

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)



**REPLY TO PETITIONERS' RESPONSE TO
MOTION TO STRIKE PARTS OF
PETITIONERS' STATEMENT OF REASONS**

New Energy Economy, Inc. (NEE) requests the Hearing Officer to strike **paragraphs 8-22** and **paragraphs 10-28** of the statement of reasons in EIB 11-15(R) and EIB 11-16(R), respectively.¹

1. *The Motion to Strike was not untimely.*

Relying once an alleged technicality, petitioners contend that NEE's Motion to Strike is untimely, because EIB has already made the decision to conduct a hearing on their petition on August 1, 2011, and that EIB has already accepted their pre-filed testimony. *Pet. Response at 2-4*. Petitioners' arguments have no merit.

First, NEE could not have filed its motion to strike any earlier, because it did not learn of the petitioners' recent change in position—that the prior and current proceedings are “entirely separate”—until the hearing of September 7, 2011. Prior to that time, petitioners *and* EIB had unequivocally represented to both the Supreme Court and the Court of Appeals that the two proceedings were the same “matter.” Petitioners and EIB thus informed these Courts that the “matter” had been “remanded” from the Court of Appeals to the EIB for “further proceedings,” thus enabling EIB to exercise “jurisdiction” over the matter. *EIB Opposition to Petition for Writ (Exhibit A) at 3; EIB Opposition to Motion to Vacate (Exhibit B) at 4-8; PNM Opposition to*

¹ After reviewing petitioners' closing arguments in the prior proceedings, NEE is hereby requesting that additional paragraphs be stricken. Also, some of the paragraphs identified in the motion to strike filed in EIB 11-16(R) (Rule 100) were incorrect. This error is now corrected.

Petition for Writ (Exhibit C) at 4; see also Joint Motion for Remand (already on file); *Order of Remand* (remanding “the matter” back to EIB)(already on file). Given the representations of EIB and petitioners and the usual meaning of such terms as “remand,” “jurisdiction,” “matter” and “further proceedings,” NEE had no reason to know petitioners’ current view until it was disclosed on September 7th. In any event, their petition is clearly based on a view they no longer possess—that the Court of Appeals had to divest itself of jurisdiction over the “matter,” by remand, to enable EIB to exercise jurisdiction over the same “matter.” Accordingly, paragraphs 13 and 19-22 and paragraphs 10, 19, and 25-28 of the statement of reasons in EIB 11-15(R) and EIB 11-16(R), respectively, should be stricken to conform to petitioners’ current view, *i.e.*, that the prior proceedings are irrelevant.

Second, although EIB did indeed already decide to conduct a hearing on the petition, nothing in EIB’s Rules of Procedure (NMAC Part 20.1.1.) suggests that petitioners’ statement of reasons is now sacrosanct. NEE and the other parties should not be forced to rebut or even consider irrelevant allegations, which (according to petitioners) would include allegations about the prior proceedings.

Third, petitioners contend that EIB made the decision to conduct a hearing on their petitions on August 1, 2011, at a public meeting. *Pet. Response at 2-3*. However, as a practical matter, this decision had already been made, in private, pursuant to a settlement agreement between EIB and petitioners. This is reasonably clear, not only from the evidence already in the record of this proceeding, but also from EIB’s and petitioners’ arguments to the Supreme Court. On July 22, 2011, PNM made the following argument to the Supreme Court:

iii. [Appellees]² Claims are Moot.

The order of the Court of Appeals granting to Joint Motion for 180-Day Remand has rendered moot [Appellees'] Petition in this extraordinary proceeding. ... Here, the heart of [Appellees'] argument is that they should be able to have a voice in further proceedings regarding the future of Rule 100. The remand to hold further proceedings has provided [Appellees'] with the relief they seek—further participation in the Rule 100 rulemaking process. In light of the remand of appeal, an actual controversy no longer exists, and there is no further relief for the Court to grant.

Exhibit C at 11. The Petition for Writ at issue before the Supreme Court would not have been rendered “moot” unless EIB had, in fact, already decided to conduct “further proceedings” to repeal the Rules.³ As mentioned above, PNM filed its brief on July 22, 2011—several days before EIB would meet publically to announce its decision.

More troubling, however, is the fact that EIB made the same argument a few days later, on July 25, 2011:

Finally, a writ of superintending control would not be appropriate as [Appellees']⁴ case is moot. As of July 19, 2011, Part 100 has been remanded to the [EIB] for further proceedings. It would be judicially inefficient and impractical to allow [Appellees'] to intervene in a matter that has been remanded to the [EIB].

Exhibit A at 12. Although the brief goes on to allude to the August 1st hearing, the “mootness” argument again makes no sense unless EIB had already decided—as of July 25th—to take up the petitions to repeal the Rules.⁵

² Here, [Appellees] refers to Amigos Bravos, League of Women Voters of New Mexico and Center of Southwest Culture.

³ This argument is based on a fallacy, however, because EIB's decision to repeal Rule 100 will create new rights of appeal. Petitioners' appeals will only become moot, if at all, after all appeals have been exhausted.

⁴ See Footnote 1.

⁵ The “mootness” argument also reflects EIB's and petitioners' prior view that the Order of Remand was an actual remand, divesting the Court of Appeals of jurisdiction, and not merely a stay.

2. *EIB cannot resolve the same issues that are currently on appeal, because this would violate the Separation of Powers Doctrine and encroach on the appellate jurisdiction of the Court of Appeals.*

In the prior proceedings before EIB, petitioners challenged the validity of the Rules on virtually every conceivable factual and legal basis. Their multiple avenues of attack are well-summarized in petitioners' closing arguments in the prior proceedings, which are incorporated herein by reference as if attached hereto as exhibits in their entirety.⁶ For example, petitioners claimed in the prior proceedings that EIB lacked legal authority to adopt the Rules, that the Rules conflicted with existing federal and state laws, that the Rules would not abate or prevent air pollution, that the Rules were vague and missing critical elements, that the Rules would not mitigate climate change, that it was technically infeasible to reduce GHG emissions, that the costs of the Rules outweighed the benefits, that no adequate economic analysis supported the Rules, and that the Rules would hurt New Mexico's economy. *Id.*; see also EIB 10-04(R) Tr. 7 (petitioners' opening argument).

All the issues that petitioners raised in the prior proceedings regarding the validity of the Rules are pending before the Court of Appeals. Accordingly, when EIB and petitioners first jointly developed and then filed their Joint Motion for Remand, they clearly believed that it was necessary to obtain a "remand" in order to divest the Court of Appeals of jurisdiction of the appeals. See *Joint Motion for Remand* (already in record); Exhibits A-C. EIB and petitioners were right: EIB cannot constitutionally determine the validity of the Rules while, at the same time, the validity of the Rules is on appeal at the Court of Appeals. This violates the Separation of Powers Doctrine and specifically encroaches on the appellate jurisdiction of the Court of

⁶ Petitioners' closing arguments in the Rule 350 proceeding are Item Nos. 86-93 at: http://ftp.nmenv.state.nm.us/www/EIB/June_21_2010_Meeting/EIB%2010-04/EIB%2010-04%20Pleading%20Documents%2084%20through%2093/. They made essentially the same arguments in the Rule 100 proceeding, but these are not yet posted on EIB's website.

Appeals, which has exclusive appellate jurisdiction to review EIB's decisions. NMSA 1978, § 74-1-9 (1985); NMSA 1978, § 74-2-8 (1992). Accordingly, **paragraphs 8-22** and **paragraphs 10-22** of the statement of reasons in EIB 11-15(R) and EIB 11-16(R), respectively, should be stricken.⁷ These paragraphs implicate the issues that are currently before the Court of Appeals, and therefore, these issues are beyond EIB's power to resolve.

WHEREFORE, NEE requests the Hearing Officer to strike from the record **paragraphs 8-22** and **paragraphs 10-22** of the statements of reason in EIB 11-15(R) and EIB 11-16(R), respectively.

