



STATE OF NEW MEXICO

BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE PROPOSED REPEAL OF REGULATION, 20.2.100 NMAC –
Greenhouse Gas Reduction Program
No. EIB 11-16(R)

ORDER AND STATEMENT OF REASONS FOR
REPEAL OF SECTION 20.2.100 NMAC

This matter comes before the New Mexico Environmental Improvement Board (“Board” or “EIB”) upon a petition filed by Tri-State Generation and Transmission Association, Inc. (“Tri-State”), the New Mexico Oil and Gas Association (“NMOGA”), Public Service Company of New Mexico (“PNM”), Southwestern Public Service Company (“SPS”), the Independent Petroleum Association of New Mexico (“IPANM”), the City of Farmington and the Farmington Electric Utility System (“FEUS”), and El Paso Electric Company (“EPE”) (collectively, the “Petitioners”) proposing the repeal of § 20.2.100 NMAC - Greenhouse Gas Reduction Program (“Part 100”).

The Board’s hearing on the petition was held during the public meetings in Santa Fe, New Mexico from December 5 through 9, 2011, and from December 12 through 14, 2011. The Board heard and received technical testimony from the Petitioners, the New Mexico Environment Department (“NM Environment Department”), and Grupo Cementos de Chihuahua, and cross-examination from New Energy Economy, Inc. (“NEE”) and Western Resource Advocates (“WRA”), as well as public comment from interested persons.

On March 16, 2012, the voting members of the Board, having reviewed the record and the transcript of the proceedings, deliberated and voted unanimously (5-0) to repeal Part 100 in its entirety. The Board also determined that Part 100 sunsetted by operation of law on January 2, 2011. The Board also discussed, among other things, the reasons for the repeal of Part 100 and its basis for the determination that Part 100 had sunsetted.

I. PROCEDURAL HISTORY

A. Adoption of Part 100 (EIB 08-19(R)).

1. On December 19, 2008, and February 2, 2009, respectively, NEE filed with the Board an original and corrected petition for regulatory change for the adoption of proposed amendments to 20.2.1 NMAC, 20.2.2 NMAC, 20.2.70 NMAC and 20.2.72 NMAC. EIB 08-19(R) Pleading Log ("PL") 1, 6.

2. At its meeting on April 6, 2009, the Board held a hearing on the question of its authority to adopt a statewide cap on greenhouse gas emissions as sought in NEE's rulemaking petition. At the conclusion of the hearing, the Board ruled that it had the authority to address the rulemaking petition. EIB 08-19(R) PL 25.

3. Public comment was taken on the NEE proposal on March 1, 2010. See EIB 08-19(R) Reporter's Transcript of Proceedings - Public Comment Session, March 1, 2010.

4. On March 2, 2010, NEE filed a notice of intent to present technical testimony and substituted a revised regulatory proposal in the form of proposed Part 100 that replaced NEE's prior regulatory change petition. EIB 08-19(R) PL 105a; EIB 08-19(R) PL 114 at 2-3.

5. On April 29, 2010 the State District Court in the Fifth Judicial District issued a preliminary injunction enjoining the EIB from conducting further proceedings on the NEE rulemaking petition. See EIB 08-19(R) PL 124. As a result, the proceedings in EIB 08-19(R) were stayed between April 29, 2010 and June 18, 2010. EIB 08-19(R) PL 126; EIB 08-19(R) Statement of Reasons at 3, ¶¶ 13-18. Upon review, the New Mexico Supreme Court ordered the District Court to dissolve the preliminary injunction because it found the District Court action to be premature. *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, 149 N.M. 42, 243 P.3d 746.

6. NEE filed a revised version of proposed Part 100 on June 28, 2010. EIB 08-19(R) PL 127.

7. Other parties filed notices of intent to present technical testimony and direct testimony on July 16, 2010, and all parties filed, or were permitted to file, rebuttal testimony on August 4 and 6, 2010. EIB 08-19(R) PL 129-139,148,152-155. Certain parties also filed surrebuttal testimony. See, e.g., EIB 08-19(R) PL 176.

8. On July 19, 2011, the New Mexico Court of Appeals entered a stay in the Part 100 appellate proceedings. Orders of Remand, Case Nos. 31,015; 31,016; 31,017; 31,018; 31,019; 31,020; 31,021 (N.M. Ct. App. July 19, 2011).

9. NEE filed a second revised version of proposed Part 100 on August 6, 2010. EIB 08-19(R) PL 155 - Exhibit R10.

10. The Board held a public hearing to consider Part 100, from August 16-20, 2010, and October 4-5, 2010, in Santa Fe, New Mexico.

11. NEE distributed a third revised version of proposed Part 100 during the last afternoon of the hearing on October 5, 2010. EIB 08-19(R) Tr.278:23 to 279:3 (Oct. 5, 2010); EIB 08-19(R) NEE Hearing Surrebuttal Exhibit R10 (10/5/10 version).

12. NEE attached a fourth revised version of proposed Part 100 to its Closing Argument, which it filed on November 22, 2010. EIB 08-19(R) PL 187 - Exhibit A.

13. On December 6, 2010, the Board voted 4 to 1, with one recusal, to adopt Part 100, with several amendments, including amendments to the EFFECTIVE DATE and SUNSET CLAUSES. EIB 08-19(R) Statement of Reasons at 13, ¶¶ 29, 30.

14. On December 27, 2010, the Board filed Part 100 with the State Records Center. State Records Center NMAC Transmittal Form (Dec. 27, 2010).

15. On December 30, 2010, the Board transmitted an Order and Statement of Reasons for the adoption of Part 100. EIB 08-19(R) Statement of Reasons.

16. On January 25, 2011, Petitioners filed Notices of Appeal in the New Mexico Court of Appeals, appealing the Board's action to adopt Part 100. New Mexico Court of

Appeals Case Nos. 31,015; 31,016; 31,017; 31,018; 31,019; 31,020; 31,021 (NM. Ct. App. Jan. 25, 2011).

17. On April 20, 2011, NEE and Amigos Bravos Groups filed motions to intervene as appellees in Case No. 31,020.

18. Petitioners requested that the New Mexico Court of Appeals refer their appeal to mediation, and on May 25, 2011, the Court of Appeals scheduled mediation pursuant to Court of Appeals Order No. 1-42.

19. On May 24, 2011, the New Mexico Court of Appeals issued an Amended Order denying NEE and Amigos Bravos Groups' motion to intervene.

20. On June 17, 2011, the Petitioners and EIB Chair Deborah Peacock participated in Court-ordered mediation proceedings with the Court of Appeals in-house mediator at the Court of Appeals. All parties to the appeals participated in the mediation.

21. At the EIB's next scheduled regular meeting, on July 12, 2011, the EIB voted in open session, unanimously, to sign with Petitioners seven Joint Motions for a 180-Day Remand to the New Mexico Environmental Improvement Board for Further Proceedings and for Stay of Appellate Proceedings, to request a 180-day stay of all seven appeals and to "allow further proceedings permitted under the Board's procedures that may cause the issues in this appeal to become moot and this appeal to be dismissed."

22. On July 19, 2011, the New Mexico Court of Appeals issued an Order remanding all seven appeals to the EIB for 180 days for further actions and proceedings and for staying appellate proceedings pending the remand.

23. On July 22, 2011, NEE filed an Emergency Motion to Vacate Court of Appeals' Order of Remand with the New Mexico Supreme Court.

24. The New Mexico Supreme Court considered NEE's Emergency Motion to Vacate Court of Appeals' Order of Remand and issued an Order staying the Court of Appeals' Order of Remand and scheduled Oral Argument for July 27, 2011.

25. In the July 27, 2011, Oral Argument, the Supreme Court ruled from the bench that NEE and Amigos Bravos Groups could intervene in the Court of Appeals' cases and also lifted the stay on the Court of Appeals' Order of Remand.

26. On September 29, 2011, NEE filed a Motion to Vacate Order of Remand and Return this Appeal to the General Calendar on Case No. 31,020 at the New Mexico Court of Appeals, which was denied.

27. On October 5, 2011, NEE filed a Motion to Consolidate Pending Appeals 31,015; 31,016; 31,017; 31,018; 31,019; and 31,021 with 31,020 at the Court of Appeals, which was denied.

28. On January 17, 2012, Petitioners and EIB filed Status Reports and Motions to Extend Remand and for Stay of Appellate Proceedings.

B. Current Repeal Proceedings (EIB 11-16(R)).

1. Petitioners filed a new joint petition for the proposed repeal of Part 100 on July 15, 2011, and it was given a new EIB number, EIB 11-16(R). EIB 11-16(R) PL 1.

2. On July 21, 2011, NM Environment Department entered an appearance. EIB 11-16(R) PL 3.

3. On July 29, 2011, NEE entered an appearance and filed various motions. EIB 11-16(R) PL 4, 5.

4. On August 7, 2011, the Board unanimously agreed to schedule a hearing and to consider the repeal petition, and appointed Ms. Felicia Orth as Hearing Officer in the proceeding. Draft Minutes, Environmental Improvement Board Meeting, August 1-2, 2011, at 3 (as unanimously adopted with amendments on September 2, 2011).

5. On August 11, 2011, the Hearing Officer issued an Order Establishing Procedures establishing December 5, 2011, as the date of commencement of the hearing on the repeal petition. EIB 11-16(R) PL 8.

6. On August 22, 2011, the Board published notice of the hearing in the Albuquerque Journal, 105 days in advance of the hearing. Albuquerque Journal, Legal Notices, August 22, 2011 (New Mexico Environmental Improvement Board Notice of Public Hearing to Consider Proposed Repeal of 20.2.100 NMAC"), available at <http://legals.abqjournal.com/legals/2011/8/22>.

7. On August 26, 2011, Western Resource Advocates ("WRA") entered an appearance. PL 9-13.

8. On August 26, 2011, the Board provided notice of its consideration of the petition to the Small Business Regulatory Advisory Commission by sending the Commission a letter advising it of the proposed repeal of Part 100 and the date for the public hearing on the proposed repeal. PL 14.

9. On August 31, 2011, NEE filed a Motion to Recuse Board Members Casciano, Fulfer and Peacock; Objections to Order Establishing Procedures and Request to Vacate or Amend; and a Motion That Board Members Fully Disclose Information Relating To Their Possible Bias and Lack of Impartiality. PL 15-17.

10. On August 31, 2011, a notice of public hearing commencing December 5, 2011, was published in the New Mexico Register. XXII N.M. Reg., No. 16, 595-96 (Aug. 31, 2011).

11. On October 3, 2011, at the Board's regularly scheduled meeting, Board Members Casciano and Fulfer recused themselves from participation in this proceeding. The remaining Board Members indicated that they were impartial and could fairly consider the petition.

12. On October 7, 2011, 59 days prior to the hearing, Petitioners and the Department filed notices of intent to present technical testimony and direct testimony in support of the petition to repeal Part 100. PL 49-55.

13. On October 7, 2011, Grupo Cementos de Chihuahua, S.A. de C.V., filed an entry of appearance. PL 56-57.

14. On October 24, 2011, League of Women Voters of New Mexico, Center of Southwest Culture, Inc. and Amigos Bravos filed entries of appearance. PL 60-62.

15. On November 7, 2011, the Board issued an Order on Motion That Board Members Fully Disclose Their Possible Bias and Lack of Impartiality; and an Order on Motion to Recuse Board Members Casciano, Fulfer and Peacock. PL 64-65.

16. On November 9, 2011, NEE filed a notice of intent to present technical testimony and direct testimony in opposition to the petition to repeal Part 100. PL 69.

17. On November 15, 2011, after soliciting input from Board Members, the Hearing Officer announced that the Board would take administrative notice of the entire record in EIB 08-19(R) in the current EIB 11-16(R) proceeding. See EIB 11-15(R) Tr. 538:21 to 539:2.

18. On November 18, 2011, Chainbreaker Collective, Climate Change Leadership Institute, Coalition for Clean Affordable Energy, Drilling Mora County, Earth Care International, Girls Gone Green, Green Economy Commission, Las Vegas Peace & Justice Center, New Mexico Interfaith Power and Light, New Mexico Physicians For Social Responsibility, Positive Energy, Rocky Mountain Youth Corps, Santa Fe Alliance, San Juan Citizen's Alliance, The Sierra Club, Southwest Organizing Project, Tewa Women United, VAWT Power Management, Inc., Wild Earth Guardians - New Mexico, and The Wilderness Society - New Mexico filed entries of appearance. PL 70-89.

19. On December 2, 2011, the Hearing Officer issued an Order on Scheduling Motions; and an Order on Motions to Admit Prior Sworn Testimony and To Take Administrative Notice of Record in EIB Rulemaking and Court Files. PL 99-100.

20. The Board held a public hearing on the repeal petition in Santa Fe, New Mexico, on December 5-9 and December 12-14, 2011.

21. The parties filed closing arguments and proposed statements of reasons on February 16, 2012.

22. On March 16, 2012, the Board deliberated and unanimously voted to repeal Part 100 and discussed, among other things, the reasons for the repeal of Part 100 and the legal basis for the sunset, by operation of law, of Part 100.

