



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  
OBJECTION TO IMPROPER HEARING PROCEDURES  
And  
REQUEST FOR RECONSIDERATION**

New Energy Economy, Inc. (NEE) hereby replies to petitioners' response to NEE's *Objection to Improper Hearing Procedures and Request for Reconsideration* ("Request for Reconsideration").

1. The Request for Reconsideration is ripe for decision. Petitioners' contend that NEE's Request for Reconsideration is not ripe, because the Hearing Officer had not yet issued a written order. The Hearing Officer made her ruling orally on September 7<sup>th</sup> and she then followed up with a written order. Even if there were doubts concerning the Hearing Officer's ruling on September 7<sup>th</sup>, no doubts remain. NEE's Request for Reconsideration has been fully briefed and is ripe for decision.

2. The Hearing Officer based her ruling on information she obtained outside the record of this proceeding. Petitioners' concede that the decisions in this proceeding must be based on the record in this proceeding, *Pet. Response at 5*, and that the Hearing Officer's ruling at issue was, at least in part, based on the direction she received from individual EIB members outside the record of this proceeding. *Pet. Response at 4, fn. 3*. Petitioners also do not dispute that counsel for NEE was not present when the Hearing Officer received this off-the-record advice. This conduct violated EIB's Rules of Procedure and the statutes governing EIB rulemakings.

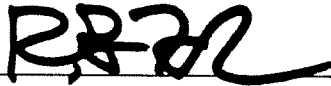
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As it must, EIB delegated this matter to the Hearing Officer, who was thereafter responsible for conducting the hearing. NMAC § 20.1.1.107. After delegation, neither EIB nor its individual members (unless they are the delegated hearing officer) had any authority to govern the conduct of this hearing. Id. Instead, the “hearing officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial consideration of issues arising in proceedings governed by this part.” NMAC § 20.1.1.107(B). Even if EIB can randomly usurp the Hearing Officer’s express delegated authority, it may only act as a quorum in an open public meeting, NMSA 1978, § 74-1-4 (2001); NMSA 1978, § 74-2-3 (1992), which it did not do in this case. Moreover, the consultation between the Hearing Officer and individual EIB’s members was off-the-record, no different than if it had occurred during a chance meeting at the hardware store. Regardless of whether she obtained this information at the hardware store or at an EIB meeting, the Hearing Officer cannot consider it when making a ruling in this hearing—because it was obtained outside the record of this hearing. By whatever label petitioners care to give it, if not *ex parte*, it was clearly improper and contrary to the EIB’s Rules of Procedure.

3. The Hearing Officer’s ruling goes to the merits. In another hearing which concluded about one year ago, and which is memorialized in a transcript comprising 1000s of pages and in scores of motions, briefs, and orders, EIB heard all of the same arguments and same evidence that petitioners are now offering once again. The record of this extensive proceeding is partially available at <http://www.nmenv.state.nm.us/eib/pastpleadingshtml.htm> (EIB 08-19 (R) New Energy Economy Petition), which NEE designates as Exhibit A to this Reply and incorporates herein by reference as if the same were attached hereto in its totality. As shown in Exhibit A, NEE and NMED presented the merits of the case supporting adoption of Rule 100.

See, e.g., Pleading Item Nos. 12, 14, 16, 20, 21, 105a, 120, 127, 130, 140 and 155. The case for adoption of the Rule was overwhelming. Petitioners cross-examined NEE's witnesses at length; they also offered multiple witnesses of their own and submitted other evidence and arguments in opposition. Exhibit A—Transcript of Proceedings in EIB 08-19(R).<sup>1</sup> As set out in other filings, NEE contends that it is not only a waste of time and money for EIB to redo EIB 08-19(R), especially given petitioners' pending appeals, it is legally precluded from repealing Rule 100 based on the same evidence that it heard (or that could have be provided to it) in the proceeding in which it adopted the Rules last year. Accordingly, contrary to petitioners' arguments, *Pet. Response at 5*, the Hearing Officer's decision goes to the heart of the merits of this case.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW  
CENTER

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**CERTIFICATE OF SERVICE:** I certify that I caused a copy of the foregoing paper to the parties of record and Stephen Vigil on 9/30, 2011.

  
R. Bruce Frederick

<sup>1</sup> These transcripts of not yet been posted on EIB's website.