Respectfully submitted:

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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 9/30, 2011.


R. Bruce Frederick

⁷ Additional paragraphs have been added upon review of petitioner's closing arguments in the prior proceedings.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**AMIGOS BRAVOS, LEAGUE OF WOMEN VOTERS OF
NEW MEXICO and CENTER FOR SOUTHWEST CULTURE,**

Petitioners,

v.

No. 33,091

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

Respondent,

and

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

SUPREME COURT OF NEW MEXICO
FILED

JUL 25 2011

Katherine J. Huberman

Real Parties in Interest.

**NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD'S
RESPONSE IN OPPOSITION TO VERIFIED EMERGENCY PETITION
FOR WRIT OF SUPERINTENDING CONTROL OR OTHER
APPROPRIATE WRIT**

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

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Attorneys for Real Party in Interest NM Environmental Improvement Board



COMES NOW GARY K. KING, Attorney General of New Mexico, by and through Stephen A. Vigil, Assistant Attorney General, counsel for the New Mexico Environmental Improvement Board ("Board"), and pursuant to Rule 12-504(C) NMRA (2010) files this Response in Opposition to the Verified Emergency Petition for Writ of Superintending Control or Other Appropriate Writ filed by Amigos Bravos, League of Women Voters of New Mexico, and Center for Southwest Culture ("Petitioners") against Honorable Court of Appeals Judge Linda M. Vanzi ("Respondent"). The Board asks that the Court deny the Petitioners' Petition because the exercise of this Court's extraordinary power of superintending control is not appropriate in this case as Respondent's decision was discretionary and consistent with New Mexico law, contrary to the assertions of the Petitioners.

INTRODUCTION

This case concerns the Board's adoption of 20.2.100 NMAC ("Part 100"), Greenhouse Gas Reduction Program. Part 100 was filed with the State Records center on December 27, 2010. On January 25, 2011, the Public Service Company of New Mexico ("PNM") filed a timely notice of appeal of the Board's adoption of Part 100. The Court of Appeals referred the matter to mediation on May 5, 2011. On April 20, 2011, Petitioners moved to intervene as appellees in PNM's appeal. On May 24, 2011, the Court issued an Amended Order denying Petitioners' intervention as appellees. In its Order, the Court correctly noted that there is no

rule of appellate procedure allowing for intervention. The Court found that Petitioners could not intervene to support Part 100 because the Air Quality Control Act ("AQCA") only allows those persons "adversely affected" to appeal a decision of the Board. Finally, the Court noted that Petitioners could participate as amici if the case is assigned to the general calendar. Petitioner filed a Motion for Rehearing and Request to Certify the issue to the Supreme Court on June 6, 2011. Petitioner's Motion was denied in its entirety on June 10, 2011. Mediation took place on June 17, 2011. As a result of the mediation, joint motions for a 180-day remand of Part 100 to the Board for further proceedings were filed in the Court of Appeals on July 13, 2011. The Court of Appeals granted these motions on July 19, 2011. See Exhibit 1 (Order of Remand in No. 31,020). Therefore, Part 100 is now effectively before the Board. The Board contends that Petitioners' writ petition is now moot as Petitioners will be able to fully participate in any further proceedings before the Board.

Respondent's decision was not "contrary to law" and "manifestly unfair" as Petitioners state, but was supported by law and fell squarely within her discretion. Petitioners now seek to have this Court compel Respondent to perform a discretionary act. However, Petitioners fail to cite a single case in which the Court of Appeals was compelled to grant a third party intervenor status. The Court should not use its extraordinary power of superintending control where

Respondent's ruling was supported by law and fell within the bounds of her discretion. Were this Court to allow any party that is party to an administrative rulemaking to intervene on appeal, appeals would become unwieldy. Furthermore, the policy making function of the Board would be compromised.

STANDARD OF REVIEW

This case concerns intervention on the appellate level. The Court of Appeals has stated that it will uphold a district court's denial of a motion to intervene, absent a clear abuse of discretion. *Nellis v. Mid-Century Ins. Co.*, 2007-NMCA-090, ¶ 4, 142 N.M. 115, 163 P.3d 502. The Board contends the same standard should be applied here.

I. Petitioners Mischaracterize Respondent's Ruling.

A. Petitioners Overstate the Holding of Respondent.

Respondent's order stated that Petitioners were seeking to intervene to support an administrative rule on appeal (as appellees) and that there is no authority for such a procedure. Respondents erroneously interpret this holding as a declaration that the Court of Appeals has no authority to allow intervention on appeal. *See Verified Petition*, p. 8. However, Respondent's order did not create a blanket rule that parties to a proceeding below could not intervene on appeal nor did Respondent state that she had no authority to allow intervention on appeal in general. Respondent also did not hold that parties on appeal are limited to those

identified in an appellant's notice of appeal. Respondent's ruling was a simple order denying a motion to intervene; an action she had the discretion to do. In that respect, the Court issued a well reasoned decision specific to the circumstances of the particular appeal.

B. Petitioners Conflate Administrative Rulemaking with Lawsuits

Petitioners propose the following question to the Court:

Do New Mexico appellate courts have the authority to grant intervention in pending appeals, where the party seeking intervention was a named party below and seeks to defend the lower tribunal's ruling?

The framing of this question is misleading as it fails to take into account the facts of the case as well as the nature of administrative rulemakings. Petitioners' question conflates their role in an administrative rulemaking proceeding with one in a lawsuit.

The Board is a policy-making body and is responsible for environmental management and consumer protection. *See* NMSA 1978 §, 74-1-8(A) (1971 as amended through 2000). The Board is charged with promulgating, modifying or repealing regulations that fall within its statutory authority. *See* NMSA 1978, § 74-1-8. When the Board adopts a rule it is acting in a legislative capacity. According to the AQCA, "No regulations ... shall *be adopted* until after a public hearing by the [Board] ... " NMSA 1978, § 74-2-6(B) (1967 as amended through 1992) (emphasis added). Although Petitioners participated in the administrative

rulemaking, they are not responsible for the actual promulgation of the rule. The Board must decide, based on the record established, whether or not to adopt a proposed rule. The Board may also make changes to a proposed rule, as it did in the case of Part 100. Once the Board has adopted a rule proposed to it, that rule becomes a rule of the Board.

Petitioners argue that Respondent's ruling contravenes the purpose of Rule 12-601(B) NMRA (2007) which requires that an appellant serve "the agency involved and all parties." Petitioners imply that PNM naming only the Board in its notice of appeal was erroneous. Petitioners' reliance on Rule 12-601(B) is misplaced. Petitioners conflate procedural rules regarding service with substantive standing. Rule 12-601(B) governs the service of process, whereas the AQCA governs who may appeal an action of the Board. In other words, Rule 12-601(B) merely tells an appellant upon whom process is to be served and how that process should be served. Rule 12-601(B), by itself, does not grant substantive standing rights. Therefore, PNM was not required to and should not have named Petitioners as appellees.

The Board is the real party in interest in this matter as the entity that actually promulgated Part 100. A party aggrieved by a rule adopted by the Board does not appeal against a party who supported the rule. Rather, that party appeals against the Board for adopting the rule. *See* NMSA 1978, § 74-2-9(A) (1971 as amended

through 1992) (“Any person adversely affected by an administrative *action taken by the [Board]* ... may appeal to the court of appeals.” (emphasis added)). Furthermore, Petitioners admit that they were served on PNM’s notice of appeal. As stated by Petitioners, this notice allows a party the *opportunity* to intervene. This notice does not control how a court should rule on a motion to intervene.

II. Petitioners’ Arguments Regarding Mandatory Intervention on Appeal are Contrary to Law

Petitioners point to various statutes and cases for its contention that Respondent’s ruling was erroneous and that Petitioners must be allowed to intervene on appeal. However, the authority cited by Petitioners clearly does not support this contention. As a whole, the statutes and cases cited by Petitioners stand for the proposition that the Court of Appeals *may* allow a third party to intervene. None of the statutes or cases cited by Petitioner affirmatively holds that the Court of Appeals is required to allow parties such as the Petitioners to intervene.