II. STATUTORY AUTHORITY AND APPLICABLE LEGAL STANDARDS

In deciding this matter, the Board is guided by the following statutory authority and legal standards. Pursuant to the Environmental Improvement Act, NMSA 1978, §§ 74-1-1 to 17, the Board has the authority to promulgate rules and standards for “air quality management as provided in the Air Quality Control Act.” See NMSA 1978, § 74-1-8(A)(4).

According to the Air Quality Control Act (“AQCA”), the Board “shall ... adopt, promulgate, publish, amend and *repeal* regulations consistent with the Air Quality Control Act to ... prevent or abate air pollution ...” NMSA 1978, § 74-2-5(B)(1) (emphasis added).

The ACQA further states that: “Any person may recommend or propose regulations to the environmental improvement board.” NMSA 1978, § 74-2-6(A). Subsection B specifically states that:

No regulation or emission control requirement shall be adopted until after a public hearing by the environmental improvement board . . . *As used in this section, “regulation” includes any amendment or repeal thereof.*

NMSA 1978, § 74-2-6(B) (emphasis added).

The Board’s rulemaking procedures define a “regulatory change” as the “adoption, amendment or *repeal* of a regulation.” See § 20.1.1.7(P) NMAC (emphasis added).

Pursuant to § 20.1.1.300(A) NMAC, “[a]ny person may file a petition with the board to adopt, amend or *repeal* any regulation within the jurisdiction of the board.” (emphasis added).

New Mexico case law establishes that agency consideration of a regulatory repeal must be adequately noticed and supported by evidence in the record. See *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm’n (In re Rates and Charges of Mountain States Tel. & Tel. Co.)*, 104 N.M. 36, 41-42, 715 P.2d 1332, 1337-38 (1986); see also *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm’n*, 115 N.M. 678, 680-81, 858 P.2d 54, 56-57 (1993).

Pursuant to § 74-2-9(C)(2) of the AQCA, the Board’s decision must be supported by substantial evidence. Substantial evidence is evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder. *Wagner v. AGW Consultants*,

2005-NMAC-016, ¶ 85, 137 N.M. 734, 114 P.3d 1050; *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶17, 125 N.M. 401, 962 P.2d 1236.

With respect to the Board's regulatory role, NMSA 1978, § 74-2-5(E) states that:

In making its regulations, the environmental improvement board . . . shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

character and degree of injury to or interference with health, welfare, visibility and property;

the public interest, including the social and economic value of the sources and subjects of air contaminants; and

technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

III. PRELIMINARY MATTERS

A. Allegations of Bias and Ex Parte Communications.

Each of the individual Board members who participated in the EIB 11-16(R) proceedings stated on the record that he or she could be fair and impartial in deciding the Petition. However, during the proceedings, NEE made allegations that the Board and its individual members were biased. NEE also made allegations that the Board engaged in *ex parte* communications. These contentions are addressed in turn.

1. Alleged Bias.

NEE contends that the Board is, collectively and individually, biased in this matter because the individual Board members were appointed by Governor Susana Martinez. Governor Martinez has openly stated her opposition to Part 100.

NEE's assertions are without merit. The fact that the Board members were appointed by Governor Martinez does not demonstrate, suggest or prove bias.¹ By statute, the Board is

¹ If this were true, members of the Board appointed under Governor Bill Richardson would also be presumed to have an undue bias based on the mere fact that they were appointed by him.

composed of Democrats and Republicans and no more than four members of the Board are permitted from a particular political party. See NMSA 1978, § 74-1-4(A).

NEE's assertion that the Board is biased amounts to an allegation that the Board has predetermined the matter. Such an assertion is unsubstantiated and patently untrue. Under the Board's rules, members have a duty and obligation to be fair and impartial when they participate in Board proceedings. Section 20.1.1.111 NMAC states that:

No board member shall participate in any action in which his or her impartiality of fairness may reasonably be questioned, and the member shall recuse himself or herself in any such action by giving notice to the board and the general public by announcing this recusal on the record.

During the October 3, 2011 Board meeting regarding concerns of bias, each Board member was questioned about whether he or she could not be impartial or fair and therefore should be recused. Members James Casciano and Gregg Fulfer recused themselves and announced their recusals on the record.² The other Board members, Jeffrey Bryce, Tim Morrow, Deborah Peacock and Elizabeth Ryan, each addressed the issue and indicated that they could be fair and impartial. See Transcript of October 3, 2011 meeting; see also Board's Order Denying Motion that Board Members Fully Disclose Their Possible Bias and Lack of Impartiality (setting forth specific discussion from each Board Member as to why each is not biased).

The Board has considered the petition fairly and in forthright fashion. Other than bald, unsubstantiated statements, NEE offers nothing to support its assertions and its baseless rhetoric is neither credible nor persuasive.

2. Alleged Ex Parte Communications.

On August 31, 2011, NEE filed a motion to recuse Board Chair Peacock, alleging bias. NEE argued that Ms. Peacock, "engaged in *ex parte* communications with the petitioners on the

² Mr. Fulfer stated "I feel that I'm very impartial ... But to maintain the highest integrity of the Board, I'm going to recuse myself." Similarly, Mr. Casciano stated "although I ... feel that I can be objective myself, I don't want to call into question at all the fairness of the Board." See EIB 11-16(R) Tr. Oct. 3, 2011, at 32:19 to 33:10; See also EIB 11-16(R) PL 65 at 2.

matters now pending before the EIB.” NEE’s allegations refer to a mediation ordered by the Court of Appeals concerning seventeen appeals of the adoption of Part 100 (Order No. 01-42).³ The parties in those appeals are the same parties identified as the Petitioners in this matter.

a. Court of Appeals Order to Attend Mediation.

Pursuant to the Court of Appeals Order to attend mediation, the Board properly chose Chair Peacock to attend the mediation with the Board’s counsel. The Board welcomed the mediation of the appeals because the Board believed it was in the public interest to attempt to resolve seventeen separate appeals all arising from the adoption of Part 100.

On June 17, 2011, Chair Deborah Peacock participated in the mediation, in her role as Chair of the EIB, together with Board Counsel and the parties to the appeals. It is important to note that, at the time of the mediation, the Court of Appeals had determined that NEE and Amigos Bravos, who had filed motions to intervene, were not entitled to intervene in the appeals.⁴ NEE and Amigos Bravos did not participate in the mediation because they were not, at that time, parties to the appeals. Including either those entities in the mediation would have been inappropriate and they were not included in the Court of Appeals Order to attend mediation. Notably, the NM Environment Department, the state agency responsible for implementation and enforcement of Part 100, was also not a party to the appeals and, therefore, did not participate in the mediation.

Presumably, NEE alleges that the discussions during the mediation by the parties at that time were *ex parte* because NEE was not involved in the mediation. Importantly, the term “*ex parte* communications” generally refers to communications that are held between one or more parties without all of the other parties present in the presence of the decision maker. In this circumstance, all of the parties to the pending appeals at that time were present at the Court of

³ There are seventeen appeals currently before the Court of Appeals regarding EIB 08-19(R), EIB 10-04(R) and EIB 10-09(R), namely Court of Appeals No. 30,897; 30,898; 30,899; 30,901; 30,902; 30,907; 30,908; 30,952; 30,953; 30,954; 31,015; 31,016; 31,017; 31,018; 31,019; 31,020, and 31,021.

⁴ Their motions to intervene were denied by the Court of Appeals on May 24, 2011.

Appeals mediation. At no time were there any communications with Chair Peacock when all appeals parties were not present.⁵ The Board notes that the mediation was held at the Court of Appeals with the Court of Appeals in-house mediator, Mr. Robert Rambo, present at all times and held pursuant to his instruction, facilitation, and sole supervision.

Mere participation by Chair Peacock in the mediation ordered by the Court of Appeals, along with all other parties to the appeals, does not amount to an impermissible *ex parte* communication by either the Chair or the Board.

b. Appeals Are Separate Proceedings; Merits Not Discussed.

In addition to the general prohibition on *ex parte* communications applicable to Board members, Board members are required to abide by the provisions of § 20.1.1.112 NMAC, which prohibits “*ex parte* discussions.” Section 20.1.1.112 NMAC states that:

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.

Section 20.1.1.112 NMAC specifically prohibits *ex parte* communications between board members with parties who appear before the board during a pending proceeding. The rule prohibits discussions on the merits of the proceeding “after the initiation and before the conclusion of a proceeding”.

This Rule is limited in two regards. First, the Rule is limited to a specific time frame in which such discussions are prohibited (“after the initiation and before the conclusion of a proceeding”). Second, this Rule is limited in that the prohibited act is discussing “the merits of the proceeding.”

(i) The Timeline Demonstrates That These Were Separate Proceedings.

NEE argues that the repeal proceedings in EIB 11-16(R) are not separate from and are combined with the proceedings which are the subject of the appeals stemming from EIB 08-

⁵ Chair Peacock stated on the record that, “[she] has never engaged in any *ex parte* communications and never discussed any outcome in this matter.” See Transcript of October 3, 2011 meeting and Board’s Order.

19(R) regarding the adoption of Part 100. It makes this argument in an attempt to bolster its claim that there were *ex parte* communications during the Court of Appeals ordered mediation, presumably using the following logic: If the two matters (adoption and repeal proceedings) are one and the same proceeding, then the proceeding has already been "initiated" pursuant to § 20.1.1.112 NMAC and therefore *ex parte* communications may have occurred during the prohibited time period ("after the initiation and before the conclusion of a proceeding").

NEE, though, admits that the repeal proceedings in EIB 11-16(R) are separate proceedings from the rule adoption proceedings in EIB 08-19(R). At the Oral Arguments before the New Mexico Supreme Court regarding the appeals for Part 100, *New Energy Economy, Inc. v. Vanzi*, Mr. Bruce Frederick, attorney for NEE, acknowledged that the repeal proceedings (11-16(R)) were separate proceedings from the appeals regarding the adoption of the rules (08-19(R)). Specifically, Chief Justice Daniels asked the following questions to NEE's counsel and received the following responses:

CHIEF JUSTICE DANIELS: Well, let me ask you this: Wouldn't the EIB have the right to just start a new rule proceeding? Which seems like what they've done.

MR. FREDERICK: PNM can petition the Board. Any other person can petition the Board to start a new rule proceeding anytime.

CHIEF JUSTICE DANIELS: That's what they've done, isn't it?

MR. FREDERICK: That is exactly what they've done. New Energy Economy could file another petition. *That's a separate case.*

Transcript of Oral Argument, Supreme Court, at 4:3-17, *New Energy Economy, Inc. v. Vanzi* (July 27, 2011) (No. 33,074) (emphasis added); EIB 11-15(R)/11-17(R) Oct. 3, 2011, Tr. at 18:11-24.

The Supreme Court ruled that the repeal proceedings are separate proceedings from the matters on appeal. Also, the Supreme Court ruled from the bench at the conclusion of the Oral Argument in *New Energy Economy, Inc. v. Vanzi* that the order staying the Court of Appeal's Order of Remand was lifted, and therefore the Board could proceed. Tr. 104:22 to

105:1, see *also*, slip op. at ¶ 10 (N.M. Sup. Ct. Feb. 16, 2012). Based on this decision, the Board did not reopen the original administrative hearing on Part 100. Instead, the Board docketed a new proceeding based upon the Petition.

Regarding the timeline set forth in 20.1.1.112 NMAC ("after the initiation and before the conclusion of a proceeding"), because the repeal proceedings and adoption proceedings of a rule are considered separate proceedings, we note that the Court-ordered mediation regarding the EIB 08-19(R) appeals occurred before the initiation of new repeal proceedings in 11-16(R). The mediation regarding EIB 08-19(R) appeals occurred on June 17, 2011. Petitioners filed their petition(s) for EIB 11-16(R), new and separate proceedings, on July 15, 2011, after the mediation.

Thus, the repeal proceedings, EIB 11-16(R), are separate proceeding from the EIB 08-19 rule adoption proceedings which are still under appeal. Accordingly, there could not have been any *ex parte* communications at the mediation (conducted on June 17, 2011) prior to the repeal petitions filed on July 15, 2011.

ii. There Were No Discussions of the Merits

In addition to the fact that the timing of the mediation does not line up with the prohibition set forth in § 20.1.1.112 NMAC, Chair Peacock and the Board's counsel did not discuss the merits of this proceeding with any participants during the mediation. As referenced above, § 20.1.1.112 NMAC prohibits *ex parte* communications as to the merits of a pending matter. At the mediation, and prior to initiation of these proceedings, the Chair and the Board: (1) did not know whether any further proceedings regarding Part 100 would be filed; or (2) who might file a petition; or (3) the likely nature of any such proceedings (e.g. repeal or amendment or new proposed rules). Likewise, at the mediation, and prior to initiation of the proceedings in EIB 11-16(R), the Chair and the Board: (1) did not agree to entertain any particular petition regarding Part 100; (2) did not agree to repeal Part 100; and (3) did not agree to any outcome regarding Part 100. The Board specifically notes that Chair Peacock had no authority to make any

decisions on behalf of the Board at the mediation. All substantive decisions of the Board are required to be made in public meetings with a quorum of the Board present.⁶

Only after petitions to repeal were filed and the Board held a hearing to consider whether or not to hear the petitions, did the Board agree to hear the petition for repeal of Part 100. Not until the hearings and deliberations took place in EIB 11-16(R), were merits considered and discussed by the Board, in open and public meetings, where all parties were present.

