NEW MEXICO
ENVIRONMENTAL IMPROVEMENT
BOARD,**

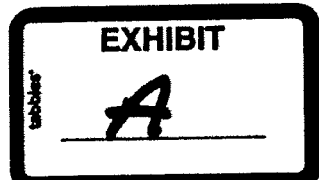
Real Parties in Interest.

WRIT OF SUPERINTENDING CONTROL

THE STATE OF NEW MEXICO

TO: Hon. Linda Vanzi
New Mexico Court of Appeals
P.O. Box 2008
Santa Fe, New Mexico 87504-2008

GREETINGS:



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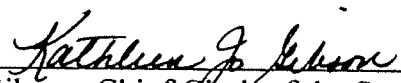
WHEREAS, a petition for a writ of superintending control having been filed in this matter and having been granted by this Court on July 27, 2011; and the Court being sufficiently informed and good cause appearing for the issuance of a writ of superintending control;

NOW, THEREFORE, you, the respondent, Hon. Linda Vanzi, are ordered to VACATE the orders filed on May 24 and June 10, 2011, in cause numbered 31,020, *Public Service Company v. New Mexico Environmental Improvement Board*, and allow New Energy Economy, Inc., which had been granted party status in the underlying proceedings before the Environmental Improvement Board, to participate in the Court of Appeals proceedings as an appellee in Public Service Company of New Mexico's appeal from the Board's decision.

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of this Court this 27th day of July, 2011.

(S E A L)



Kathleen Jo Gibson, Chief Clerk of the Supreme Court
of the State of New Mexico

1 IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

2 PUBLIC SERVICE COMPANY
3 OF NEW MEXICO,

4 Appellant,

5 vs.

No. 31,020
EIB 08-19 (R)

To
Bruce
Fredrick

7 NEW MEXICO ENVIRONMENTAL
8 IMPROVEMENT BOARD,

10 Appellee.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JUL 19 2011

[Signature]

11 IN THE MATTER OF THE PETITION TO
12 ADOPT NEW REGULATIONS WITHIN
13 20.2 NMAC, STATEWIDE AIR QUALITY
14 REGULATIONS, TO REQUIRE GREENHOUSE
15 GAS EMISSIONS REDUCTIONS.

16 ORDER OF REMAND

17 This matter came before the Court on the joint motion of El Paso Electric
18 Company and the New Mexico Environmental Improvement Board for remand
19 to the Board for further proceedings.

20 It is hereby **ORDERED** that this matter is remanded to the New Mexico
21 Environmental Improvement Board for 180 days. The appeal proceedings shall
22 be stayed pending the remand. The parties shall report to the Appellate
23 Mediator in accordance with paragraph three of their motion.

24 *[Signature]*
25 MICHAEL D. BUSTAMANTE, Judge
26



IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS NEW MEXICO
FILED

JUL 13 2011

B. H. [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



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.

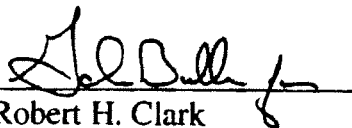
Respectfully submitted,

**PUBLIC SERVICE COMPANY OF NEW
MEXICO**

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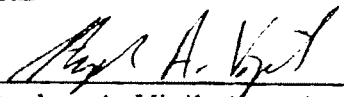
and

MILLER STRATVERT P.A.

By: 
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Richard L. Alvidrez
P.O. Box 25687
Albuquerque, NM 87125-0687
Telephone (505) 842-1950

Attorneys for Appellant Public Service
Company of New Mexico

**ENVIRONMENTAL IMPROVEMENT
BOARD**

By: 
Stephen A. Vigil, Asst. Atty. General
NM Attorney General's Office
P.O. Box 1508
Santa Fe, New Mexico 87504-1508

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF THE PROPOSED
REPEAL OF REGULATION,
20.2.100 NMAC - *Greenhouse Gas Reduction Program***

No. EIB 11-16 (R)

**PETITIONERS' RESPONSE IN OPPOSITION TO
NEE'S MOTION TO RECUSE BOARD MEMBERS
CASCIANO, FULFER AND PEACOCK**

Tri-State Generation and Transmission Association, Inc., New Mexico Oil and Gas Association, Public Service Company of New Mexico, Southwestern Public Service Company, Independent Petroleum Association of New Mexico, the City of Farmington and the Farmington Electric Utility System, and El Paso Electric Company (together, the "Petitioners" or "Industry Groups") hereby respond in opposition to New Energy Economy, Inc.'s ("NEE") Motion to Recuse Board Members Casciano, Fulfer and Peacock ("Motion to Recuse"). As discussed below, NEE has failed to satisfy its heavy burden of showing that Board Members Casciano, Fulfer or Peacock should recuse themselves or be disqualified, and the Board should deny the Motion to Recuse.

INTRODUCTION

With the Motion to Recuse, NEE improperly attempts to influence the outcome of the hearing by altering the composition of the Board through unsubstantiated claims of bias. The clear implication of the Motion to Recuse is that any decision unfavorable to NEE must be the result of bias. This Board should not allow NEE's tactic to succeed. As demonstrated below, there is no evidence that Board Members Casciano, Fulfer or Peacock have a deep-seated



14. At the oral argument before the Supreme Court on that motion, NEE conceded that the Board had authority to repeal Rule 100, even while the Industry Groups' appeal was pending.

15. After considering NEE's request to vacate, the New Mexico Supreme Court construed the Order of Remand as a stay, but otherwise determined that the Order of Remand was proper because the Board had authority to repeal its own rules at any time.

16. On July 15, 2011, the Industry Groups filed a petition to repeal Rule 100. The petition initiated a new proceeding, separate from the prior rulemaking that had resulted in the promulgation of Rule 100.

ARGUMENT

I. Standard of Decision

As NEE notes, the Board's rulemaking procedures provide that "[n]o board member shall participate in any action in which his or her impartiality or fairness may reasonably be questioned." 20.1.1.111 NMAC (2011). 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].

Reid v. N.M. Bd. of Examiners in Optometry, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). In conducting this inquiry, however, the New Mexico Supreme Court has instructed courts and administrative bodies to be mindful that:

"Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible*. Thus, judicial remarks during the course of the trial [or prior proceedings] that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."

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2 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

3 **July 27, 2011**

4 **NO. 33,074**

5 **NEW ENERGY ECONOMY, INC.,**

6
7 **Petitioner,**

8
9 **v.**

10 **HON. LINDA M. VANZI,**
11 **New Mexico Court of Appeals Judge,**

12 **Respondent,**

13
14 **and**

15 **PUBLIC SERVICE COMPANY OF**
16 **NEW MEXICO and NEW MEXICO**
17 **ENVIRONMENTAL IMPROVEMENT**
18 **BOARD,**

19 **Real Parties in Interest.**

20 **ORDER**

21 **WHEREAS,** Petitioner having filed on July 22, 2011, its emergency
22 Motion to Vacate court of Appeals' Order of Remand, this Court having issued
23 on July 25 a stay of the order of remand, and it appearing to this Court that the
24 order is in the nature of a discretionary abatement of Court of Appeals
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proceedings while the EIB considers a new case and therefore merits no intervention by this Court; and the Court having heard arguments of the parties and being sufficiently informed;

NOW, THEREFORE, IT IS ORDERED that this Court's July 25 stay order is hereby vacated.

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of this Court this 27th day of July, 2011.

(SEAL)
ATTEST A TRUE COPY

[Signature]
Clerk of the Supreme Court
of the State of New Mexico

Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk of the Supreme Court
of the State of New Mexico