The Board has examined the authorities cited in Petitioners’ brief and finds that they are distinguishable. All the statutes and cases cited by Petitioners affirm that the Court of Appeals’ authority to allow intervention is discretionary.

New Mexico statutes confirm this permissive standard. NMSA 1978, Section 39-3-21 (1917 as amended through 1966) states, “Persons *may be* substituted as parties or compelled to become parties in cases pending in the

supreme court or court of appeals in like time and manner, and with like effect, as provided for in original suits in district courts." (emphasis added). NMSA 1978, Section 39-3-16 (1917 as amended through 1966) states that Court of Appeals "may ... determine whether or not the parties omitted should have been joined." (emphasis added).

The cases cited by Petitioners also express a permissive standard. *Ferguson-Steere Motor Co v. State Corp. Comm'n*, 59 N.M. 220, 224-225, 282 P.2d 705 allows the Court to add parties improperly omitted to an appeal. First, as discussed earlier, Petitioners were not improperly omitted. Second, the standard expressed in *Ferguson-Steere* is permissive. *See Id.* at 225 (" ... [A]dded weight is given the appellant's contention that an omitted party *may be added* in this court *upon such terms as it may prescribe* and as justice may require." (emphasis added).). *State ex rel. Sweet v. Jemez Springs, Inc.*, 114 N.M. 297, 301-302, 837 P.2d 1380, 1384-1385 (Ct. App. 1992), articulates a similar standard stating: " ... [A]bsent a showing of prejudice, the court *may add* a necessary or indispensable party to an appeal after the time for filing the notice of appeal has expired." (emphasis added). *Russell v. University of New Mexico Hosp.*, 106 N.M. 190, 193, 740 P.2d 1174, 1177 (Ct. App. 1987), notes that an appellate court "may take the necessary steps to bring before it the parties to the appeal." (emphasis added).

In *Thriftway Marketing Corp. v. State*, 111 N.M. 763, 810 P.2d 349 (Ct. App. 1990), the Court of Appeals held that intervention on the appellate level is only allowed in appropriate circumstances. The issue in *Thriftway* was whether the Court of Appeals should, “in [its] discretion, allow intervention of a third party [on] appeal.” *Id.* at 764 (emphasis added). Indeed, the Court noted, “An attempt to intervene after final judgment has been issued by the district court should not be allowed in the absence of extraordinary or unusual circumstances.” *Id.*

Richins v. Mayfield, 85 N.M. 578, 580, 514 P.2d 854, 856 (1973), is inapplicable as it refers to intervention at the district court and trial level. (“... [T]he trial judge must find that the right or interest cannot otherwise be protected, except by intervention.”). *In re Application of Sleeper*, 107 N.M. 494, 760 P.2d 787 (Ct. App. 1988), is distinguishable as the State Engineer was already a named party in the notice of appeal and was added as an appellant not an appellee.

Taken as a whole, the statutes and case law cited by Petitioners do not support a conclusion that Respondent’s ruling was incorrect nor do they support a conclusion that Petitioners must be allowed to intervene. Petitioners overstate the weight of the cases cited.

IV. Petitioners Do Not Meet the Requirements for a Writ of Superintending Control

A successful petition for an extraordinary writ of superintending control should demonstrate that the lower court’s order: (1) is erroneous; (2) is arbitrary;

(3) does gross injustice to the petitioner; (4) may irreparably harm the petitioner; and (5) cannot be adequately remedied except by issuance of the writ. *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 12, 130 N.M. 144, 20 P.3d 126. Petitioners fail to establish any of these requirements. Furthermore, Petitioners fail to demonstrate why an extraordinary writ from this Court is appropriate under the circumstances of this case.

A. Petitioners' Claim Does not Warrant Superintending Control

Given the extraordinary nature of superintending control, the Supreme Court has "invoked it most reluctantly." *State ex rel. Schiff v. Murdoch*, 104 N.M. 344, 345, 721 P.2d 770, 771 (1986); *see also State ex rel. Att'y Gen v. First Jud. Dist.*, 96 N.M. 254, 256, 629 P.2d 330, 332 (1981) ("We are generally reluctant to issue a writ of superintending control directed at a lower court while a case is in progress."). Most importantly, "matters entrusted to the trial court's discretion ordinarily are not matters over which this Court should exercise its jurisdiction to grant extraordinary relief." *See Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836; *see also Albuquerque Gas & Elec. Co. v. Curtis*, 43 N.M. 234, 237, 98 P.2d 615, 616 (1939) ("The power [of superintending control] will not be exercised to control the discretion of another court." (internal citation omitted).)

Petitioners' proposed question is not of substantial public interest because it can and was adequately handled using the applicable New Mexico Law. "[A]n

issue is one of 'substantial public interest' when it raises a question of first impression that is likely to recur, and when the need for uniformity is great." *Jicarilla Apache Nation v. Rio Arriba County Assessor*, 2004-NMCA-055, ¶ 12, 135 N.M. 630, 92 P.3d 642. Intervention on the appellate level concerning an administrative rulemaking is not a question of first impression.

In the present case, Respondent appropriately cited *Old Abe Co. v. N.M. Mining Comm'n*, 121 N.M. 83, 86, 908 P.2d 776, 779 (Ct. App. 1995) for the proposition that while Petitioners were not entitled to intervenor status, they were free to join the proceeding as amici. Importantly, the facts of *Old Abe* are quite similar to the current situation. In *Old Abe*, the Mining Commission promulgated administrative rules which were challenged by several mining companies. Several citizen action groups moved to intervene *as appellees* in the mining company's appeal.¹ The groups asked to intervene to support the Mining Act and the regulations the Commission adopted pursuant to it. The groups were granted amicus status instead. The Board contends that *Old Abe* is controlling in this matter and there is no need for the Court to entertain Petitioners' Petition.

Pursuant to Rule 12-215 NMRA, the granting of amicus status is appropriate for Petitioners. Before Respondent, the Board welcomed Petitioners' participation

¹ A review of the actual motion to intervene filed in *Old Abe* indicates that Concerned Citizens Del Norte and the New Mexico Wilderness Study Committee sought to intervene as appellees to support the decision of the Commission.

as amici. That position has not changed. In fact, the Board would encourage the Court's granting of amicus status to Petitioners so that Petitioners' views can be heard in the appeal of Part 100.

Finally, a writ of superintending control would not be appropriate as Petitioners' case is moot. As of July 19, 2011, Part 100 has been remanded to the Board for further proceedings. It would be judicially inefficient and impractical to allow Petitioners to intervene in a matter that has been remanded to the Board. On July 15, 2011, a Petition to repeal Part 100 was filed with the Board. See Exhibit 2. The Board will hear the petition at its August 1, 2011 meeting. Should the Board vote to schedule a hearing on the petition, Petitioners would be able to fully participate in the administrative proceedings.

B. Respondent's Decision was Consistent with the Applicable Law

Respondent's decision was consistent with New Mexico law regarding intervention on appeal. Petitioners fail to demonstrate that Respondent's ruling was incorrect. Respondent's discretionary ruling can be characterized as a ruling based on standing. The Board argued and Respondent agreed that Petitioners were not "adversely affected" by the adoption of Part 100 as required by the AQCA.

The AQCA contains no provision allowing third parties to intervene in an appeal of rule adopted by the Board.² The Act only contemplates appeals by those persons “adversely affected” by a Board action. According to the AQCA, “Any person *adversely affected* by an administrative action taken by the Board ... may appeal to the court of appeals.” NMSA 1978, § 74-2-9(A) (1992) (emphasis added).³ Petitioners sought to intervene as appellees in PNM’s appeal of Part 100. However, under the AQCA only parties who are “adversely affected” may appeal a rule adopted by the Board.⁴ Petitioners are not adversely affected by the adoption of Part 100 because Petitioners supported the rule adopted by the Board.