3. The Board's Consideration of the Petition and its Deliberations Were Proper.

Chair Peacock, appropriately, did not recuse herself from the proceedings. By participating in the mediation ordered by the Court of Appeals, the Board did not engage in *ex parte* communications; it was in the public interest for the Board to participate in mediation. There is no credible, persuasive evidence (or any evidence whatsoever) indicating that Chair Peacock or any other voting Board member, engaged in any impermissible *ex parte* communications. Bluntly, the Board did not engage in *ex parte* communications regarding the merits of this matter after the filing of the petition and before the conclusion of this proceeding.

As to alleged impermissible bias, the Board rejects the assertion and notes that each of the voting Board members affirmed on the record that he/she could be fair, impartial and open-minded during the proceedings. There is simply no evidence to the contrary. The petition, evidence presented, positions of the parties, etc., have been given fair consideration by each voting member of the Board without pre-determination.

4. Review of the Record.

While the proceedings are separate, the voting members of the Board represent that they have duly familiarized themselves with the record and the transcript of this proceeding, EIB 11-16(R), as well as the record and transcript of the prior Part 100 proceeding, EIB 08-19(R).

⁶ In the July 12, 2011 Board meeting the members of the Board voted, unanimously, in an open meeting to approve a Joint Motion resulting from the mediation.

**IV. PART 100 HAS SUNSETTED AND HAS NOT BEEN
IN EFFECT SINCE JANUARY 2, 2011**

A. Sunset Clause.

Section 20.2.100.15 NMAC states:

SUNSET

This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date.

Put another way, the sunset clause terminates Part 100 by operation of law when a federal regulatory scheme regulating greenhouse gas emissions is in place.

B. NEE and WRA Questions About Sunset Clause.

In their Closing Brief in EIB 11-16(R), NEE and Western Resource Advocates (WRA) state that: “[t]he sunset language was not part of the Rule proposed by NEE, and it is unclear where that language came from.” See EIB 11-16(R) PL 113 at 34 ¶ 16b.

Mr. Michel, a witness in 08-19(R), and now counsel for Western Resources Advocates (WRA) in 11-16(R), stated on the record during the 11-16(R) hearings as follow:

Madam Hearing Examiner, before we get started, there were some questions of the last witness relating to the sunset provision, Part 100, and I just wanted to alert the Board that the proposed sunset language in the proposed rule in Case 08-19 was very different from what ended up in the final rule, and, frankly, we’re not sure where that language came from. It’s kind of a mystery. Somehow it wound its way into the final rule without much deliberation or consideration.

EIB 11-16(R), Tr.1694:4-18.

Because of the assertions regarding the sunset clause made by NEE and WRA counsel, the Board thoroughly reviewed the entire record of the EIB 08-19(R) proceedings (the Part 100 adoption proceedings) and the present proceedings in order to fully understand the meaning of the Sunset clause and the intention behind the Board's adoption.

1. History of the Sunset Clause.

a. Version 1 of Part 100.

The original Part 100 petition was filed December 19, 2008, and entitled *Petition to Adopt New Regulations and to Amend Various Sections of Title 20, Chapter 2, Parts 1, 2, 70, and 72 of the New Mexico Administrative Code for the Purpose of Creating a Statewide Cap on Greenhouse Gas Emissions and [Promulgating] Other Requirements Related Thereto and Request for Public Hearing* filed by NEE. EIB 08-19(R) PL 1. This version did not include a sunset clause.

b. Version 2 of Part 100.

On January 2, 2009, NEE filed a *Motion to File Corrected Petition and to Provide Complete Copies of NMAC Parts 20.2.1, 20.2.2, 20.2.70, and 20.2.72, Showing Petitioner's Proposed Amendments*. EIB 08-19(R) PL 6. This version did not include a sunset clause.

c. Version 3 of Part 100.

NEE filed a new proposal for Part 100 on March 2, 2010 (their Exhibit 12). This proposal contained a sunset clause which states:

20.2.100.15 SUNSET

This Part shall no longer apply beginning in the year that sources begin reducing greenhouse gas emissions pursuant to a mandatory regional or national greenhouse gas reduction program.

See EIB 08-19(R) PL 105d, Exhibit 12 at 5.

d. Version 4 of Part 100.

NEE submitted a corrected Exhibit 12 on June 28, 2010, with no apparent changes to the previous sunset provision. EIB 08-19(R) PI 127, Exhibit 12.

e. Version 5 of Part 100.

On August 6, 2010, NEE filed a Petitioner's Notice of Intent to Present Rebuttal Technical Testimony, including the Prepared Rebuttal Testimony of Steven S. Michel on behalf of New Energy Economy under Tab B. In Exhibits 9-10, Mr. Michel included changes to the proposed Part 100. The sunset clause was changed to:

20.2.100.15 SUNSET

This Part shall no longer apply to a source beginning in the year that it begins reducing greenhouse gas emissions pursuant to multi-jurisdictional or national mandatory greenhouse gas emission caps, or 2020, whichever comes first.

See EIB 08-19(R) PL 155 Tab B, Exhibits 9-10.

f. Version 6 of Part 100.

On October 5, 2010, the last day of the hearings, NEE filed an amendment to Part 100, which reads as follows:

20.2.100.15 SUNSET

This Part shall not apply to a source in any year that it reduces greenhouse gas emissions pursuant to multi-jurisdictional or national mandatory greenhouse gas emission caps, and shall sunset December 31, 2020.

EIB 08-19(R) – NEE Hearing Surrebuttal Exhibit R10 (10/5/10 version).

g. Version 7 of Part 100.

NEE submitted an annotated version of Part 100 in its written closing argument on November 22, 2010. At that time, the sunset clause was the same as the October 5, 2010 version and this is the version the Board considered during its deliberations:

20.2.100.15 SUNSET

This Part shall not apply to a source in any year that it reduces greenhouse gas emissions pursuant to multi-jurisdictional or national mandatory greenhouse gas emission caps, and shall sunset December 31, 2020.

See EIB 08-19(R) PL 187, Exhibit A.

h. Board Deliberations.

The Board deliberated on December 6, 2010 and revised the sunset clause. The final sunset clause adopted by the Board reads:

20.2.100.15 SUNSET

This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date.

The official version of the sunset clause that appears in NMAC is identical to the version that the Board approved on December 6, 2010.

2. EIB 08-19(R) Proceedings.

The sunset clause was fully discussed during the EIB 08-19(R) hearing. The following is illustrative testimony from the 2010 hearings regarding the sunset clause.

In NEE's opening statement, during 2010, counsel for NEE, Mr. Bruce Frederick, stated:

The beauty of our proposal is that it applies only to New Mexico and its implementation is guaranteed and it does not depend on participation by any other state. However, when and if the Department's proposal is adopted or a national program is adopted, our regulation will automatically sunset, so there won't be any overlap.

See EIB 08-19(R) Tr. 28: 14-20.

Mr. Stephen Michel, witness for NEE, stated in his direct written testimony during 2010: "[t]hese regulations would sunset in the event NM sources become subject to a regional or national GHG reduction program." See EIB 08-19(R) PL 105d – Michel Direct at 6:40-41.

Mr. Michel further stated in his direct testimony and at the hearing:

Finally, the regulations call for their sunset when a regional or national greenhouse gas reduction program becomes effective.

For this reason, and to avoid overlapping reduction requirements, I testified that these regulations should sunset if and when New Mexico sources begin reducing their greenhouse gas emissions pursuant to a mandatory regional or national greenhouse gas reduction program.

EIB 08-19(R) Tr. 38:20-39:19 (Michel); see also EIB 08-19(R) PL 105d – Michel Direct at 25:3-15.

During cross-examination of Mr. Michel, he stated that, "The sunset day in the regulation is 2020. Hopefully there will be a federal regulation before that, in which case this regulation will sunset before that date." See EIB 08-19(R) Tr. Vol. 2 at 102:5-8. Mr. Michel was asked the following question during cross-examination:

Q: You talked about the sunset date under this regulation of 2020. And doesn't the sunset date really presuppose that there will be either other state or federal action on greenhouse gas emissions?

EIB 08-19(R) Tr. Vol. 2 at 113:25 to 114:4.

Mr. Michel responded that the question, “presupposes that . . . there will be other action, in which case it would have already sunset.” See EIB 08-19(R) Tr. Vol. 2 at 114:5-7. Mr. Michel is also on record as stating that, “[t]he sunset provision allows for this rule to be replaced by a regional or national program.” See EIB 08-19(R) Tr. Vol. 5 at 59:2-3.

As can be seen by this hearing testimony and changes made to the sunset clause during the hearing and deliberations, both NEE and WRA were well aware of the history of the sunset clause.

3. Board Deliberations in EIB 08-19(R)

The Board amended the sunset clause during its deliberations. In its Statement of Reasons, page 13 paragraph 30, this Board stated:

The Board amended Section 20.2.100.15 – SUNSET to read: “This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date.”

EIB 08-19(R) PL 191 at 13; See *also* EIB 08-19(R) Tr. Vol. XI Deliberations at 122-24.

This language is identical to the wording put into place in § 20.2.100.15 NMAC.

During deliberations, Board Counsel pointed out that the proposed sunset clause did not pertain to the rule as a whole, but was actually source dependent. He read the proposed rule to the Board: “This part shall not apply to a source in any year that it reduces greenhouse gas emissions pursuant to multi-jurisdictional or national mandatory greenhouse gas emission caps, and shall sunset December 31, 2020.”

Clearly, the proposed sunset clause pertained to sources and was a cause of concern to the Board. Chairwoman Dillingham stated that she, “[h]ad a concern about that, as well, because it looks like instead of the whole rule being sunsetted it could be source by source”. See EIB 08-19(R) Tr. Vol. XI Deliberations at 32-33. Board Member Green suggested that the Board, “[j]ust take out the source by source. Just say it sunsets ten years after the effective date”. See EIB 08-19(R) Tr. Vol. XI Deliberations, p. 49.

During the 2010 hearings, Chairwoman Dillingham noted that, “[y]ou’re aware that this regulation would sunset if there is a regional program and that the regional design would sunset, or if there was a federal program, this rule would sunset.” See EIB 08-19(R) Tr. Vol. 8 at 209:15-19. Chairwoman Dillingham specifically stated that, “[t]he issue of the federal program coming into place, we’ll take care of that in the sunset clause”. See EIB 08-19(R) Tr. Vol. XI Deliberations, p. 82.

In the Board’s EIB 08-19(R) deliberations, members had extensive comments about a federal program preempting Part 100.

CHAIRWOMAN DILLINGHAM: [W]e still have to . . . pay attention to the federal, if there is a federal program that preempts, which I think we would all prefer.

MR. GOLLIN: I think the federal program would supersede –
. . .

MR. GREEN: . . . My understanding, though, that these don’t go into effect if either there is a federal or a regional program. . . . I understand the testimony to be that it doesn’t go into effect if either one of those goes into effect.

CHAIRWOMAN DILLINGHAM: And that’s all under the sunset clause.

EIB 08-19(R) Tr. Vol. XI Deliberations, pp. 67-69.

MR. GREEN: Sunset shall sunset, if a greenhouse cap -- greenhouse reduction program, either state, regional, or federal is put into place.

CHAIRWOMAN DILLINGHAM: Shall sunset if a greenhouse reduction program –

MR. GREEN: Either regional -- state, regional, or –
. . .

MR. GOLLIN: Which means any reduction.

MR. GREEN: Right.

MR. GOLLIN: Beyond cap -- and at that point, we’re not nit-picking about how much that goes down.

MR. GREEN: Right. That, basically, the state, regional, or federal trumps. This is purely a stopgap.

EIB 08-19(R) Tr. Vol. XI Deliberations, pp. 98-99.

CHAIRWOMAN DILLINGHAM: . . . [T]he federal could be, technically, hardly any reductions. But as long as there is federal, we're willing to step aside.

MR. GREEN: I think the federal will supersede the states anyway, but, yes.

MR. GOLLIN: So there was another issue. There were - - so there were actually three issues, I think, here under sunset.

One is a sunset if a regional or federal greenhouse gas reduction program is in place.

The second is potentially a date certain, which in this case would be a rolling one, ten years after the effective date or so.

But then there is a third issue which people raised, which is the language about "shall not apply to a source." And I think there was some sentiment about striking that and just basically saying "this regulation."

CHAIRWOMAN DILLINGHAM: "This part shall sunset if", and not designate a source.

MR. GREEN: I would like to get rid of "source." I would like to specify the federal and regional, and then I would like to cut off after eight years, so that you accomplish the 3 percent that you were looking for.

EIB 08-19(R) Tr. Vol. XI Deliberations, pp. 101-102.

Mr. Gollin went on to state that:

100.15 currently reads, "This part shall not apply to a source in any year that it reduces greenhouse gas emissions pursuant to multi-jurisdictional or national mandatory greenhouse gas emissions caps and shall sunset December 31, 2020."

So an amendment could be written to say something to the effect of, "[t]his part shall sunset if a regional or federal greenhouse gas reduction program is in place or" - - and then it's the nine years after the effective date. But need some additional language here.

EIB 08-19(R) Tr. Vol. XI Deliberations, p. 110.

Later in the deliberations, Mr. Gollin changed his approach slightly:

MR. GOLLIN: Okay. So what if we were to amend the sunset to read in its entirety, "This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date"?

