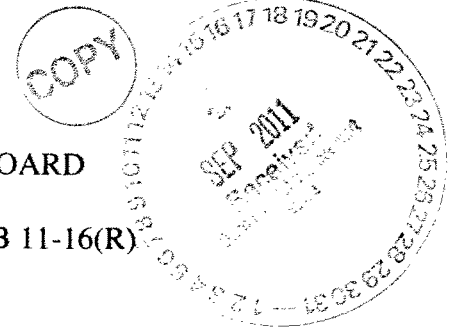


STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

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

No. EIB 11-16(R)



**OBJECTION TO IMPROPER HEARING PROCEDURES  
AND REQUEST OF RECONSIDERATION**

On September 7, 2011, the Hearing Officer conducted a recorded, formal hearing in this proceeding in accordance with Environmental Improvement Board's (EIB) procedural rules and paragraph 4 of the Order Establishing Procedures, which provides:

On September 7, 2011, the Administrator, Hearing Officer and Counsel will meet to discuss those portions of the ... hearing record made in the [prior proceedings in which EIB adopted] the regulations ... that the parties would offer for the Board's consideration in [the current] proceeding.

Contrary to the request of New Energy Economy, Inc. (NEE) and Western Resource Advocates, Inc. (WRA), and in accordance with petitioners' request, the Hearing Officer ruled that the entire record from the prior proceedings<sup>1</sup> would not automatically be admitted into the record of the instant proceeding. The Hearing Officer decided to admit all of the public testimony from the prior proceedings but not all of the technical testimony and other materials comprising the voluminous record of the prior proceedings. The Hearing Officer deemed it necessary to admit all the public testimony, because there is no time to schedule more public testimony at locations across the state in the instant proceeding, as was required by EIB in the prior proceedings, given the hearing deadlines imposed in the current proceeding.<sup>2</sup>

As to all the technical testimony and other materials in the record of the prior proceedings, the Hearing Officer ruled that the parties will be limited to offering specific

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<sup>1</sup> The prior proceedings are identified in paragraph 5 of the Order Establishing Procedures.

<sup>2</sup> NEE has objected that these deadlines were arrived at through *ex parte* negotiations between EIB and petitioners.

portions of the record, which may then be excluded *sua sponte* by the Hearing Officer or on objection of the other parties. Parties will be required to make their offers through “sponsoring” witnesses, who would be subject to *voir dire* and cross-examination.

At the September 7<sup>th</sup> hearing, counsel was surprised to learn that the Hearing Officer had already conferred with EIB as to which parts of the record of the prior proceedings to admit. This conference was entirely *ex parte*, since it occurred outside the record of the instant proceeding and outside the presence of counsel. EIB did not consider the various arguments of the parties, nor did it formally vote on the issue of whether the entire record of the prior proceedings should be admitted. Individual members apparently expressed a desire not to be burdened with reading the entire records from the prior proceedings in which the EIB adopted the Rules at issue. The Hearing Officer ultimately ruled in accordance with their desire.

### ARGUMENT

NEE objects to the Hearing Officer’s *ex parte* conference with EIB, as set out below, and requests that she reconsider her ruling and admit the entire record from the prior proceedings.

1. The EIB’s *ex parte* instruction to the Hearing Office is not part of the “transcript of proceedings” in this matter. The ultimate decision of EIB in this proceeding, as well as the Hearing Officer’s various rulings, must be based exclusively on matters contained in the official record, *i.e.*, in the “transcript of proceedings.” NMSA 1978, § 74-1-9(1985); NMSA 1978, § 74-2-9 (1992); NMAC § 20.1.1.403. The “transcript of proceedings” means:

... the verbatim record (audio tape or stenographic) of the proceedings, testimony and argument in the matter, together with all exhibits proffered at the hearing, whether or not admitted into evidence, including the record of any motion hearings or prehearing conferences.

NMAC § 20.1.1.7 (S). EIB’s procedural rules also forbid *ex parte* communications, whether on- or off-the-record. Cf. NMAC § 20.1.1.112. In this case, the Hearing Officer conferred with EIB

on a crucial matter, *i.e.*, whether to admit the entire record from the prior proceedings. The conference occurred outside the record of this proceeding and outside the presence of counsel. The Hearing Officer then ruled in accordance with the opinions expressed at the conference by individual EIB members.

2. The conference between the Hearing Officer and EIB, apparently unrecorded, gives the appearance that important decisions regarding this proceeding are being made outside the hearing record. This would appear to conflict with EIB's procedural rules and violate the right of the public and the parties to an open, fair, and on-the-record proceeding.

3. Neither EIB nor its individual members may control the Hearing Officer's rulings on delegated matters. EIB's procedural rules require it to "designate a hearing officer for each hearing who shall" conduct the hearing and "exercise all powers and duties prescribed or delegated under" EIB's procedural rules. NMAC § 20.1.1.107(B). After such delegation, EIB members may attend the hearing but they may not seek to influence or control the hearing process or the hearing officer's rulings. NMAC § 20.1.1.107(A) (limiting the EIB's "powers and duties" in the hearing process to those "not otherwise delegated to the hearing officer or the board administrator.") It is the Hearing Officer, not EIB, who is charged with conducting "a fair and impartial proceeding" to "assure that the facts are fully elicited ...." *Id.* Thus, the Hearing Officer's rulings in a particular hearing should reflect her independent judgment and be based solely on the facts of the case and the argument of counsel. In this case, however, it appears that the Hearing Officer's ruling may have been influenced by opinions of individual EIB members, which were expressed outside the record of this hearing.

## CONCLUSION

The Rules at issue in these proceedings were adopted by EIB less than a year ago following extensive recorded evidentiary hearings. All of the petitioners were parties to these hearings. All of them made the same arguments against adoption that they are now making for repeal. As the Hearing Officer noted at the recent hearing, the records of the prior proceedings are clearly relevant to the issues now before EIB. Indeed, they are the same issues.

Furthermore, it is no secret that NEE intends to argue on appeal that petitioners are precluded from re-litigating the same issues that were fully litigated and decided in the prior proceedings. But this argument requires admission of the entire record of the prior proceedings.

The Hearing Officer's ruling, contrary to NEE's interests, followed an off-the-record conference between her and EIB, which occurred outside the presence of counsel. As set out above, this gives the impression that the Hearing Officer and EIB are not following their own procedural regulations and that they are making decisions adverse to NEE's interest outside of NEE's presence. This impression is strengthened by the fact that EIB joined petitioners in opposing NEE's intervention in petitioners' pending appeals of the Rules and in excluding NEE from participating in the private mediation that led directly to the instant proceedings. Thus, as a practical matter, NEE and EIB are adverse parties in pending litigation, and yet EIB is purporting to conduct a fair and impartial hearing on the subject of their adversity, *i.e.*, the resolution of petitioners' appeals of the Rules. If EIB and the Hearing Officer truly seek to provide a fair and impartial hearing, despite all indications that this may be impossible, then they should strictly abide by EIB's procedural rules.

WHEREFORE, NEE requests that the Hearing Officer strictly abide by EIB's procedural rules and to reconsider her decision not to admit the entire record of the prior proceedings. In

fairness to the public, NEE and other opponents of repeal, the entire record should be admitted into this proceeding.

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 New Energy Economy, Inc.

**CERTIFICATE OF SERVICE:** I certify that I caused a copy of the foregoing paper to be emailed to Petitioners' attorneys and Stephen Vigil on 8/14, 2011.

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R. Bruce Frederick