² Although not binding on this Court, the Federal Rules of Appellate Procedure may be instructive. Under Fed. R. App. P. 15, a motion to intervene in the appeal of an agency order must be authorized by statute.

³ Part 100 was adopted pursuant to the Board’s authority to “prevent or abate air pollution” under the AQCA. See NMSA 1978, § 74-2-5(B)(1); Board’s Order & Statement of Reasons for Adoption of Regulations (NEE Exhibit 1). Under the Environmental Improvement Act, Air Quality rules are to be adopted in accordance with the AQCA. See NMSA 1978, § 74-1-8(A)(4). It follows that appeals of air quality rules should be governed by the AQCA as well. See *Hall v. Regents of Univ. of New Mexico*, 106 N.M. 167, 740 P.2d 1151 (1987) (conflicts between general and specific statutes are resolved by giving effect to the specific statute.)

⁴ The requirement that a litigant be aggrieved by an agency or court decision is not limited to the AQCA. The Tenth Circuit has noted that “The person aggrieved test is meant to be a limitation on appellate standing to avoid endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order. *Nintendo Co. v. Patten (In re Apex Computer Corp.)*, 71 F.3d 353, 357 (10th Cir. 1995) (internal citations and quotations omitted).

Petitioners clearly failed to demonstrate to Respondent how they were aggrieved by the adoption of Part 100.

Petitioners are not real parties in interest in the appeal of Part 100. PNM, whose facilities and business may be adversely affected by the adoption of Part 100, is a real party in interest. The Board, the entity that formally and officially adopted Part 100, is a real party in interest. *See* NMSA 1978, § 74-1-8(A)(4) (the Board is responsible for promulgating air quality rules); *see also* *Montoya v. Department of Fin. & Admin.*, 98 N.M. 408, 411, 649, P.2d 476, 479 (Ct. App. 1982) (“the agency which made the order in question is usually considered a necessary, or at least a proper party”)

C. Petitioners have Not Suffered Gross Injustice or Irreparable Harm

As mentioned above, two of the requirements for the issuance of a writ of superintending control are gross injustice and irreparable harm to the Petitioner. Petitioners have not articulated any concrete or particularized injury in fact they has suffered as a result of the Board’s adoption of Part 100. Petitioners cannot claim injury for the Board’s adoption of Part 100 because they advocated for its adoption.

According to *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 1222, “as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant

demonstrate injury in fact, causation and redressability to invoke the court's authority to decide the merits of a case." While *ACLU* is more applicable to standing at the District Court level, standing should be required for would-be appellees. Standing requires the showing by a litigant of an injury in fact. "Courts have defined the term 'injury in fact' as 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 24, 130 N.M. 368, 24 P.3d 803 (internal citation omitted). Petitioners' alleged injuries are conjectural based upon what the Board might do.

Petitioners cannot claim injury if and until the rule is amended or repealed by the Board. This is a fact acknowledged in the Affidavit of Arturo Sandoval provided in support of Petitioners' motion to intervene in the Court of Appeals. Mr. Sandoval explicitly states: "I am deeply concerned that the new Board ... will not vigorously defend the Rule and that industry appellants may prevail *in weakening or overturning the Rule as a result. If this occurs, my personal interests will be harmed, as will the interests of the [sic] Center and the communities it serves.*" See Verified Petition, Exhibit D (emphasis added). The Court of Appeals has remanded Part 100 to the Board for further proceedings. Any potential amendment or repeal of Part 100 requires these further administrative proceedings under the AQCA and the Board's rulemaking procedures. Petitioners would have

an opportunity to fully participate in those proceedings as well as the option to appeal any adverse action by the Board which arises out of those proceedings.

Furthermore, Petitioners' alleged interests in Part 100 are too weak and generalized to warrant intervention. For example, Petitioners presented Respondent with an affidavit from Brian Shields stating that he has suffered personal harm from climate change because he has to drive farther to go skiing in the winter. *See Verified Petition, Exhibit D.* Such a generalized interest in the subject matter of the appeal is insufficient to establish standing or to warrant intervention.

It should be noted that the provisions of Part 100 do not take effect until 2013 or six months after 20.2.350 NMAC (Cap & Trade Provisions) is no longer in effect.

D. Issuance of a Writ of Superintending Control is Not Required to Satisfy an Alleged Constitutional Right to Appeal.

Petitioners contend that a writ of superintending control must be issued in order to satisfy an alleged constitutional right to appeal. As a preliminary matter, actual issuance of the writ is not required to satisfy this alleged right. The Court, in ordering briefing and oral argument on this matter, has given Petitioners their day in court. The Court is free to make its own decisions on the merits of Petitioners' claims.

The Board also disputes that Petitioners have an absolute right to one appeal of the Court of Appeals' denial of a motion to intervene. According to *Las Cruces v. Sanchez*. . "Article VI, Section 2 only applies to cases originating in district court, not to cases originating in courts of limited jurisdiction ... " 2007-NMSC-042, ¶ 9, 142 N.M. 243, 164 P.3d 942 citing *State v. Heinsen*, 2005-NMSC-035, ¶ 10, 138 N.M. 441, 121 P.3d 1040. As this case originated in the Court of Appeals, a court of limited jurisdiction, this constitutional provision does not apply.

V. Petitioners' Position that any Party that Participates in an Administrative Rulemaking Should be Able to Intervene as an Appellee Creates Bad Policy.

Petitioners claim that Respondent's ruling has "far ranging impacts" and is "manifestly unfair." The Board strenuously disagrees with this claim and contends that what Petitioners are asking this Court will have negative consequences. Petitioners are advocating for a party that participates in an administrative rulemaking proceeding to be allowed to intervene on appeal as an appellee. Such a holding would make appeals of administrative regulations unwieldy and would compromise the policy making role of the Board.

Under the Air Quality Control Act, "*Any person* may recommend or propose regulations to the environmental improvement board ... for adoption." NMSA 1978, § 74-2-6(A) (emphasis added). Therefore, anyone can petition the Board to adopt a rule. Under Petitioners' argument, any party who enters an appearance in

an administrative rulemaking can participate in an appeal as an Appellee regardless of the number of parties involved or their capacity. The Board contends that such an outcome is not desirable.


Under Petitioners' preferred holding, third party groups would have unprecedented authority to control the Board's litigation and the Board's independence and policy making function would be compromised. The Board is charged with setting the environmental policy of the state. This point was eloquently made in *Commonwealth Edison v. Train*, 71 FRD 391, 393 (N.D. Ill. 1976): "To say that the NRDC [Natural Resources Defense Council] has an enforceable interest in [the] regulations would mean that any time a party brought suit involving such regulations, NRDC could step in to defend the regulations, almost as if it, and not the [EPA] Administrator, had promulgated them."

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Petitioners' Petitioner for a Writ of Superintending Control or Other Appropriate Writ.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, a true and correct copy of the foregoing Response in Opposition to Verified Emergency Petition for Writ of Superintending Control or Other Appropriate Writ was served via U.S. first-class mail, postage prepaid, to the following:

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Stephen A. Vigil

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NEW ENERGY ECONOMY, INC.,

Petitioner,

v.

No. 33.074

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.