CHAIRWOMAN DILLINGHAM: Okay. That sounds better to me.

MR. GOLLIN : "This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date."

CHAIRWOMAN DILLINGHAM: Okay.

Mr. GOLLIN: Do you want me to read it again?

CHAIRWOMAN DILLINGHAM: Yes.

MR. GOLLIN: "This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date".

EIB 08-19(R) Tr. Vol. XI Deliberations, pp. 122-123.

Board members Ghassemi, Gollin and Dillingham voted to approve the language immediately referenced above as the final sunset language for Part 100. The provision passed by a Board vote of 3 to 2. See EIB 08-19(R) Tr. Vol. XI Deliberations, p. 125.

The Board was well aware of its policy objective to sunset Part 100 when a federal GHG reduction program was in place. The Board's Statement of Reasons for EIB 08-19(R) sets forth its basis for the sunset clause and the published rule including the sunset clause has been in place for over a year. The sunset clause in Part 100 is actually remarkable because it is one of the few Part 100 provisions that is clear, unambiguous and sets forth an intelligible policy objective.

4. EIB 11-16(R) Proceedings

Since Part 100, as adopted, sunsets if there is a regional or federal greenhouse gas reduction program in place (§20.2.100.15 NMAC) this Board considered and questioned, during the 11-16(R) hearings, whether any of these sunset clause events have occurred. The Board determined that such an event did occur and therefore Part 100 has sunsetted.

During the repeal hearings for EIB 11-16(R), the sunset clause was thoroughly explored by the Board with Mr. Peter Holmstead, former Assistant Administrator for Air and Radiation at the U.S. Environmental Protection Agency ("EPA"). See EIB 11-16(R) Tr. 1673-1681.

Mr. Holmstead's testimony establishes that:

1) The definition of greenhouse gas in § 20.2.100.7(J) NMAC, is "greenhouse gas" which means a gas, except water vapor, with a global warming potential. That goes beyond CO₂.

2) The definition of CO₂e in Part 100, §20.2.100.7(C) NMAC, refers to federal regulation 40 CFR 98.6 of subpart A of Part 98 which also defines greenhouse gases with a global warming potential as CO₂, CH₄ (methane), N₂O (nitrous oxide), SFG (sulfur hexafluoride), hydrofluorocarbon (HFCs), perfluorocarbons (PFCs), and other "fluorinated greenhouse gases as defined in this section."⁷

3) The sunset clause is not limited to CO₂. It is broader in that it uses the term "greenhouse gases" as defined under 40 CFR 98.6. Thus, a federal greenhouse gas reduction program for any of these gases causes Part 100 to sunset.

Mr. Holmstead specifically testified that:

The PSD program, in particular, came into effect on January 2nd of this year [2011]. That definition of CO₂ equivalents, I believe, only applies to the PSD program, although it might also apply to the mobile sources, but mobile sources don't emit all of those pollutants, but the PSD program does. So the PSD program was actually finalized earlier, but didn't become effective until January 2nd of this year, and it does cover all of those gases.

EIB 11-16(R) Tr. 1675:5-14. In response to Mr. Holmstead's testimony, Board Chairwoman Peacock engaged in the following exchange:

MS. PEACOCK: . . . So would you say that the PSD program is a greenhouse gas reduction program that is in place?

MR. HOLMSTEAD: Yes.

MS. PEACOCK: Okay. And even though there are a lot of lawsuits that we've heard about today, it's still in place?

⁷ Subpart A of Part 98, which includes section 98.6, also includes Table A-1 that comprises an extensive list of the specific Global Warming Potentials (GWP) of these greenhouse gases. The GWP of CO₂ is 1.0, and the GWP of other greenhouse gases are expressed relative to CO₂. For instance the GWP of nitrous oxide (N₂O) is 310, which means that each metric ton of N₂O emissions would have 310 times as much impact on global warming over 100 years than one metric ton of CO₂. As another example, the GWP of sulfur hexafluoride is 23,900.

MR. HOLMSTEAD: Oh, certainly, yes, it is in place.

MR. HOLMSTEAD: The PSD program was phased in. So beginning on January 2nd of this year, if you are a major source for other gases besides greenhouse gases, you had to go through the PSD program and get BACT for CO₂, as well as all your other pollutants. As of July, even if you emitted no other pollutants, if you were a major source of greenhouse gases, then you're covered by the program. So it was the way that the program was phased in. For the first six months, it only applies to sources that were already covered for other pollutants; and then beginning in January, greenhouse gases were treated just like any other pollutant.

...

MR. HOLMSTEAD: [The Federal Motor Vehicle Regulations] have been in place . . . under the Clean Air Act, beginning on January 2nd of this year. So all light-duty vehicles, including cars and trucks, are subject to the Greenhouse Gas Control Program beginning on January 2nd of this year. They become more stringent over time, and EPA applies them to bigger trucks and other things, but they have been in place, that program, since the beginning of this year.

MS. PEACOCK: And are they considered a greenhouse gas reduction program?

MR. HOLMSTEAD: They would certainly have to be.

EIB 11-16(R) Tr. 1676:5 to 1678:16.

Mr. Holmstead summarized EPA activity on climate change as follows:

. . . since the Board promulgated Part 100, EPA has continued to propose, adopt, implement, and enforce mandatory regulations to reduce greenhouse gas emissions. These efforts are summarized on an EPA website,⁸ a printout of which is included as Exhibit 2 to my testimony. I will discuss a few of the more recent and significant developments here.

EIB 11-16(R) PL 53-Holmstead Direct 3:23-26.⁹

The significant developments to which Mr. Holmstead refers include the following:

- a) In 2007, the United States Supreme Court issued its decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, the Supreme Court found that greenhouse gases

⁸ <http://www.epa.gov/climatechange/initiatives/index.html>.

⁹ Holmstead Exhibit 2 is the website printout from the EPA. The Board notes that the EPA's website has extensive climate change resources and shows that the EPA is indeed regulating GHGs.

are air pollutants covered by the Clean Air Act. The Court also held that the Administrator must determine whether or not emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. In making these decisions, the Administrator is required to follow the language of section 202(a) of the Clean Air Act. The Board notes that the Supreme Court's decision resulted from a petition for rulemaking under section 202(a) filed by more than a dozen environmental, renewable energy, and other organizations. See EPA Climate Change-Regulatory Initiatives, <http://epa.gov/climatechange/endangerment.html>.

b) On December 7, 2009, the EPA issued an "Endangerment Finding". Specifically, EPA Administrator Jackson issued two distinct findings regarding greenhouse gas emissions under section 202(a) of the Clean Air Act.

1) Endangerment Finding: The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases – carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) – in the atmosphere threaten the public health and welfare of current and future generations.

2) Cause or Contribute Finding: The Administrator finds that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare.

c) On March 29, 2010, the EPA issued a final rule that PSD (Prevention of Significant Deterioration) permitting requirements are not triggered for a pollutant such as a GHG until a final nationwide rule requires actual control of emissions of the pollutant.

d) On April 1, 2010, the EPA released Light Duty Vehicle Rule ("LDVR"), EPA's first national emissions standard to control GHG emissions from passenger cars and light duty trucks. The EPA's action triggered the PSD rules.

e) On January 2, 2011, the LDVR took effect making GHGs "regulated pollutants". This action also triggered PSD and Title V requirements for all GHG-emitting stationary sources.

In his direct testimony, Mr. Holmstead explained these new federal regulations as follows:

As of January 1, 2011, any source already subject to PSD for a non-GHG pollutant, and that when newly constructed or modified would emit more than 75,000 tons per year of carbon dioxide equivalent (CO₂e), was required to obtain a PSD permit that includes BACT for greenhouse gases. As of July 1, 2011, any new stationary source that emits more than 100,000 tons per year CO₂e of greenhouse gases (even if it does not emit other non-GHG pollutants) must obtain a PSD permit that includes a BACT limit for GHGs. In addition, any existing source with the potential to emit more than 100,000 tons per year CO₂e must obtain a PSD permit that includes a BACT limit for GHGs before making any modification that would have the potential to increase its emissions by more than 75,000 tons per year of CO₂e. EPA has also announced that smaller sources will be phased in to the PSD program for GHGs starting in 2013. These new PSD regulations, which went into effect after the Board voted to adopt Part 100, impose mandatory emissions controls on large stationary sources of greenhouse gases, some of which will be subject to both sets of regulations if Part 100 is not repealed.

EIB 11-16(R) PL 53-Holmstead 3:38 to 4:9.

Mr. Jack Ihle, Manager, Environmental Policy for Excel Energy, similarly testified that:

As of January 2, 2011, the EPA subjects new and modified power plants to New Source Review for GHG emissions.

EIB 11-16(R) PL 52-Ihle Direct 8:5-6.

There was substantial evidence presented to the Board during the EIB 11-16(R) hearings that a federal greenhouse gas reduction program went into place on January 2, 2011. Accordingly, the Board determined that Part 100 had sunsetted as of January 2, 2011.

5. Short Duration of Part 100.

The Board recognizes that the adoption of Part 100 for a period of less than a month appears odd on its face. The explanation for the short period of Part 100's duration appears to

be that the Board members, during the deliberations that led to the adoption of Part 100, were either unaware of the pending EPA regulatory action or simply chose to disregard the information presented concerning the issue. While the Board, in its Statement of Reasons, mentioned the Endangerment Finding by the EPA from 2009, it made no mention of other EPA activity or regulations. See EIB 08-19(R), SOR, p. 5, paragraph 2.

Some of the comments made by the Board members during the EIB 08-19 deliberations illustrate the Board's thinking:

Board Member Gollin:

On the other hand we all, I think involved in this, would prefer other solutions to this issue and expect that at some point there will be federal, perhaps global, rules. And there is something to be said that if we don't have those by 2020 maybe New Mexico should sunset.

EIB 08-19(R) Tr. Vol. XI Deliberations at 42 (Mr. Gollin).

So I'm not uncomfortable having this sunset with the hope that the [EIB] or whatever entity here or whatever federal entity, you know, by, you know, eight, nine years from now, will be making some informed new regulation

EIB 08-19(R) Tr. Vol. XI Deliberations at 107.

Chairwoman Dillingham:

And to add to that, . . . , but to be where either in the effective date or the sunset clause that we still have to . . . pay attention to the federal, if there is a federal program that preempts, which I think we would all prefer.

EIB 08-19(R) Tr. Vol. XI Deliberations at 67.

. . . as long as there is federal; we're willing to step aside.

EIB 08-19(R) Tr. Vol. XI Deliberations at 101.

The Board notes that there was testimony presented during the EIB 08-19(R) hearings about the pending federal regulations to regulate greenhouse gas emissions from Mr. William Wehrum, former Assistant Administrator for Air and Radiation at the EPA, including the January 2, 2011 effective date. EIB 08-19(R) Tr. Vol. IV, at 51:7-17; see also EIB 08-19(R) Tr. Vol. IV, at 51:25 to 52:20.

Mr. Wehrum further testified as follows:

Q. (By Ms. Wood): . . . When does the PSD permitting program for stationary sources begin for carbon dioxide?

A. On January 2nd, 2011.

Q. How could that program affect the sources sought to be regulated here?

A. The short answer is it almost certainly will affect the sources. The PSD permitting program is activity based. And for existing large-emitting facilities, a facility must undertake a modification that results in emissions increase to trigger the program. For new facilities, the facility has to emit beyond certain thresholds in order to trigger the need for a permit.

EIB 08-19(R) Tr. Vol. V at 5:8-21 (emphasis added).

Again, the Board was either unaware of the pending federal regulations that would be in place in January 2, 2011 when they deliberated in December 2010 or they simply chose to disregard that information. It is evident from the record in EIB 08-19(R) that when the Board amended the sunset clause it adopted a rule that resulted in the sunset of Part 100 within a month of its action. While the timing of the Board's action is odd, the result is not. As discussed above, the Board specifically rejected a proposed version of the sunset clause that included a source by source sunset. The Board clearly intended to "step aside" as Chairwoman Dillingham put it, if the federal government exercised its regulatory authority regarding GHG emissions reductions. That is precisely what happened on January 2, 2011, at which time Part 100 sunsetted.¹⁰

6. Conclusion.

Like all administrative rules, proposals are made, revisions are suggested, hearings are conducted, and the administrative body adopts the language it believes is in the public interest. During the EIB 08-19(R) hearings, NEE presented at least three versions of the sunset

¹⁰ The Board is aware of the fact that on March 27, 2012 (after the hearings and deliberations in EIB 11-16(R)), the EPA also proposed new nationwide standards for emissions of carbon dioxide from new fossil fuel electric generating units. The EPA proposal is in addition to the Federal regulations already in place and is not a part of the record in this matter. Thus, the Board did not consider it for the purpose of deciding the petition.

clause to the Board which the Board ultimately rejected. The Board held hearings and had deliberations in which the sunset clause was discussed extensively. Ultimately, the Board adopted its final version as follows:

§ 20.2.100.15 SUNSET:

This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date.

It is clear from the record in this matter that a federal greenhouse gas reduction program has been in place since January 2011. The Board has determined that Part 100 has sunset by operation of law and therefore sunsetted on that date. Accordingly, the Board voted to repeal Part 100, on those grounds, and as separate grounds for repeal.

