

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)



**OBJECTIONS TO ORDER ESTABLISHING PROCEDURES
AND
REQUEST TO VACATE OR AMEND**

New Energy Economy, Inc. (NEE) objects to the August 11, 2011, *Order Establishing Procedures* and requests that it be vacated or amended as set forth below.

A. EIB should vacate the *Order Establishing Procedures* and dismiss the petitions.

1. The cramped deadlines set out in the Hearing Officer's *Order Establishing Procedures* are based on the hearing date dictated by EIB. *Order Establishing Procedures* at 1. The EIB had to establish this hearing date in order to repeal all of the rules within the 180-day deadline imposed in the so-called Order of Remand¹ that the Court of Appeals entered on the joint motion of EIB and petitioners. *Motion to Recuse Board Members Casciano, Fulfer and Peacock* (Motion to Recuse) ¶ 5. The 180-day deadline, in turn, is the direct result of an improper *ex parte* communication and settlement between Chairperson Peacock and petitioners, which the Chairperson and counsel later communicated to the entire EIB in executive session. Id. Based on their *ex parte* settlement, EIB and petitioners jointly moved the Court of Appeals to enter the "Order of Remand," imposing the 180-day deadline, so that EIB could "resolve" petitioners' appeals. Id. Petitioners submitted their petitions to repeal the rules as a direct result of the *ex parte* communication and settlement between themselves and EIB.

¹ Despite the name given this "Order of Remand" by petitioners and EIB, it merely stayed petitioners' appeals in the Court of Appeals. There has been no remand.

2. The *ex parte* communication and resulting settlement between petitioners and EIB violate both the New Mexico Open Meetings Act and EIB's regulations. Pursuant to the Open Meetings Act:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. Reasonable efforts shall be made to accommodate the use of audio and video recording devices.

NMSA 1978, § 10-15-1(A). EIB's regulations provide:

At no time after the initiation and before the conclusion of a proceeding under this part, shall the department, or any other party, interested participant or their representatives discuss *ex parte* the merits of the proceeding with any board member or the hearing officer.

§ 20.1.1.112.

EIB's decision to conduct a hearing on the instant petitions is also contrary to the Open Meetings Act and the prohibition against *ex parte* communications. In response to a rulemaking petition, EIB must "determine whether to hold a hearing within sixty days of submission of a proposed regulation." NMSA 1978, § 74-2-6(A). It appears that EIB did not make the crucial decision to "hold a hearing" in an open public meeting. Instead, all indications are that this decision had already been made during the *ex parte* communication and settlement between Chairperson Peacock and petitioners, which the Chairperson and counsel later conveyed to the entire EIB in executive session. This privately negotiated settlement between EIB and petitioners presumably *required* EIB to "hold a hearing" on the petitions, since there would be no other way for EIB "to resolve" petitioners' appeals administratively. Government business

cannot be conducted in private. *Id.* Accordingly, EIB must vacate the *Order Establishing Procedures* and dismiss the petitions. NMSA 1978, § 10-15-3(A) (“No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978”).

B. The scope of the hearing should be limited to new evidence.

3. The petitions to repeal the Rules restate the same arguments and “evidence” that the petitioners unsuccessfully offered to the former EIB members who adopted the Rules. Petitioners argue, for example, that the former EIB exceeded its statutory authority and lacked substantial evidence to adopt the Rules. *Petition to Repeal Rule 100*, ¶¶ 10-28; *Petition to Repeal Rules 300 & 301*, ¶¶ 13-32; *Petition to Repeal Rule 350*, ¶¶ 8 to 22). These same issues are currently before the Court of Appeals.

4. The instant proceeding should not duplicate the former proceedings for at least four reasons. First, if the current EIB members simply review the legal and evidentiary basis of the former members’ decisions to adopt the Rules, then EIB will be intruding on the Court of Appeals’ appellate jurisdiction and violating Separation of Powers. N.M. Const. Art. III; NMSA 1978, § 74-2-9(C). Second, if the current EIB members repeal the Rules based on the same arguments and evidence that the former EIB members rejected, then EIB as an institution will appear unprincipled, arbitrary and capricious. Third, because EIB has no particular expertise to decide the legal issues raised by petitioners, it should allow the Court of Appeals to decide these issues in the current pending appeals.² Fourth, given the formal nature EIB rulemakings (*Motion to Recuse*), petitioners should be precluded from re-litigating the same issues that the former EIB

² Other than an assured outcome, it is unclear why both petitioners and EIB would want to avoid a decision on these legal issues by the Court of Appeals.

decided against them and that are currently on appeal in the Court of Appeals. See Shovelin v. Central N.M. Elec. Coop., 115 N.M. 293 (1993) (if certain conditions are satisfied, preclusion doctrines may apply to administrative determinations). For all of these reasons, the instant proceeding should be limited to information and data that was not available, and could not have been made available, to EIB when it adopted the Rules last year.