SUPREME COURT OF NEW MEXICO
FILED
JUL 26 2011
Catherine J. Johnson

**RESPONSE IN OPPOSITION TO PETITIONER'S EMERGENCY
MOTION TO VACATE COURT OF APPEALS' ORDER OF REMAND**

COMES NOW GARY K. KING, Attorney General of New Mexico, by and through Stephen A. Vigil, Assistant Attorney General, counsel for the New Mexico Environmental Improvement Board ("Board"), and pursuant to Rule 12-309 NMRA files this Response in Opposition to New Energy Economy's ("NEE") Emergency Motion to Vacate Court of Appeals' Order or Remand. This Response is being filed well before the 15 days accorded to the Board under Rule 12-309. The Board asks that the Court deny NEE's Motion for the following reasons: (1)



NEE's motion is premature and improper as this Court does not have jurisdiction of the entire appeal of Part 100, Court of Appeals No. 31,020; (2) the Court of Appeals had jurisdiction to enter the Order of Remand as this Court has not issued a stay of the proceedings in No. 31,020; and (3) the authorities cited by NEE are distinguishable.

PROCEDURAL HISTORY

This case concerns the Board's adoption of 20.2.100 NMAC ("Part 100"): Greenhouse Gas Reduction Program. Part 100 was filed with the State Records center on December 27, 2010. On January 25 2011, the Public Service Company of New Mexico ("PNM") filed a timely notice of appeal of the Board's adoption of Part 100. On April 20, 2011, NEE moved to intervene as an appellee in PNM's appeal. On May 5, 2011, the Court of Appeals entered an order referring the matter to mediation through the Appellate Mediation Office. On May 24, 2011 the Court issued an Amended Order denying NEE's intervention as an appellee. Petitioner filed a Motion for Rehearing and Request to Certify the issue to the Supreme Court on June 2, 2011. Petitioner's Motion was denied in its entirety on June 10, 2011.

Mediation through the Appellate Mediation Office took place on June 17, 2011. As a result of the mediation, joint motions for a 180-day remand of Part 100 to the Board for further proceedings were filed in all seven appeals of Part 100 in

the Court of Appeals on July 13, 2011. The Court of Appeals granted all seven motions on July 19, 2011, issuing separate orders. The Board's next scheduled meeting is August 1, 2011.

INTRODUCTION

NEE's motion should be denied for three reasons. First, NEE's motion is premature. In its Petition for a Writ of Superintending Control, NEE only asked this Court to review Judge Vanzi's Order denying its intervention in Court of Appeals case No. 31,020. In asking this Court to vacate the Order of Remand, NEE is implicitly asking this Court to expand its jurisdiction over the matter. Second, the Court of Appeals has jurisdiction over case No. 31,020 as a whole and was within its right to issue the order of remand. NEE's Petition for a Writ of Superintending control did not automatically stay the proceedings below, nor did this Court issue an order staying the proceedings below prior to the filing of the orders of remand. Third, the cases cited by NEE are distinguishable and not controlling. Finally, the Board emphatically denies NEE's unsupported and false allegations of collusion between the Board and PNM.

I. NEE's Motion is Premature and Improper.

NEE's motion is premature and improper as the Order of Remand is not before this Court. This Court has not asserted jurisdiction over PNM's entire appeal. NEE petitioned this Court for a writ of superintending control on the

specific and narrow issue of whether Judge Vanzi's order denying its intervention was correct. This is the only issue before the Court. This Court has not and should not exert jurisdiction over PNM's entire appeal. The Order of Remand is a separate order and should be treated separately. "Usually, an order from the district court remanding to an administrative agency for further action is not a final, appealable order." *Bustamante v. DeBaca*, 119 N.M. 739, 741, 895 P.2d 261, 263 (internal citations omitted).

In seeking to vacate the Court of Appeals' Order of Remand, NEE is asking this Court to intervene in an administrative process. According to this Court's ruling in *New Energy Economy v. Shoobridge*, 2010-NMSC-049, ¶ 1, 243 P.3d 746, "...[T]he separation of powers doctrine forbids a court from prematurely interfering with the administrative processes created by the Legislature." The Court of Appeals, in entering its order of remand, effectively sent Part 100 back to the Board for further proceedings as set out by the Legislature in the Air Quality Control Act.

II. The Court of Appeals had Jurisdiction to Enter the Order of Remand.

The Court of Appeals had jurisdiction to enter the order of remand because NEE's Petition did not automatically divest it of jurisdiction. In fact, NEE admits that its "Petition for Writ did not completely divest the Court of Appeals of

jurisdiction over PNM's appeal." Motion to Vacate at 10. In addition, this Court never entered an order staying the entire proceedings in No. 31,020.

The Board has reviewed the authorities cited by NEE and finds that they are distinguishable and not applicable. For example, NEE cites 5 Am. Jur. *Appellate Review* § 316 for the proposition that a trial court cannot take action that would alter the status of the case as it rests before the appellate court. However, NEE fails to quote the entire section which clarifies that this doctrine applies to timely notices of appeal from a judgment of a district court. The title of § 316 is "appeal by right" and is not controlling, binding, or persuasive in this matter.

NEE's reliance on *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 11, 139 N.M. 625, 136 P.3d 1035 is curious. In *Murken*, the Court of Appeals explains that an appeal of an intervention ruling "would have prevented the district court from altering its ruling on the intervention motion" but the district court retained jurisdiction to certify the class and approve the settlement. *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 12, 139 N.M. 625, 136 P.3d 1035. Analagizing *Murken* to the present matter, it would follow that the Court of Appeals lost jurisdiction over the intervention issue but retained jurisdiction over the motion for remand.

NEE cites *Oliver v. Pulaski County Circuit Court*, 340 Ark. 681, 13 S.W.3d 156 (2000), to make the argument that a remand divests the appellate court of

jurisdiction. First, *Oliver* is an Arkansas case not binding on this Court. Second, it dealt with district courts reviewing administrative orders. Third, the very next two sentences after which NEE quotes state, “[h]ere however, the circuit court [district court] remains a reviewing court and retains continuing jurisdiction over the appeal. After the board completes its action, the circuit court may then proceed with its consideration of the appeal on the merits.” (internal citations omitted). Therefore, under *Oliver*, remand only temporarily divests the appellate court of jurisdiction while the case is being reexamined by the appropriate administrative board.

NEE cites *State ex rel. State Highway Dep’t v. Branchau*, 90 N.M. 496, 565 P.2d 1013 (1977), to support its argument that PNM and EIB’s joint motion was done using “stealth and surprise.” NEE misrepresents the holding of this case, as it was made by the court in relation only to Rule 1-016 NMRA which involves pre-trial procedures such as amending pleadings and limiting issues for trial.

NEE cites *Russell v. University of New Mexico Hosp.*, 106 N.M. 190, 740 P.2d 1147 for the proposition that the Court of Appeals loses jurisdiction after a remand and can only obtain jurisdiction again if another notice of appeal is filed. In the current case matter, the Court of Appeals has not permanently remanded the matter back to the Board. The remand is for 180 days. Second, this case revolves around the issue of notice of appeal, which the injured party never afforded to

defendant. That circumstance is not present here as NEE was served on PNM's notice of appeal.

III. The Court of Appeals has not Delegated Judicial Review to the Board.

The Court of Appeals remand does not "delegate judicial review" to the Board. This Court has "recognized the power of agencies to interpret and construe the statutes that are placed, by legislative mandate, within their province." *Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 112 NM 379, 382, 815 P.2d 1169, 1172 (1991) (internal citation omitted). Under the AQCA, any possible repeal or amendment of a rule requires the same hearing process as the promulgation of a new rule. *See* NMSA 1978, § 74-1-9(B) (1971 as amended through 1985). Therefore, the Board will be performing a policy making function, not a judicial review function.

The Board is a policy-making body and is responsible for environmental management and consumer protection. *See* NMSA 1978 §, 74-1-8(A) (1971 as amended through 2000). The Board is charged with promulgating, modifying or repealing regulations that fall within its statutory authority. *See* NMSA 1978, § 74-1-8. When the Board adopts, amends or repeals a rule it is acting in a legislative capacity not a judicial capacity. In a real sense, NEE is asking this Court to substitute its policy judgments for that of the Board.