V. PART 100 VIOLATES THE STRINGENCY LIMITATION OF § 74-2-5(C)(2).

The Board concludes that Part 100 runs afoul of the stringency limitations set forth in AQCA. Section 74-2-5(C) of AQCA provides that this Board may only prescribe standards of performance for sources and emission standards for hazardous air pollutants that are "no more stringent but at least as stringent as required by federal standards of performance; and shall be applicable only to sources subject to such federal standards of performance." In this section, AQCA delegates regulatory authority into two categories: standards-based regulation and technology-based regulation. *Id.* Under AQCA, the phrase "standard of performance" is expressly defined as "a requirement of continuous emission reduction, including any requirement relating to operation or maintenance of a source to assure *continuous emission reduction.*" § 74-2-2(U) (emphasis added). Because Part 100 imposes a continuous reduction of GHG emissions from selected sources, the Board has determined that Part 100 is regarded as a "standard of performance" within the meaning of AQCA. Based on this understanding of AQCA, at deliberations, the Board then analyzed whether Part 100's standard of performance was more stringent than federal standards.

As discussed above in Article IV above regarding Part 100's sunset provision, the EPA recently adopted and implemented PSD regulations immediately after Part 100 was adopted by the Board in December of 2010. Effective January 2, 2011, EPA began regulating greenhouse gas emissions from new and modified sources of greenhouse gases under the federal Clean Air Act's PSD program. EIB 11-16(R) PL 53 - Holmstead at 3:23-26, 38-41, 4:1-9; EIB 11-16(R) PL 52 - Ihle at 9:14-18. Furthermore, pursuant to two consent decrees that EPA entered into following the adoption of Part 100, EPA conducted two rulemakings regarding the adoption of mandatory restrictions on GHG emissions from new and existing petroleum refineries and from new and existing fossil fuel-fired electric generating units under the federal Clean Air Act's new source performance standard program (42 U.S.C. § 7411). EPA agreed in the consent decrees to take final action in 2012 on those measures. See 75 F.R. 82,392 (Dec. 30, 2010) (proposed settlement agreement establishing deadline of May 2012 for final action on power plants; approved by EPA on February 28, 2011); 75 F.R. 82,390 (Dec. 30, 2010) (proposed settlement agreement establishing deadline of November 2012 for final action on refineries; approved by EPA on March 2, 2011).

Despite its misleading name, the federal "new source performance standards" apply to both *new and existing* sources of GHG emissions in New Mexico. EIB 11-16(R) PL 53 - Holmstead at 4:11- 5:2; EIB 11-16(R) PL 52 - Forrister at 24:17 – 25:4; EIB 11-16(R) PL 52 – Ihle at 9:3-6; see *also* EIB 11-16(R) Tr. 1808:14-20 (Forrister); EIB 11-16(R) Tr. 90:10-16 (Ihle). The federal PSD program requires that "Best Available Control Technology ("BACT") be implemented for new construction and major modifications to major stationary sources. Increases of 75,000 metric tons annually or more of GHG emissions from existing sources are subject to BACT. Effective July 1, 2011, new construction with emissions of 100,000 metric tons annually or more of GHG emissions became subject to pre-construction permitting requirements. See 76 FR 43,490 (adopting final rule).

Clearly, Part 100 and the new EPA's PSD regulations involve fundamentally different standards for GHG emissions. For instance, Part 100 applies to sources at a much lower emissions threshold, 25,000 metric tons annually, than the federal regulation which applies at 75,000 or 100,000 metric tons annually. See 76 FR 43,490. In addition, the two rules take wholly different approaches to regulating GHG emissions. Part 100 imposes an absolute GHG emission limit on covered sources while the PSD rule utilizes a technology-based regulatory regime. A benefit of the federal program is that it has a new source review process and insurance of BACT. The Board is concerned that there is no assurance that a New Mexico source's compliance under one rule constitutes compliance under the other rule.

The Board heard substantial evidence that EPA has also acted to regulate GHG emissions by other methods. It issued final rules establishing mandatory reporting of GHG emissions, 74 F.R. 56,260 (Oct. 30, 2009), final emission standards for GHG emissions from light-duty vehicles, 75 F.R. 25,324 (May 7, 2010), and final emission standards for GHG emissions from heavy-duty vehicles, 76 F.R. 57,106 (Sept. 15, 2011). See *also* EIB 11-16(R) PL 53 - Holmstead at 5:5-10. EPA estimates these new programs will reduce GHG emissions by *two billion tons at a minimum*. *Id.* at 5:8-10.

Based on testimony regarding the new federal programs and substantial evidence that a source in New Mexico could emit 25,000 metric tons and not fall under the federal program but yet fall under Part 100, the Board has determined that Part 100 is more stringent than the new federal PSD program. The Board concludes Part 100 does not comply with § 74-2-5(C)(2) of AQCA because Part 100 has a significantly more stringent regulatory scheme than the federal scheme set forth in 76 FR 43,490. The Board concludes the difference between a 25,000 metric ton threshold and a 75,000 metric ton threshold is substantial and exactly the stringent standard §74-2-5(C)(2) prohibits.

In light of the above, the Board voted to repeal Part 100 based on the grounds that Part 100 violates the stringency limitation of § 74-2-5(C)(2), as separate grounds for repeal.

VI. NMSA 1978, SECTION 74-2-5(E)

A. Statutory Requirements.

Part 100 Fails the Statutory Balancing Test.

The Board must weigh Part 100 against the statutory requirements of NMSA 1978, § 74-2-5(E). Section 74-2-5(E) states:

In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

(1) character and degree of injury to or interference with health, welfare, visibility and property;

(2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and

(3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

The Board is mindful of the fact that, as an administrative body, it has only that power and authority conferred upon it by statute. See *PNM Elec. Servs v. New Mexico Pub. Util. Comm'n (In re Applications of PNM Elec. Servs.)*, 1998-NMSC-017, ¶ 10. As such, the Board has carefully considered the statutory requirements of the AQCA and the three-prong balancing test forth in NMSA 1978, § 74-2-5(E). Each of the three prongs is addressed separately below.

A. Character and Degree of Injury to or Interference with Health, Welfare, Visibility and Property

The first prong of the balancing test is the character and degree of injury to or interference with health, welfare, visibility, and property. NMSA 1978, § 74-2-5(E)(1). If Part 100 results in some benefit to the environment in New Mexico, it will benefit the health and welfare of New Mexicans and their property.

The Board heard testimony that greenhouse gases mix uniformly in the atmosphere; a ton of GHG has the same impact no matter where it is emitted. See EIB 11-16(R) PL 49 -

Tongate at 2:1-3; EIB 11-16(R) PL 52 - Miles Light at 7:15-20; EIB 08-19(R) Tr. Vol. III 64:18-24 (Gutzler); EIB 08-19(R) PL 139 - Wehrum at 23:20-21. New Mexico's GHG emissions barely register in the context of national and international emissions. EIB 11-16(R) PL 52 – Ihle at 5:14-17, 6:5; EIB 11-16(R) PL 53 - John Christy at 5:25 – 6:5. Part 100 applies to about 23 million metric tons of carbon dioxide, less than half of one percent of total gross GHG emissions in the United States, and a much smaller percentage of global emissions. See EIB 11-16(R) PL 52 - Ihle at 4:16-18, 5:5 – 6:4; EIB 11-16(R) PL 52 - Themig at 13:14-16; EIB 11-16(R) PL 53 - Christy at 5:25 – 6:10; EIB 11-16(R) PL 54 - A. Smith, at 9:2-3; EIB 08-19(R) PL 139 - Wehrum at 21:1-10. Part 100 applies only to large stationary sources within the Board's jurisdiction and therefore does not cover mobile sources such as motor vehicles, a major source of GHG emissions in New Mexico. Part 100 also does not apply to sources outside of the Board's jurisdiction, including electric generating facilities located on the Navajo Nation and within the jurisdiction of the Albuquerque-Bernalillo County Air Quality Control Board. Of the tons under the rule's jurisdiction, the total reduction required by the rule is minuscule, representing only a minute fraction of the total GHG emissions of the United States. See EIB 11-16(R) PL 52 - Themig at 13:11-12; EIB 11-16(R) Tr. 2164:25 - 2165:1 (Themig); EIB 08-19(R) PL 139 - Wehrum at 21:8-10, 22, Chart 1. Evidence showed that ten years of emission reductions under Part 100 would achieve total GHG emission reductions equal *to only about 39 hours of total U.S. GHG emissions*. See EIB 11-16(R) PL 52 - Ihle at 6:2-4; EIB 11-16(R) Tr. 87:2-6 (Ihle). The impact of Part 100 on worldwide GHG emissions would be in the range of only 0.004 percent to 0.006 percent. EIB 11-16(R) PL 54 - A. Smith at 61:3-9; EIB 11-16(R) PL 52 - Themig at 13:12-16. At most, Part 100 would likely result in a reduction of between one and three million metric tons of GHG emissions per year. This is true even if one assumes that the emission reductions within New Mexico are not offset by emission increases caused by shifting energy generation and industrial activity to outside the state. See EIB 08-19(R) PL 127 - Michel at 14:7-8.

Substantial evidence showed that because New Mexico is such a small contributor to overall GHG emissions, any decrease in the state's emissions will have no perceptible impacts on climate change, in New Mexico or anywhere else. See EIB 11-16(R) PL 53 - John Christy at 2:20-23, 5:1-22, 6:12-14; EIB 11-16(R) Tr. 468:13 - 469:4 (John Christy); EIB 11-16(R) Tr. 1669:15-16 (Holmstead); EIB 11-16(R) PL 49 - Tongate at 2:15-16; EIB 11-16(R) PL 53 - Holmstead at 2:29-30; EIB 11-16(R) Tr. 86:1 - 87:1 (Ihle); EIB 11-16(R) Tr. 2162:22-25 (Themig); EIB 11-16(R) Tr. 1104:6-20 (Tongate); EIB 11-16(R) Tr. 52 - Themig at 13:16-17; EIB 11-16(R) PL 52 - Bothwell at 10:20-22; EIB 11-16(R) PL 52 - Ihle at 2:20 – 3.2, 4:16-17. The Board was submitted evidence that even if all of the economic activity in New Mexico ceased, that dramatic change would not create a noticeable impact on climate change. See EIB 11-16(R) PL 53 - John Christy at 6:12-14; EIB 11-16(R) Tr. 468:13 - 469:4 (Christy); EIB 11-16(R) Tr. 1655:1-5 (Holmstead).

Part 100 will not accomplish the goal of reducing global GHG emissions because carbon dioxide abatement efforts in New Mexico will be more than offset by carbon dioxide increases in fast-growing developing countries. See EIB 11-16(R) PL 52 - Miles Light at 11:20-21. Driven by high economic growth rates, China, India and other developing countries are becoming industrialized and are producing significantly higher carbon dioxide emissions. *Id.* at 11:21 – 12:1. Evidenced showed that while, annual U.S. emissions are projected to increase by 358 million metric tons of carbon dioxide-equivalent between 2010 and 2027 (from 5,644 million metric tons to 6,002 million metric tons), China's emissions will grow from 8,262 million metric tons to 12,041 million metric tons. An increase of 3,779 million metric tons. *Id.* at 12:1-4. Over the same period, the overall increase predicted from non-OECD [Organization for Economic Cooperation and Development] countries is estimated to be 7,015 million metric tons. *Id.* at 12:10-11.

By contrast, New Mexico's abatement effort under Part 100 is targeted to reduce carbon dioxide emissions from 23.5 million metric tons CO₂e in 2010 to 17.9 million metric tons in 2023,

which amounts to a reduction of 5.6 million metric tons by 2027, assuming no interstate carbon leakage. *Id.* at 12:6-8. Unilateral action by New Mexico under Part 100 does not have any impact on climate change in New Mexico or worldwide. *Id.* at 12:11-13.

Furthermore, there is no substantial evidence in the record that GHG emissions from New Mexico sources alone impact the climate in a manner that results in possible harm to human health or the environment or unreasonable interference with the public welfare, visibility, or the reasonable use of property in New Mexico. Therefore, there is no substantial evidence before the Board that GHG emissions from individual New Mexico sources cause harm to human health or the environment and unreasonably interfere with the public welfare, visibility, or the reasonable use of property. In addition, there is no evidence in the record that GHG emissions from New Mexico measurably contribute to possible adverse health or environmental effects in New Mexico.

The Board observes a regulation promulgated under the AQCA must be shown to "prevent or abate air pollution" in New Mexico. Having weighed the evidence, the Board determines that Part 100 fails to achieve that statutory mandate.

1. Leakage and Environmental Impact of Part 100

"Emissions leakage" refers to the concept that, even if a rule is intended to reduce emissions in a certain geographic area, the rule may result in simply moving the sources of those emissions outside the geographic area so that any reductions that take place within the jurisdiction of the rule are displaced or offset by emissions increases outside the jurisdiction of the rule. See EIB 11-16(R) PL 52 - Bothwell at 4:4-10, 18:11-17; EIB 11-16(R) PL 54 - A. Smith at 21:24- 26; EIB 11-16(R) Tr. 1654:17-20 (Holmstead); EIB 11-16(R) PL 52 - Forrister at 22:9-11; EIB 11-16(R) PL 52 - Miles Light at 10:6-13; EIB 11-16(R) Tr. 2163:6-11 (Themig); EIB 11-16(R) Tr. 674:6-13 (Bothwell); EIB 08-19(R) PL 155 - Michel at 31:18-19.