C. Dispositive legal issues should be decided by motion before any evidentiary hearing is held.

5. Petitioners have raised a number of alleged legal issues regarding the validity of the Rules. For example, they allege that the Rules are invalid because they establish no ambient air quality standard, because they impose “performance standards” that are more stringent than those imposed by federal law, and because no substantial evidence supports the Rules.

Petitioners are mistaken. As set out above, it is the Court of Appeals that should decide these issues, not EIB. However, if EIB disagrees, then it should at least require these purely legal issues to be raised in dispositive motions and fully briefed prior to holding an evidentiary hearing. If EIB repeals the Rules on the basis of such legal issues, then the time and expense of an evidentiary hearing would be avoided. The Scheduling Order should, therefore, be amended to include a requirement that petitioners submit dispositive motions that allegedly require repeal of the Rules.

6. NEE proposes that all dispositive motions (i.e., motions requiring either dismissal or repeal) be submitted on the following schedule: brief in chief, October 14th; responses, November 14th; replies, December 2nd.

D. The schedule and requirements imposed by the *Order Establishing Procedures* are unfair and incomplete.

7. Allowing only one month for opponents to submit notices of intent (NOIs) (*Order Establishing Procedures* ¶ 7) is unreasonable, unfair, and further manifests EIB's bias in favor of petitioners. In the prior proceedings, petitioners (who have countless resources at their disposal) were given a full two months to submit their response NOIs; and they argued that even this was not sufficient time to prepare their case. Petitioners have already had months to prepare their NOIs, having filed them at their leisure after privately negotiating with Chairperson Peacock. *Motion to Recuse*. Accordingly, NEE requests at least 2 months after petitioners' NOIs to submit its response NOI. In addition, NOIs submitted by opponents of repeal should not be limited to matters that are responsive to petitioners' NOIs. Opponents intend to present testimony in opposition to the petitions, regardless of whether it is technically responsive to petitioners' NOIs.³

8. The EIB's regulations allow any person to become a party to this proceeding by filing an entry of appearance. Part 20.1.1. The scheduling order fails to mention this or to establish any deadline for the filing of such entries, again manifesting the impression that it is only petitioners who matter in this proceeding. Moreover, the scheduling order will not be binding on anyone except the current parties unless adequate notice of the *Order's* deadlines is published. NEE proposes that the deadline for filing entries of appearance in this matter be established at least one month after petitioners submit their NOIs, thus giving the public time to obtain these NOIs and decide whether to participate as parties.

9. The entire record from EIB 10-04 and EIB 10-09 should be received into the record in this proceeding, without exception. This will show the extensive record on which the

³ NEE concedes that NOIs filed in rebuttal should specifically "rebut" assertions made by other parties in their NOIs.

EIB adopted the Rules, prevent duplication, and serve to limit the scope of testimony in this proceeding. Again, the scope of this proceeding should be limited to information and data that was not available to the EIB last November and that could not have been made available to it.

10. The requirement of 9 paper copies (§§ 3, 9) is wasteful, unnecessary, and imposes an undue burden on the public and other parties who do not have the vast resources of petitioners. An original, one paper copy, and an electronic copy should be sufficient. Two-sided copies should also be allowed so long as one 1-sided copy is provided.

11. Only allowing “rebuttal testimony” (*Order* ¶ 10) to include argument on the weight or exclusion of evidence and witnesses, on its face, denies NEE and other opponents the right to submit this information. The Order only allows petitioners to submit “rebuttal testimony.” The Order should acknowledge the right of all parties to argue that evidence should be excluded or given minimal weight. Motions to exclude pre-filed evidence or testimony should be submitted by the hearing date. There should be no limit placed on the parties’ rights to make arguments as to the weight of the evidence and testimony.

12. The EIB should not deliberate and make a decision immediately following the hearing (*Order* §§ 2, 15). EIB members must familiarize themselves with the entire record in the prior proceedings as well as the record generated in the instant proceeding, and transcripts will likely not be immediately available upon the close of the hearing. Furthermore, the parties should be allowed to make post-hearing submissions, including closing argument and proposed findings of fact and conclusions of law within a reasonable time after transcripts are made available, and the record should be kept open post-hearing to allow the public additional time to submit written comments.

13. PowerPoint presentations (*Order* ¶ 11) should be expressly limited to exhibits and materials that were provided in the NOIs. As written, the Order sets out no limitation on PowerPoint presentations and will thus open the door to introduction of materials that were not previously disclosed.

14. Cross-examination should not be limited except in accordance with Section 20.1.1.401.

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 be mailed and emailed to the attorneys of petitioners, Western Resource Advocates, and the Board August 31, 2011.

 _____
R. Bruce Frederick