NEE's argument that the Court of Appeals' remand circumvents "the normal appeal and review process" is absurd. First, NEE did not initiate the appeal process, PNM did. Second, the Court of Appeals has the power to remand a case back to the agency it originated. *See e.g. Roswell v. New Mexico Water Quality Control Comm'n*, 84 N.M. 561, 505 P.2d 1237 (Ct. App. 1972). (Court of Appeals set aside the two regulations at issue and remanded the case for further proceedings consistent with its opinion).

NEE's arguments that the Board did not "re-commence the original administrative proceeding that led to PNM's appeal" and that the Board administrator assigned a new case number are irrelevant. Part 100 has been sent back to the Board on remand no matter the administrative case number assigned. The Petition filed on July 15, 2011 regards the repeal Part 100, the exact same rule that has been remanded.

III. The Board did not Collude with PNM

NEE's allegation that the Board colluded with PNM is baseless. The Board chair and PNM participated in **court-ordered** mediation. The purpose of the Court of Appeals mediation program is to "explore settlement and simplify issues." *See* COA Miscellaneous Order No. 01-42. The Board chair participated in the court-ordered mediation in good faith, as did PNM. To characterize such participation as "collusion" is disingenuous and false.

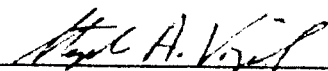
The agreement that came out of the mediation was a remand back to the Board. The Court of Appeals has not made any ruling favorable or unfavorable on the merits of PNM's appeal. There is no private agreement with PNM. The public motion for joint remand clearly states that further proceedings **may** resolve the appeal, not that further proceedings will resolve the appeal. The Board did not agree to repeal Part 100 nor did it agree to hold a hearing.

CONCLUSION

For the foregoing reasons, NEE's Emergency Motion should be denied. NEE has asked this Court to unnecessarily expand its jurisdiction on the basis of speculation, unsupported allegations and political attacks. The Court of Appeals Order of Remand was proper and should be upheld.

Respectfully Submitted,

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CERTIFICATE OF SERVICE


I hereby certify that on July 26, 2011, a true and correct copy of the foregoing Response in Opposition to Petitioner's Emergency Motion to Vacate Court of Appeals' Order of Remand was served via U.S. first-class mail, postage prepaid, to the following:

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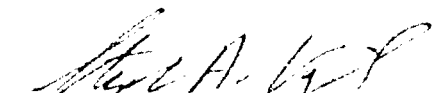
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I hereby certify that on July 26, 2011, a true and correct copy of the foregoing Response in Opposition to Petitioner's Emergency Motion to Vacate Court of Appeals' Order of Remand was hand delivered to:

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Stephen A. Vigil

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMIGOS BRAVOS, LEAGUE OF
WOMEN VOTERS OF NEW MEXICO,
and CENTER OF SOUTHWEST CULTURE,

Petitioner,

vs.

No. 33,091

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

Real Parties in Interest.

Kathleen G. Johnson

**RESPONSE OF PUBLIC SERVICE COMPANY OF NEW MEXICO IN
OPPOSITION TO VERIFIED EMERGENCY PETITION FOR WRIT OF
SUPERINTENDING CONTROL OR OTHER APPROPRIATE WRIT**

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Real Party in Interest Public Service Company of New Mexico ("PNM") files this Response ("Response") in Opposition to the Verified Emergency Petition for Writ of Superintending Control or Other Appropriate Writ ("Petition") filed on June 24, 2011 by Petitioners Amigos Bravos, League of Women Voters of New Mexico and Center of Southwest Culture (collectively, "Petitioners").

For the reasons set out in this Response, the Petition fails to allege a sufficient basis for this Court's exercise of its power of superintending control over the Court of Appeals, let alone on an emergency basis, and fails to demonstrate that Petitioners will be prejudiced by Judge Vanzi's order that is challenged in the Petition.¹

INTRODUCTION

A. Proceedings Before Environmental Improvement Board

This case arose out of a rulemaking proceeding before the New Mexico Environmental Improvement Board ("EIB") to adopt new regulations regulating greenhouse gas ("GHG") emissions in the state. Many members of the public, including Petitioners, provided non-technical comments to the EIB regarding the regulation of GHGs. The EIB held public hearings on this matter in Santa Fe, New Mexico in August and October 2010.

¹ New Energy Economy, Inc. ("NEE") filed a similar emergency petition for an extraordinary writ with this Court on June 20, 2011, in Case No. 33,704, raising many of the same issues raised in Petitioners' petition. PNM filed its response in opposition to the NEE writ petition on June 24, 2011.

On December 6, 2010, the EIB adopted the regulation that is the subject of PNM's appeal to the Court of Appeals. The regulation is codified at § 20.2.100 NMAC and is referred to as "Rule 100." Rule 100 is intended to limit GHG emissions from selected large stationary sources, including PNM's San Juan Generating Station near Farmington, New Mexico.

B. PNM's Appeal to the Court of Appeals

PNM timely appealed to the Court of Appeals the adoption of Rule 100 on January 25, 2011. (Six other parties also filed appeals of the adoption of Rule 100 in the Court of Appeals, but Petitioners did not seek to intervene in those appeals.). On April 20, 2011, three months after PNM filed its appeal, Petitioners filed their Motion for Leave to Intervene as Appellees, arguing that no party adequately represented their interests in seeing Rule 100 upheld. PNM filed its Response in Opposition to Motions for Leave to Intervene on May 5, 2011, arguing, among other things, that Petitioners had failed to demonstrate that they had the requisite interest in this case to warrant intervention, and that an *amicus curiae* brief would be the proper vehicle for Petitioners to advocate in support of Rule 100.

On May 5, 2011 the Court of Appeals entered its Order referring PNM's appeal to mediation through the Appellate Mediation Office, and otherwise staying the proceedings pending mediation.

On May 24, 2011, the Court of Appeals issued its Amended Order denying Petitioners' Motion to Intervene as Appellees, noting that there is no rule of appellate procedure allowing for intervention on appeal and that there is no authority for the proposition that a person or group can intervene in an appeal in support of a regulation. *See Amended Order*, entered on May 24, 2011.

Petitioners filed their Motion for Rehearing of Denial of Motion to Intervene as Appellees on June 6, 2011 seeking rehearing, or in the alternative, certification to the Supreme Court on the question of intervention. On June 14, 2011, the Court of Appeals (Judge Vanzi) entered its Order denying the Motion for Rehearing in its entirety.

C. The Court-ordered Mediation

The mediation directed by the Court of Appeals took place on June 17, 2011.² The mediation included not only PNM, but the other appellants in other pending appeals of Rule 100. As the result of mediation, PNM and the EIB filed a joint motion in the Court of Appeals on July 13, 2011, asking the Court of Appeals to remand the PNM appeal to the EIB for a period of 180 days so that further proceedings at the EIB could take place, during which period all appellate proceedings would continue to be stayed. As reflected in the remand motion, PNM and EIB agreed that vesting jurisdiction in EIB will allow for further proceedings

² Pursuant to Court of Appeals Miscellaneous Order No. 01-42, entered on August 19, 2009, ¶ 5, statements made during the mediation and in related discussions are confidential and "shall not be disclosed to any court by the Appellate Mediation Office, counsel, or the parties."

which are permitted under the EIB's rules. EIB and PNM stated in the remand motion that further proceedings in the EIB may cause the issues in PNM's appeal to become moot and the appeal to be dismissed. Similar joint motions for remand were filed by EIB and the other parties that had filed appeals from Rule 100. The Court of Appeals granted the remand motions on July 19, 2011. A Copy of the Order of Remand is attached hereto as Exhibit A.

D. Petitions to Repeal Rule 100

On July 15, 2011, PNM and the other parties that had appealed the adoption of Rule 100 to the Court of Appeals filed with the EIB a joint petition for the repeal of Rule 100. A copy of the Petition for Regulatory Change is attached hereto as Exhibit B. In their joint petition, PNM and the other petitioners asked the EIB to consider the repeal petition at its August 1, 2011 meeting and to appoint a hearing officer and to schedule a hearing on the repeal petition for December 2011. The repeal petition is pending at this time before the EIB. The petition is on the NMEIB agenda for its meeting on August 1, 2011.