The Board relies on substantial testimony presented that Part 100 will likely result in emissions leakage because it will incentivize covered sources, particularly in the electric sector,

to purchase less expensive out-of-state electricity or in-state electricity that is not covered by the rule. See EIB 11-16(R) PL 52 - Themig at 20:6-9; EIB 11-16(R) PL 52 - Bothwell at 18:15-17; EIB 11-16(R) PL 53 - Walz at 6:16-29; EIB 11-16(R) PL 54 - A. Smith at 22:4-12; EIB 11-16(R) PL 51 - Sims at 9:3-17; see also EIB 11-16(R) PL 52 - Themig, Exhibit MKL-2. Testimony provided by several utilities that its compliance planning efforts under Part 100 indicate that reducing New Mexico generation and increasing reliance on Texas generation is one of the most cost-effective options to achieve compliance with Part 100. See EIB 11-16(R) PL 52 - Ihle at 34:5-13; EIB 11-16(R) Tr. 87:12-15 (Ihle); see also EIB 11-16(R) PL 52 - Bothwell at 17:8-9; EIB 11-16(R) Tr. 676:25 - 677:16. Witnesses in the oil and gas sector testified that Part 100 will likely lead to increased reliance on electric compression, which will result in greater emissions than from the natural gas-fired reciprocating internal combustion engines that are currently utilized because the electricity required would be generated primarily from sources combusting coal. See EIB 11-16(R) PL 55 - Gantner at 18:11 – 20:3.

Substantial testimony provided that leakage occurs in the oil and gas industry when oil and gas production or processing that would otherwise happen in New Mexico "leaks" into surrounding states because it is more expensive in New Mexico, or because New Mexico regulations impose an additional burden beyond what is present in other states. Many oil and gas companies operate in other states and have a choice in where to invest resources. These decisions are often made years in advance. Part 100 raises the costs for oil and gas companies in New Mexico, and creates regulatory hurdles not present in surrounding states. See EIB 11-16(R) PL 55 - Henke at 6:4-9. The New Mexico Taxation and Revenue Department expressed concern about leakage in the oil and gas industry. In its 2010 report to the Revenue Stabilization and Tax Policy Committee, the Department explained that "New Mexico has lost market share [of oil and gas production] in recent years and should re-evaluate policies that affect the incentive to produce here." See EIB 11-16(R) PL 55 - Henke, Exhibit A at 12.

The Board notes that even the proponents of Rule 100 who reject the idea that Part 100 does not reduce any significant GHG emissions within New Mexico recognize that GHG emissions likely will increase elsewhere, resulting in no net effect on global GHG emissions or on climate change. See EIB 11-16(R) PL 52 - Forrister at 22:9-13; PL 52 - Bothwell at 18:15-19; EIB 11-16(R) PL 52 - Light at 10:4 – 11:7; EIB 11-16(R) PL 95 – Ihle at 9:1-13.

Based on the substantial evidence in the record, the Board determines that Part 100 likely results in leakage such that even the small GHG reductions possibly achieved by Part 100 in New Mexico do not actually translate to a statewide or global reduction of any material level.

2. Impact of Part 100 on Health, Welfare, and Property

Based on substantial evidence, the Board concludes Part 100 has no positive or negative impact to the health, welfare, visibility or property of New Mexicans. The federal Clean Air Act imposes health-based air quality standards around the country. These standards are set at levels that are safe to human health with an adequate margin of safety, even to the most vulnerable populations like children and the elderly, and without regard to the economic cost of compliance. See EIB 11-16(R) PL 94 - Holmstead at 1:25-31, 2:24-26. Nitrogen oxides (“NOx”), hazardous air pollutants (“HAPs”), and fine particulate matter (“PM_{2.5}”) cause adverse health effects on humans only when people are exposed to relatively high levels of these pollutants. See EIB 11-16(R) PL 94 - Holmstead at 1:24-25. The Board was presented no substantial evidence that suggests that trace amounts of HAPs from coal combustion in New Mexico cause any adverse effects. See EIB 11-16(R) PL 94 - Holmstead at 4:12-14. The Board specifically recognizes that NOx, PM and HAPs emissions are already regulated in New Mexico under the AQCA outside Part 100. See EIB 11-16(R) PL 95 - Ihle at 5:23 – 7:3. The Board concluded from the evidence that New Mexico is in full compliance with the standards for NOx, ozone, and PM_{2.5} standards, although the EPA and New Mexico are reviewing whether a portion of Dona Ana County may be in nonattainment under a new ozone standard. See EIB 11-16(R) PL 94 - Holmstead at 2:29-35, 43-44, 46-47, 3:6-7.

Simply put, enforcement of Part 100, which aims to reduce carbon dioxide, does not result in a reduction of EPA criteria air pollutants. Likewise, enforcement of Part 100 does not result in an improvement in public health, given that the EPA currently sets and enforces health-based air quality standards for these criteria pollutants and given that New Mexico currently meets the standards for safety. If the levels of these emissions in New Mexico were unsafe, EPA is required by law to strengthen the standards. Repealing Part 100 will not impact federal programs to regulate these criteria pollutants. See EIB 11-16(R) PL 94 - Holmstead at 3:35-37. The Board relies on evidence that establishing a carbon dioxide regulatory program with the hope it might reduce emissions of other pollutants is misguided. See EIB 11-16(R) PL 94 - John Christy at 4:12-13.

The Board reviewed and weighed the evidence presented by Dr. Goldstein's testimony that carbon dioxide emissions have negative effects on the health New Mexicans. However, the Board finds Dr. Goldstein's arguments unsupported by any analysis, and hence, without merit. See EIB 11-16(R) PL 95 - Valberg at 3:6. Dr. Goldstein did not compare New Mexico's air quality to the health-based national ambient air quality standards (the standards with which New Mexico is in compliance) to determine whether adverse health effects may arise from breathing outdoor air in the state. See EIB 11-16(R) PL 95 - Valberg at 3:7-9; EIB 11-16(R) Tr. 1365:10-24 (Valberg). Dr. Goldstein did not provide any testimony about how New Mexico's air quality might change with any change in emissions from the San Juan Generating Station resulting from the implementation of Part 100. See EIB 11-16(R) PL 95 - Valberg at 3:9-12. In other words, Dr. Goldstein provided no dose-response estimates for his implication that San Juan Generating Station is exacerbating asthma in children. See EIB 11-16(R) PL 69 - Goldstein at 3:10-16; EIB 11-16(R) PL 95 - Valberg at 3:36-41; EIB 11-16(R) Tr. 1362:25 - 1364:2 (Valberg). Dr. Goldstein does not estimate how much air pollutant-related disease in New Mexico might change before and after Part 100's implementation. See EIB 11-16(R) PL 95 - Valberg at 3:12-15; EIB 11-16(R) Tr. 1361:15-21 (Valberg).

The Board relied on substantial testimony that air quality in New Mexico is very good. See EIB 11-16(R) PL 95 - Valberg at 4:9-34. The American Lung Association's ("ALA") publication, "State of the Air 2011," ranked several regions in New Mexico among the cleanest in air quality in the nation. See EIB 11-16(R) PL 95 - Valberg at 4:9-34. Farmington, New Mexico, which is located within 20 miles of the San Juan Generating Station, is ranked by the ALA as among the "Cleanest U.S. Cities for Day-by-Day Particle Pollution (24- hour PM_{2.5})."

See EIB 11-16(R) PL 95 - Valberg at 4:26-28. There is substantial evidence in the record that San Juan County is very clean, and San Juan's contribution to PM_{2.5} concentrations in the area is very small. See EIB 11-16(R) PL 95 - Valberg at Exhibit PAV-2 at 3, 7-13; see also EIB 11-16(R) Tr. 1511:10 - 1514:5 (Valberg).

For the reasons stated above, the Board determines that Part 100 does not have any positive effects on the health and welfare of New Mexicans or any discernible environmental benefit on visibility or to property. Likewise, the Board determines that the repeal of Part 100 does not have any negative effects on the health and welfare of New Mexicans.

B. The Public Interest, Including the Social and Economic Value of the Sources and Subjects of Air Contaminants

AQCA requires the Board to consider "the public interest, including the social and economic value of the sources and subjects of air contaminants" in its regulatory actions. NMSA 1978, § 74-2-5(E)(2).

The Board has relied on substantial evidence in the record that individual New Mexico companies, businesses, and their customers will incur significant costs as a result of compliance with Part 100. Part 100, by its very nature increases electricity costs in New Mexico, which will be paid by New Mexico customers. The economic cost on New Mexico consumers has an estimated net present value, between 2013 and 2027, of \$1,974 million worth of reduced output in New Mexico, \$834 million worth of reduced income to New Mexico workers, and an annual average loss of 1,731 full time positions. See EIB 11-16(R) PL 52 - Light at 4:12-16, 12:16-20,

Exhibit MKL-2 at 16; EIB 11-16(R) Tr. 528:2-7 (Light, describing corrections to written testimony); *see also* PL 52 - Ihle at 33:17 – 34:2.

PNM's economic model results show a system cost penalty to its customers of \$501 million (in 2011 net present value) from the emission reductions over the 2013 to 2020 time period which, PNM estimates, would be the equivalent of approximately \$113 million in higher ratepayer costs for a representative year, 2020. *See* EIB 11-16(R) PL 52 - Bothwell at 10:22 – 11:2; EIB 11-16(R) Tr. 683:6-25 (Bothwell), Exhibit CDB-9. SPS's rates are anticipated to increase as a result of Part 100 by 3% to 5% in 2014, assuming a carbon cost of \$20 per metric ton, and as high as 13% in 2014 if the cost of carbon is \$50 per metric ton. *See* EIB 11-16(R) PL 52 - Ihle at 33:5-13; EIB 11-16(R) Tr. 87:7-9 (Ihle). Testimony showed Part 100 will impose significant costs on its member-systems, such as Tri-State, given that cooperatives pass on all costs to members. Because Tri-State's member cooperatives in New Mexico have average household and per capita incomes about 20 percent lower than state averages and 40 percent lower than national averages, Tri-State's members would be uniquely and significantly impacted by the rule. *See* EIB 11-16(R) PL 53 - Walz at 4:45 – 5:14.

Further testimony revealed FEUS's generation costs were projected to increase up to \$12.1 million annually by 2020, which translates into a 12% rate increase to FEUS's customers by 2020 and between a 66.5% and 213% rate increase by 2050. *See* EIB 08-19(R) 2010 City Hearing Exhibits 1 and 2 (Kapplemann). Even under the FEUS Simplified Maximum Expenditure [Price] Example (EIB 08-19(R) City Hearing Exhibit 2), the cost of compliance for the City of Farmington accumulates to \$29.5 million by 2020.

The evidence showed the cumulative cost of compliance with Part 100 to the New Mexico refining industry through 2020 will be over \$79 million. *See* EIB 08-19(R) Tr., Vol. VI, 180:5-18. Similar costs of compliance will occur throughout the oil and gas industry. *See* EIB 11-16(R) PL 55 - Darren Smith at 3:8 – 4:2. The additional burden on the oil and gas industry due to Part 100 enforcement will result in reduced production, less expansion in New Mexico,

reduced investment, lost jobs, and leakage. See EIB 11-16(R) PL 55 - Darren Smith at 3:8 – 4:2, Exhibit A, 12:11 – 14:23; EIB 11-16(R) PL 55 - Henke at 2:12- 7:5. Approximately 26,500 jobs depend on the oil and gas industry in New Mexico, and the industry generates over \$3.6 billion toward the state's gross domestic product. In fiscal year 2010, oil and gas revenues represented 27% of the total state general fund revenues. Part 100 has created uncertainty within the oil and gas industry, and has adversely impacted industry decisions regarding citing of new facilities and transportation contracts. See EIB 11-16(R) PL 55 - Henke at 3:3-22. The Board determines that regulations that unnecessarily and negatively burden or impact electric utilities and the oil and gas industry are not in the public interest of New Mexico.

The Board concludes, based on the evidence, that because neighboring states have not adopted and are not considering adopting similar regulations, Part 100 puts New Mexico businesses at an economic disadvantage. See EIB 11-16(R) PL 52 - Miles Light at 5:9-12; EIB 11-16(R) PL 49 - Tongate at 2:11-14. Part 100 also puts New Mexico at a disadvantage in attracting new businesses to the state. See EIB 11-16(R) PL 52 - Miles Light at 12:16-20; EIB 11-16(R) PL 49 - Tongate at 2:11-14. Of particular note, Part 100 hits New Mexico's poorest households the hardest. During testimony, NMED referred to Part 100 a "hidden regressive tax." See EIB 11-6(R) PL 49 - Tongate at 4:4.

The Board considers compelling that the public was overwhelmingly in support of repealing Part 100. The Board received over 36,000 letters, comments, and petitions during the 2011 proceeding, with approximately 98% opposing the Part 100. This percentage compares to approximately 750 letters, comments, and petitions received by the Board in the 2010 proceeding, with approximately 64% opposing the rule at that time. The public comment demonstrates to the Board that GHG reduction measures taken by Part 100 in the State of New Mexico in isolation from the rest of the nation has grown increasingly out of favor with the public during the past year and a half since the adoption of Part 100 and that a vast majority of New Mexico citizens greatly oppose Rule 100.

The Board acknowledges the sentiment that led to the adoption of Part 100 in 2010. Namely, that certain human activity may have harmful effects on the environment and thus our own wellbeing. The Board sympathizes with those who seek a statewide reduction in GHG emissions. However, the opinions of multiple climate experts regarding the effect of GHG emissions are anything but uniform. The emissions reduction goals of Part 100 are inconsequential in the overall scheme of reducing GHG emissions. Because GHG emissions reductions under Part 100 are so small, they cannot justify the real and significant economic impact that Part 100 has on New Mexico businesses and consumers. The Board determines that Part 100 is not in the public interest and, on a more fundamental level, is not good policy for New Mexico. Likewise, the Board determines that the repeal of Part 100 will not have any negative impacts on the economy of New Mexico.

C. Technical Practicability and Economic Reasonableness of Reducing or Eliminating Air Contaminants from the Sources Involved and Previous Experience with Equipment and Methods Available to Control the Air Contaminants Involved.

Section 74-2-5(E)(3) requires that the Board consider the “technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.”

1. Technical Practicability.

The Board has considered substantial evidence demonstrating that there is no commercially available technology that can reduce large amounts of greenhouse emissions from power plants. Without such technology, regulated sources have limited options to comply with the Part 100. Part 100 imposes significant additional costs on regulated sources. By extension, repealing Part 100 would alleviate these unnecessary costs.

Two of Part 100's attempted flexibility mechanisms are the ability of covered sources to use offsets and the ability of a covered source to use credits from renewable energy generation owned, operated, or controlled by a covered source to comply with its emission reduction

obligations. The likelihood of a viable offset market developing during the short tenure of this rule is slim. See EIB 11-16(R) PL 54 - A. Smith at 20:11-25. The renewable energy opt-in provision of Part 100 is unlikely to be a source of significant credits because independent power producers own most renewable energy generation, and as such, that generation would not be "owned, operated or controlled" by covered sources as required under Part 100. See EIB 11-16(R) PL 54 - A. Smith at 25:3-16.

Testimony illustrated that few truly effective and commercially available technological "fixes" exist to help sources comply with the emission reduction targets Part 100. Electric utilities are limited in their ability to reduce GHG emissions as a potential compliance option; there are no commercially available technologies to reduce significant amounts of carbon dioxide from fossil fuel-fired power stations. See EIB 11-16(R) PL 53 - Cichanowicz at 4:10-13; EIB 11-16(R) Tr. 1319:18-21 (Cichanowicz); EIB 11-16(R) PL 52 - Themig at 18: 13-15; EIB 11-16(R) PL 52 - Bothwell at 4:19-21; EIB 11-16(R) Tr. 2164:1-12 (Themig); EIB 08-19(R) PL 154 - Sprott at 12:5-6 ("[b]ased on the information I have seen, carbon capture and sequestration ('CCS') is years away from broad commercial application. . . ."); EIB 08-19(R) PL 139 - Cichanowicz at 2:14-17; EIB 11-16(R) PL 95 - Bothwell at 3:13-17 ("[t]here have been industry setbacks in the development of carbon capture and sequestration demonstration projects, further showing the uncertainty that any viable control technology will actually exist in the future at a scale that utilities will be able to use to mitigate the cost to implement Rule 100.").

The Board found compelling evidence that the technology to remove carbon dioxide from a stack does not exist, and the only way to reduce GHG emissions is to reduce the amount of fuel burned and electric power generated, or to import power from potentially higher emitting sources outside New Mexico. See EIB 11-16(R) PL 51 - Sims at 8:18 -10:13. Although there are some measures power plants can implement to reduce carbon dioxide emissions, such as energy efficiency, these options will not result in enough emission reductions to meet the rule's cap. See EIB 08-19(R) PL 139 - Cichanowicz at 2:14-17, 5:1 – 13:2. Although GHG emission

reduction technologies, like CCS, might become available in the future, the testimony shows that these methods are not available now. See EIB 08-19(R) PL 139 - Cichanowicz at 8:19 – 11:9 (CCS will not be available until about 2020); EIB 11-16(R) PL 53 - Cichanowicz at 10:15:23, EIB 11-16(R) PL 51 - Sims at 12:1-15.

The record showed the only current method by which GHG emissions can be substantially reduced from power plants is to convert coal-fired power plants to natural gas, which is not always possible and is extremely expensive. See EIB 08-19(R) PL 139 - Cichanowicz at 6:18-21. This method will not work at power plants that already use natural gas as fuel. Solar thermal augmentation still has technical problems and has only been tried on a small commercial scale at a huge cost. See EIB 11-16(R) PL 51 - Sims at 12:15-21; EIB 11-16(R) PL 53 - Cichanowicz at 8:4-17.

For municipal electric utilities like Farmington, renewable energy, other than hydroelectric generation, is neither feasible nor cost effective. See EIB 11-16(R) PL 51 - Sims at 13:6 – 15:3. For electric utilities with gas-fired power plants, technology does not exist to increase efficiency further to reduce carbon dioxide emissions three percent each year as required by Part 100. See EIB 11-16(R) PL 51 - Sims at 10:11-19. Those utilities will need to reduce lower-emitting gas-fired output and replace it with higher-emitting purchased power generated by out-of-state coal plants or other plants not subject to Part 100. EIB 11-16(R) PL 51 - Sims at 9:1-9. Leakage will likely increase net GHG emissions. EIB 11-16(R) PL 51 - Sims at 9:3-19. Even if electric utilities choose to reduce output to comply with the rule, however, they and their customers may nevertheless be forced to bear the costs of complying with the terms of long-term prepayment or take-or-pay gas and coal contracts. EIB 11-16(R) PL 51 - Grantham-Richards at 9:18-27, 10:6-8, 13:25-26, 14:1-5.

The Board considered substantial evidence that reduction strategies and technologies are already being used at New Mexico facilities. See EIB 11-16(R) PL 55 - Gantner at 15:1-19; EIB 11-16(R) PL 55 - Jennifer Knowlton at 7:1 – 11:17; EIB 08-19(R) PL 138 - Gantner at 11-20;

EIB 08-19(R) PL 138 – Darren Smith at 10-15; EIB 08-19(R) PL 138 - Knowlton at 3-10. There are few options in New Mexico for improving energy efficiency at oil and gas facilities, the challenges faced by flaring, and that acid gas injection is extremely expensive (upwards of \$3.4 million) and faces additional regulatory impediments. *Id.* The testimony shows that the additional achievable reductions at New Mexico oil and gas facilities are minimal. *Id.*

After examining and weighing the evidence in the record and other circumstances, the Board determines that Part 100 is not technically practicable at this time.

2. Economic Reasonableness

In examining “economic reasonableness” the Board must necessarily consider: (1) the economic impact of Part 100 on carbon dioxide emitters in New Mexico; and (2) the rule’s economic impact on the state as a whole. If the benefits of the implementation of Part 100 do not outweigh the negative burden upon New Mexico’s economy then the economic reasonableness of Part 100’s implementation is in question.

i. The Importance of a Macroeconomic Analysis

For the Board to consider the economic impacts of Part 100, it needs relevant evidence to evaluate. When the Board originally considered the petition to adopt proposed Part 100 in 2010, it did so without the benefit of an accurate and comprehensive study by the petitioner of the potential economic impacts of Part 100 as required under the AQCA. See NMSA 1978, § 74-2-5(E). NEE acknowledged that it did not undertake an economic analysis of the proposed rule. NEE amended the proposed regulatory text for Part 100 several times during the proceeding.

In adopting the Part 100 in 2010, the Board could not have relied upon an accurate and thorough analysis of the macroeconomic impacts of the rule because the proposed regulation was a moving target. On or after the last date on which parties could provide written testimony to the Board, August 6, 2010, the proposal changed in many significant ways, including the following:

- Methane was removed as a covered gas (change made on August 6, 2010);
- Flexibility (and therefore uncertainty) was introduced regarding the determination of a source's baseline emissions (change made on August 6, 2010);
- The definition of "source" was substantially amended, including to incorporate retired sources for three years after their retirement, and to remove oil and gas production facilities (change made on August 6, 2010);
- The definition of "new source" was changed to incorporate capacity added to existing sources (change made on August 6, 2010);
- The definition of "offset" was amended to allow for methane-based emission reductions to qualify as offsets, and to allow Climate Action Reserve projects to qualify (change made on August 6, 2010);
- The definition of "threshold amount" was amended to introduce an alleged "opt-in provision" (change made on August 6, 2010);
- The baseline emission requirements for new sources were substantially altered (change made on August 6, 2010);
- An alleged opt-out provision was introduced, allowing a source that demonstrates difficulty complying to opt out for one year or to opt out if compliance would threaten the source's financial integrity (change made on October 5, 2010);
- A hard sunset date of December 31, 2020 was introduced (change made on October 5, 2010 and later amended by the Board); and
- The compliance limit calculation methodology was amended (change made on November 22, 2010).

Each of the above referenced changes were substantial and were completed after other parties would have been able to incorporate them into any economic analysis. This timing of the changes means that the Board did not have the benefit of any meaningful macroeconomic analysis of the amended rule proposal prior to making its decision. During the Board's final

deliberations on proposed Part 100, on December 6, 2010, a Board Member mentioned his "discomfort" about the lack of "economic modeling" under this rule. See EIB 08-19(R) Final Deliberations Tr. Vol. XI 17:12-17 (Green).

The benefits of a macroeconomic impact analysis are significant because it allows the Board to determine the likely cost that enforcement of Part 100 imposes upon New Mexico. Although knowing what a company's estimate of its own costs to comply with a rule is important to the Board, a macroeconomic analysis of how these costs may ripple, positively or negatively, throughout the economy helps the Board determine whether the true costs to the state as a whole outweigh the benefits of the rule, or vice versa. The Board is convinced the new evidence submitted in 2011 proceeding was much more of an accurate, complete analysis of the economic impact to New Mexico.

ii. Economic Considerations From Record of EIB 08-19

While the Board finds that the record in the 2011 proceeding aptly captures the macroeconomic impact upon the New Mexico economy due to Part 100, the Board also recognizes that the record in EIB 08-19(R) provides substantial evidence that Part 100 would likely impose significant economic costs on certain New Mexico sources. See, e.g., EIB 08-19(R) PL 139 - Spiers at 3:11 – 8:8; EIB 08-19(R) PL 137 - Patton at 7:24 – 10:8; EIB 08-19(R) PL 136 - Kappelmann at 16:6 – 22:21; EIB 08-19(R) PL 131 - Bothwell at 17:21 – 22:11; EIB 08-19(R) PL 132 - Ihle at 4:1 – 5:9; EIB 08-19(R) PL 135 - Scott at 6:4 – 7:9; EIB 08-19(R) PL 133 - Lamp at 8:17 – 11:11; EIB 08-19(R) PL 138 - Gantner at 21:1 – 24:10; EIB 08-19(R) PL 138 - Darren Smith at 6:13-23; EIB 08-19(R) PL 138 - Knowlton at 15:2 – 16:7, 19:15 – 21:2; EIB 08-19(R) PL 138 - Price at 13:5 – 17:19; EIB 08-19(R) PL 136 - Grantham-Richards at 4:15 – 11:21; EIB 08-19(R) PL 136 - Sims at 11:11 – 13:9; EIB 08-19(R) PL 136 - Crawford and Lillywhite at 3:17 – 20:10; EIB 08-19(R) PL 134 - Roark at 4-6; EIB 08-19(R) PL 153 - Crawford and Lillywhite at 2:29 – 12:14. In fact, testimony provided by these witnesses shows

overwhelmingly that the costs imposed by the adoption and enforcement of Part 100 would result in increased costs to the New Mexico economy.

The record in EIB 08-19(R) provides substantial evidence that Part 100 would likely pose significant economic hardship, both to the state as a whole and to individual compliance entities. Provisions intended to provide flexibility in the manner of compliance and make it less costly fail to ease the economic burden of the rule.

iii. Results of Macroeconomic Analysis of Part 100

The Board finds the testimony surrounding the macroeconomic analysis persuasive. The current macroeconomic analysis is comprehensive, balanced, bottom-up macroeconomic analysis of Part 100, using conservative assumptions. See, e.g., EIB 11-16(R) Tr. 2036:21-25 (A. Smith). The analysis incorporated the lowest cost feasible methods of achieving the emission reduction goals stated in Part 100, and was careful not to overstate the costs. See EIB 11-16(R) Tr. 2023:944 (A. Smith). The analysis focused on the projected costs of Part 100 as compared to a business-as-usual scenario without Part 100, and focused on the costs and benefits to the state as a whole, rather than to individual companies. See EIB 11-16(R) Tr. 2028:17-20, 2051:10-12 (A. Smith).