If the EIB agrees to hear the repeal petition, it will schedule proceedings consistent with its rulemaking rules, which involve an opportunity for full public input and participation. *See* 20.1.1.1 through 20.1.1.501 NMAC.

I.

**THE PETITION FAILS TO ALLEGE A MATTER
OF SUFFICIENT IMPORTANCE TO
WARRANT THIS COURT'S EXERCISE OF ITS
POWER OF SUPERINTENDING CONTROL.**

A writ of superintending control is an extraordinary writ that should “be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are applicable.” *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 12, 130 N.M. 144, 20 P.3d 126 (quoting *State ex rel. Harvey v. Medler*, 19 N.M. 252, 259-60, 142 P. 376, 378 (1914)). Such a writ is appropriate where it is “necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens and expenses.” *Id.* (quoting *State ex rel. Transcon. Bus Serv. v. Carmody*, 53 N.M. 367, 378, 208 P.2d 1073, 1080 (1949)). None of these concerns are present in this case. Petitioners do not raise an issue of significant public importance, and fail to demonstrate that they will be prejudiced if denied the ability to intervene in PNM’s appeal.

A. Petitioners do not Raise an Issue of Significant Public Importance.

This Court has “used its power of superintending control to address issues of great public interest and importance. . . in which [its] refusal to entertain jurisdiction might amount to a denial of justice” and “when it was the only means available to maintain the integrity of [the] court system and the respect in which it is held.” *Dist. Ct. of the Second Jud. Dist. v. McKenna*, 118 N.M. 402, 405, 881

P.2d 1387, 1390 (1994) (quotation marks and citations omitted). Petitioners' Petition does not warrant the exercise of this Court's extraordinary powers because the question posed in Petitioners' Petition does not raise an issue of great public importance.

Whether a special interest group has a right to intervene, as an appellee, in an appeal of a regulation is not a question of great public importance. This is because the Attorney General, who is responsible for representing the people of New Mexico, is already tasked with defending regulations in the appellate courts. Moreover, special interest groups have the ability to participate in the appeals through a mechanism that this Court has long recognized, as *amicus curiae*. The Petitioners have not articulated any valid reason why their participation in the appeal as *amicus curiae* is insufficient to allow them to adequately advocate their positions.

The *Old Abe Co. v. N.M. Mining Comm'n* case is very much analogous to the present situation because that case also involved an unsuccessful attempt by several public interest organizations to formally intervene in other parties' appeal from an administrative rulemaking. 121 N.M. 83, 86, 908 P.2d 776, 779 (Ct. App. 1995). There, the Concerned Citizens Del Norte and the New Mexico Wilderness Study Committee moved to intervene in the appeal. *Id.* The Court of Appeals denied the motion but permitted these organizations, together with the Sierra Club,

to file an *amicus curiae* brief, which they did. *Id.* This was an acceptable outcome, as evidenced by this Court's denial of the petition for writ of certiorari. *Old Abe Co. v. N.M. Mining Comm'n*, 120 N.M. 828, 907 P.2d 1009 (1995).

Just as in *Old Abe Co.*, Petitioners have the ability to participate in the appellate process as *amicus curiae*. And, as in *Old Abe Co.*, the denial of Petitioners' motion to intervene does not raise a question of significant public importance.

B. Petitioners Will Suffer No Prejudice if Their Intervention in the Court of Appeals is Denied.

Petitioners argue that only if they are permitted to intervene in PNM's appeal in the Court of Appeals will they be able to protect their interests. Petition, at 4 and 6. However, other than a vague statement regarding possible future water shortages, Petitioners fail to explain why they have any special and unique interests in Rule 100, separate and apart from the general public. Indeed, PNM submits that Petitioners' interests are no different than the interests possessed by other members of the public at large. Petitioners will not receive a greater benefit, nor suffer a greater harm, than any other member of the general public from a decision by the Court of Appeals as to the lawfulness of Rule 100.

The underlying theme of the Petition is that PNM and the EIB have, in some manner, the unilateral power to decide the fate of Rule 100 unless Petitioners are allowed to intervene. However, such a unilateral power does not exist. There are

essentially two ways that the “fate” of Rule 100 will be determined and in either path Petitioners will have the ability to protect their interests without formally “intervening” in this Court of Appeals proceeding.

I. The Appeal Path

The first path for the resolution of the issues raised by PNM’s appeal is by the appeal process, i.e., by briefing, oral argument, etc. If this is ultimately how the case is resolved, the Court of Appeals has clearly stated it would entertain a petition from Petitioners to file *amicus* briefs. The Rules of Appellate Procedure specifically provide that a person with a demonstrated interest in the proceeding and a good reason why an *amicus* brief would be desirable to the Court, may file an *amicus* brief in support of one of the parties to the appeal. Rule 12-215 NMRA. Indeed, by adopting Rule 12-215, this Court provided the means for interested groups and members of the public to advocate their positions in appeals where they otherwise have no right to participant.

This Court has recognized that *amicus curiae* briefs can aid the Court in analyzing and determining issues before it. *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 155, 824 P.2d 293, 295 (1992) (stating that the Court was aided in the appeal by the able *amicus* briefs submitted by the NMDLA and NMTLA). This was one of the Court of Appeals’ points, of course, when it denied Petitioners’ Motion to Intervene, although Petitioners ignore it in their Petition.

By filing *amicus* briefs, Petitioners would be able to tell the Court of Appeals precisely why, in their view, Rule 100 should be affirmed as a lawful and appropriate exercise of the EIB's authority. Any suggestion that an *amicus* brief is not an appropriate or effective way of bringing an interested party's positions before the court would be contrary to many years of established precedent and the Rules of Appellate Procedure. *See* Rule 12-215.

ii. The Remand Path

The second way that the issues presented in PNM's appeal could be resolved would be by action of the EIB on a remand from the Court of Appeals. Indeed, as addressed in this response, PNM and the EIB have filed with the Court of Appeals a motion to remand the matter to the EIB for 180 days for further proceedings. EIB and PNM believe that further proceedings in the EIB may cause the issues in PNM's appeal to become moot and the appeal to be dismissed. Additionally, PNM (and other parties) have filed with the EIB a petition for the repeal of Rule 100.

The petitioners are free to participate in the NMEIB meeting to argue against the petition. If it agrees to hear the repeal petition, EIB must conduct a full public process, consistent with the requirements of due process and the EIB's own rulemaking procedures. *See* 20.1.1.1 through 20.1.1.501 NMAC. At such an EIB proceeding, all interested parties, including Petitioners, will be able to present their views to the EIB about whether Rule 100 should be retained in its existing form, or

modified or repealed. If Petitioners are dissatisfied with the results of an EIB decision on the repeal petition, they are at liberty to file their own appeal in the Court of Appeals under the applicable statutory framework.

In short, under either of the likely ways in which the issues presented by PNM's appeal could be resolved, Petitioners will have a chance to make their arguments. Petitioners' participation as formal "intervenors" in the pending Court of Appeals docket is not critical to their ability to protect their "interests" in Rule 100 and presents no issue of great or significant public importance warranting emergency intervention by this Court.

iii. Petitioners' Claims are Moot.

The order of the Court of Appeals granting the Joint Motion for a 180-Day Remand has rendered moot Petitioners' Petition in this extraordinary proceeding. "A case is moot when no actual controversy exists, and the court cannot grant actual relief." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. Here, the heart of Petitioners' argument is that they should be able to have a voice in further proceedings regarding the future of Rule 100. The remand to the EIB to hold further proceedings has provided Petitioners with the relief they seek – further participation in the Rule 100 rulemaking process. In light of the remand of the appeal, an actual controversy no longer exists, and there is no further relief for the Court to grant. Because it is the general rule of this Court to "not decide moot

cases,” Petitioner’s Petition for an extraordinary writ should be denied. *Id.*

II.

THE COURT OF APPEALS’ DECISION IS SUPPORTED BY NEW MEXICO LAW.

Despite Petitioners’ claim to the contrary, the Court of Appeals did not determine that it lacked authority to join a party to an appeal. Instead, the Court of Appeals held: (1) that there was no rule of appellate procedure for intervention; and (2) that there is no legal authority in New Mexico that generally grants a supporter of a regulation the right to intervene as an appellee in an appeal by another party challenging the propriety of the regulation. *See* Amended Order, entered on May 24, 2011, at p. 2. These are accurate statements of New Mexico law. Petitioners did not cite a single rule of appellate procedure that addresses intervention on appeal. Nor did Petitioners cite a single New Mexico case that stands for the proposition that a supporter of a regulation has a right to intervene in an appeal, as an appellee, in order to advocate that a court uphold a regulation.

In New Mexico, the right to participate in an appeal of an agency decision is generally created by statute. *See Durand v. N.M. Comm’n on Alcoholism*, 89 N.M. 434, 435, 553 P.2d 714, 715 (Ct. App. 1976) (stating that “the right of appeal is a matter of substantive law. . . .”). Some statutes are broad in their grant of appellate participation, others are very narrow. *Compare*, NMSA 1978, § 74-2-9(A) (1992) (permitting appeals only by persons adversely affected by an administrative action

taken by the EIB) *with* NMSA 1978, § 62-11-1 (1993) (allowing any party to any proceeding before the New Mexico Public Regulation Commission to file a notice of an appeal, and allowing any person whose rights may be directly affected by an appeal to appear and become a party to the appeal). In this case, the controlling statute, the Air Quality Control Act, only allows those adversely affected by a decision by EIB to file an appeal. § 74-2-9(A). Petitioners were not adversely affected by EIB's adoption of Rule 100. Therefore, the Air Quality Control Act does not grant Petitioners the right to intervene in PNM's appeal of Rule 100.

Absent a statutory right to participate in an appeal, Petitioners must seek permission to intervene from the appellate courts. *See N.M. Highway Dep't v. Van Dyke*, 90 N.M. 357, 358, 563 P.2d 1150, 1151 (1977) (noting that the Court of Appeals allowed insurer to intervene); *Old Abe Co.*, 121 N.M. at 86, 908 P.2d at 779 (reciting that court denied motions to intervene, but permitted movants to file *amicus curiae* briefs); *Thriftway Mktg. Corp. v. State*, 111 N.M. 763, 764, 810 P.2d 349, 350 (Ct. App. 1990) (allowing intervention in appeal when an important interest was demonstrated). As Petitioners acknowledge, the Court of Appeals has broad inherent power to manage its case load, and could, if it so determined, allow intervention in an appeal. Petition at 10-11. In this case, the court utilized this inherent power to manage its case load by denying Petitioners' Motion to Intervene, and suggesting that Petitioners move the Court of Appeals for

permission to file an *amicus* brief. It is incongruous for Petitioners to argue that the Court of Appeals has broad power to manage its case load, and then complain about how the court exercised this acknowledged power. Petitioners have not demonstrated that the Court of Appeals abused its discretion in denying intervention. *See Nellis v. Mid-Century Ins. Co.*, 2007-NMCA-090, ¶ 4, 142 N.M. 115, 163 P.3d 502 (denial of motion to intervene reviewed for abuse of discretion).

Because the Court of Appeals properly exercised its discretion, a writ of superintending control is not warranted and Petitioners' Petition should be denied.

III.

PNM CORRECTLY NAMED ONLY THE EIB IN ITS APPEAL OF RULE 100.

Petitioners make much of the fact that PNM only named the EIB as an appellee in PNM's appeal challenging Rule 100. *See* Petition, at 5, 11 and 15. Petitioners imply that this was somehow improper on PNM's part, and that the Court of Appeals has compounded this wrong by denying Petitioners' Motion to Intervene. Nonetheless, Petitioners provide no authority for the proposition that PNM had any duty or even could name any party other than the EIB as an appellee. *See e.g. McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 11, 148 N.M. 16, 229 P.3d 489 (stating that if an argument is unsupported by cited authority, the Court may assume no authority exists for that proposition).

A review of the relevant sections of the Air Quality Control Act, NMSA

1978, Sections 74-2-1 to -17 (1967 as amended through 2009), demonstrates that PNM was justified in only naming the EIB in PNM's appeal of Rule 100. While Section 74-2-9(A) does not explicitly list against whom an appeal should be taken, it does state that only aggrieved parties can appeal an administrative action taken by the EIB. PNM was an aggrieved party, but was only aggrieved by the action of the EIB in adopting Rule 100, not by any of Petitioners' actions below.

Moreover, Petitioners were merely a few of the dozens of citizens and citizens groups that filed or made statements before the EIB in reference to the proposed Rule 100. Yet, according to Petitioners' argument, PNM should apparently have named dozens of individuals and groups as appellees despite the fact that PNM's only complaint was against the action the EIB took in adopting Rule 100. This is illogical and would cause appeals from administrative rulemaking proceedings to become extraordinarily unwieldy. The law does not require that every party that files comments in an administrative rulemaking proceeding be named as a party in a subsequent appeal.

Because PNM was only aggrieved by the actions of the EIB and it is the actions of the EIB that are challenged, logically and practically, the EIB is the only party against whom PNM should have appealed.

IV.

ISSUANCE OF AN EXTRAORDINARY WRIT IS NOT NECESSARY BECAUSE PETITIONERS DO NOT HAVE A CONSTITUTIONAL RIGHT TO AN APPEAL

Petitioners claim that N.M. Const. Art. VI, Section 2 provides them an absolute right to appeal the Court of Appeals' ruling denying Petitioners' Motion to Intervene. This constitutional provision, however, does not guarantee Petitioners the relief they claim.

This Court has repeatedly held that Art. VI, Section 2 only applies to cases originating in district court. *City of Las Cruces v. Sanchez*, 2007-NMSC-042, ¶ 9, 142 N.M. 243, 164 P.3d 942; *State v. Heinsen*, 2005-NMSC-035, ¶ 10, 138 N.M. 441, 121 P.3d 1040 (stating that Article VI, Section 2 applies to appeals from the district court); *see also Kucel v. N.M. Med. Review Comm'n*, 2000-NMCA-026, ¶ 12, 128 N.M. 691, 997 P.2d 823 (stating that the guarantee provided in Art. VI, Section 2 has been implemented by the Legislature through NMSA 1978, §§ 39-3-2 and 34-5-8(A)(1)). Most recently, this Court held in *Sanchez* that the City of Las Cruces did not have a right to appeal a decision rendered by a municipal court, specifically stating that "Article VI, Section 2 only applies to cases originating in district court. . . ." 2007-NMSC-042, ¶ 9.

In this case, Petitioners are not appealing a decision from the district court; they are seeking review of a procedural ruling from the Court of Appeals. Art. VI,

Section 2 does not apply to this case, Petitioners do not have the right to appeal the Court of Appeal's ruling in its Amended Order, and an extraordinary writ is not necessary to protect Petitioners' rights.

CONCLUSION

For the foregoing reasons, PNM respectfully requests that the Court deny the Petition.

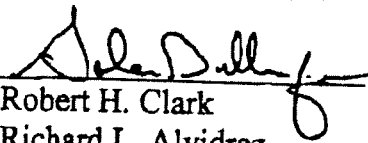
Respectfully submitted,

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CERTIFICATE OF SERVICE

Appellant Public Service Company of New Mexico hereby certifies that it caused to be served by U.S. mail, postage prepaid, a copy of the foregoing Public Service Company of New Mexico's Response in Opposition to Verified Emergency Petition for Writ of Superintending Control or Other Appropriate Writ, on July 22, 2011 to the following:

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