Based on this comprehensive model, while New Mexico's economy will continue to grow during the period of the rule (assuming the rest of the country's economy continues to grow), the state's growth rate would be negatively impacted by enforcement of Part 100. Part 100 will cause less growth than there otherwise would be. See EIB 11-16(R) Tr. 2078:10-13 (A. Smith). Part 100 will have a net cost to New Mexico of at least \$317 million to \$1.3 billion (in present value state GDP impacts through 2030 in 2012), depending on whether offsets are plentiful or not. EIB 11-16(R) PL 54 - A. Smith at 5:3-5. Moreover, the modeling assumptions used in this analysis are were unrealistic in that it did not factor in leakage, offsets available in the market, or the fact that utilities would likely enter into a consortium to jointly own and operate a single, large natural gas combined cycle power plant. Because these factors were not included, the

estimates are probably significantly understated. See EIB 11-16(R) Tr. 1945:5-7 (A. Smith); EIB 11-16(R) Tr. 1948:1-2 ("I believe that the likely value [of the costs of Part 100] could well be above \$1.3 billion.") (A. Smith); EIB 11-16(R) Tr. 1946:2-12 (A. Smith); EIB 11-16(R) Tr. 1947:16-18 (A. Smith). The Board interprets this assessment to be highly conservative and yet still illustrates the economic impact of the implementation and enforcement of Part 100 upon New Mexico as significant.

The utility sector "value-added," or the sector's contribution to GDP, will fall by \$42 million to \$118 million as a result of Part 100. The mining sector "value-added" will fall by \$130 million to \$525 million, and the oil and gas sector "value-added" will fall by \$39 million to \$76 million. See EIB 11-16(R), PL 54 - A. Smith at 5:6-9. Nearly every sector of the economy, even those not directly covered by Part 100, will be impacted, especially the government, retail trade, construction, and professional/technical services sectors. See EIB 11-16(R) PL 54 - A. Smith at 5:10-16.

The Board finds Part 100 will result in between 322 and 1,511 fewer jobs in 2020 than in a business-as-usual scenario without the rule. Job losses increase over time and in 2030 they will be between 213 and 2,124. EIB 11-16(R) PL 54 - A. Smith at 5:17-22. Over one-quarter of the job losses will occur in San Juan and McKinley Counties because a significant portion of the job losses occur in New Mexico's mining sector. See EIB 11-16(R) PL 54 - A. Smith at 5:23-26.

The study found that emission reductions required by Part 100 will come largely from a switch from coal to natural gas-fired electricity in the state. See EIB 11-16(R) PL 54 - A. Smith at 6:19-20. The state's economy is negatively impacted by this because New Mexico-produced coal will be replaced by gas that largely will come from outside of the state. See EIB 11-16(R) PL 54 - A. Smith at 6:20-24. In addition, coal-fired electric generating units employ more workers than gas-fired units, so this kind of fuel switching could result in an additional loss of jobs not captured in her model. See EIB 11-16(R) PL 54 - A. Smith at 6:24-27.

The Board considered whether new renewables could displace existing coal-fired capacity and finds the potential to be "extremely limited" because of the intermittency of most renewable sources of energy. See EIB 11-16(R) PL 54 - A. Smith at 23:6-11. The study assumed that between 700 and 800 MW of new renewable capacity would be built because of requirements under the state's RPS. These were used as the baseline because they would occur regardless of whether Part 100 is implemented. See EIB 11-16(R) PL 54 - A. Smith at 23:14-15. The study also assumed that significant energy efficiency measures would be undertaken pursuant to other regulations, and these savings were incorporated in the baseline. See EIB 11-16(R) PL 54 - A. Smith at 24:1-10.

As a result of Part 100, economic growth in New Mexico will be lower and the standard of living will fall; unemployment and poverty will increase. See EIB 11-16(R) PL 52 - Light at 12:16-20, Exhibit MKL - 2, Table 3. Economic leakage will increase the penalty to the state's economy. See EIB 11-16(R) PL 52 - Forrister at 22: 9-17; EIB 11-16(R) PL 54 - A. Smith at 21:22-24, Exhibit 5 at 46:12 – 47:2; EIB 11-16(R) PL 55 - Henke at 5:20 – 6:11. Companies in New Mexico will be at a competitive disadvantage to companies in neighboring and other states. Companies selling products from neighboring states will have an advantage over New Mexico companies, who must absorb the costs of the rule directly, indirectly through increased electric costs, or both. See EIB 11-16(R) PL 54 - Smith at 22:4-12; EIB 11-16(R) PL 55 - Henke at 2:12 – 6:11.

After considering the evidence presented in EIB 08-19(R), and the evidence presented in the 2011 hearing it is clear to this Board that enforcement of Part 100 will result in significant net economic costs to New Mexico. Part 100 is not economically reasonable because implementation of its provisions will lead to significant economic costs to New Mexico as a whole, and to individual sources, with no corresponding environmental benefit.

The Board found compelling that all parties to this proceeding agree that Part 100 will not stop global warming or even have a discernible effect on temperatures in New Mexico. On

the other hand, there is substantial evidence that the cost to the New Mexico economy alone is likely to run in the hundreds of millions of dollars. Likewise, the Board determines that the repeal of Part 100 will not have any negative impacts on the economy of New Mexico.

C. Balancing Test Conclusion

In weighing the factors of the balancing test prescribed by the AQCA, the Board finds that Part 100 has no discernible benefit to the environment in New Mexico and has no positive effect on the health, welfare, visibility, or property of New Mexicans. For multiple reasons, the Board determines that Part 100 is not in the public interest of New Mexico and is substantially opposed by the public in New Mexico. The Board concludes Part 100 is not technically practicable for New Mexico. Lastly, the Board finds the economic burden of Part 100 on New Mexico is great and outweighs any potential environmental benefit. Likewise, the Board concludes repeal of Part 100 will not have any negative effect on the health and welfare, public interest, or economy of New Mexico and its citizens. Based on substantial evidence, the Board concluded Part 100 failed all three factors of the balancing test and on that basis, voted to repeal Part 100.

VII. THE WORDING OF PART 100 IS VAGUE, AMBIGUOUS, DEFICIENT, AND IN VIOLATION OF NEW MEXICO STATUTES

The history of the drafting of Part 100 was summarized by Richard Goodyear, Air Quality Bureau Chief, NM Environment Department, in his Direct Testimony as follows:

This rule was proposed by an organization called New Energy Economy as an alternative way for New Mexico to achieve reductions of greenhouse gases originating in New Mexico if the state cap and trade rule is no longer in force. 20.2.100.5 NMAC. The [Environment] Department did not participate in the development of this rule. In general, by comparison with other rules, [Part 100] suffers from a lack of precision and specificity. In addition, from my regulatory perspective, [Part 100] has significant omissions

EIB 11-16(R) PL 49 - Goodyear Direct at 1:15-20.

A close scrutiny of Part 100 shows that Mr. Goodyear's assessment is accurate. Part 100 is vague and ambiguous, lacks precision and specificity, has significant omissions and is contrary to certain New Mexico statutes. Some examples were discussed by the Board during the EIB 11-16(R) deliberations, and are summarized as follows:

A. Violation of Board's Statutory Requirements and Functions.

The Board found that certain language in Part 100 violated statutory requirements or demonstrated a fundamental lack of understanding of the Board's statutory functions. In summary, such sections include:

1. Mandatory Revisions and Reauthorization Hearing.

Section 20.2.100.16 NMAC is entitled "Revisions" and states:

Three years after the effective date, *the department shall petition the board* to amend these regulations to modify the definitions of source and threshold, change the covered emission, adjust the reduction requirements to compensate for emissions from new sources, or make other changes as necessary to assure that New Mexico is reducing its greenhouse gas emissions in a manner that is consistent with the best available information and advice from climate change scientists. Within nine years of the effective date, *the board shall conduct a reauthorization hearing* of this rule. (emphasis added)

This Section is problematic, in part, because it is unclear as a matter of law as to whether or not the Board can require the NM Environment Department to file a petition or to otherwise require a reauthorization hearing in specific time frames.¹¹

The provision further requires the NM Environment Department to propose amendments to Part 100 to "modify the definitions of source and threshold", "change the covered emission" and "adjust the reduction requirements". The provision attempts to restrict the NM Environment Department's discretion. For example, why should the NM Environment Department be required to go through this mandated process if, in its judgment, it does not want any modifications or amendments?

¹¹ The Preamble, § 20.2.100.8 NMAC, also states "Accordingly, these regulations should be reviewed in 2014, and thereafter as necessary, to assure they remain consistent with the most current scientific knowledge and understanding."

Another troubling aspect of the provision is the clause requires the NM Environment Department to petition the Board to “make other changes as necessary to assure that New Mexico is reducing its greenhouse gas emissions in a manner that is consistent with the best available information and advice from climate change scientists.” There is, frankly, no such thing as “best available information and advice” concerning climate science. Part 100 suggests that there is unanimity in opinions among climate scientists. The Board considers any assertion that climate science is uniform and well-established to be dubious. The Board notes that credentialed climate scientists in the EIB 08-19(R) proceedings and the EIB 11-16(R) proceedings, in particular Dr. Gutzler and Dr. Christy, hold vastly different views with respect to climate science issues.

Moreover, this Board is not inclined to commit itself to a role to which it is not tasked by statute to perform. As provided by law, a petition may be filed with the Board to review its rules and the Board will conduct appropriate hearings as required by law. NMSA 1978, § 74-1-9(A). If the Board were to grant a hearing in the future on a petition concerning GHGs, the parties to that proceeding may or may not bring in climate change scientists as witnesses. The Board does not seek any particular advice from the scientific community. It is up to the parties to develop the record before the Board. The NM Environment Department may, of course, in its discretion, petition the Board as permitted by law. However, the Board likely cannot compel such filings.

2. Appeals.

Section 20.2.100.9(A) NMAC states that, “[i]n the event of disapproval, the source may correct the report or *appeal the department’s decision to the board.*” Unless the action appealed by the source involves a “permit”, however, the source cannot appeal the NM Environment Department’s decision to the Board because the Board lacks statutory authority to hear such an appeal. The Board’s authority under the AQCA extends only to a review of the NM Environment Department permitting decisions. See NMSA 1978, 74-2-7(H). Pursuant to

NMSA 1978, 74-2-9(A), appeals from all other actions of NM Environment Department go to the Court of Appeals. This clause, therefore, may be in violation of applicable New Mexico statutes.

B. Definition Problems, Vague and Ambiguous Language, Unenforceability.

The Board extensively discussed certain wording in Part 100 that lacked key definitions or had terms that were vague or ambiguous, making Part 100 impossible to interpret by the NM Environment Department and industry. EIB 11-16(R) Tr. Deliberations at 54:3 to 77:8. This problematic wording includes:

1) "Existing Source" § 20.2.100.7(I) NMAC (interpretation problems because of threshold amount definition). EIB 11-16(R) Tr. Deliberations at 59:2 to 61:6.

2) "New Source," § 20.2.100.7(K) NMAC (interpretation problems because of threshold amount definition and, according to the NM Environment Department, it appears to lack authority to enforce). EIB 11-16(R) PL 49 - Goodyear Direct at 3:6-17; EIB 11-16(R) Tr. Deliberations at 59:2 to 61:6; EIB 11-16(R) PL 49 – Goodyear at 3:22 – 4:1.

3) "threshold amount," § 20.2.100.7(N) ("25,000 metric tons per year or such lesser amount as the facility owner selects" can be interpreted several ways). EIB 11-16(R) Tr. Deliberations at 59:2 to 61:6.

4) Alleged "opt-in" § 20.2.100.7(N) (Part 100 never uses the word "opt-in" or any similar clause, yet NEE's annotated version from EIB 08-19(R) states that Part 100 has opt-in provisions).¹² EIB 11-16(R) PL 187 - NEE Closing Argument, Exhibit A at 3, FN6; EIB 11-16(R) Tr. Deliberations at 59:2 to 61:6.

5) Alleged "off-ramp" clause, § 20.2.100.12 NMAC (not clear if Part 100 intends this). EIB 11-16(R) Tr. 2102:5-18; EIB 11-16(R) Tr. Deliberations at 69:19-70:12; Smith Direct.

¹² Dr. Anne Smith, Senior Vice President, NERA Economic Consulting, testified about her concerns about the so-called opt-in clause and noted that the only way she became aware of the opt-in option was from reviewing the 2010 record because the "opt-in" words are not in Part 100. Smith, Tr. 1954-1955 EIB 11-16(R)]

6) "Best available control technology" (BACT) § 20.2.100.10(B) (while BACT is defined in Federal and other NM State rules (with differing definitions), there is no definition in Part 100).¹³ EIB 11-16(R) Tr. Deliberations at 64:8 to 65:25.

7) 2010 as a base year, § 20.2.100.7(K) NMAC (it is unusual and inappropriate to use a single year as a base year) see EIB 11-16(R) PL 54 - Bothwell Direct at 29:4-12; EIB 11-16(R) Tr. Deliberations at 61:13 – 62:3.

8) "Credits," § 20.2.100.11(A) NMAC (interpretation problems with "owned, operated or controlled by the same person" (e.g. what happens if there is a source that has a 50/50 ownership but 100 percent control of a power plant) See EIB 11-16(R) 1949-1951 (Smith); EIB 11-16(R) PL 49 - Goodyear Direct at 4:6-9; EIB 11-16(R) Tr. Deliberations at 66:1 to 67:12.

9) "Early action credits", § 20.2.100.11(B) (interpretation problems with "owned, operated or controlled by the same person") See above.

10) "Offsets", "Banking" and "Borrowing", § 20.2.100.11 NMAC (limited specificity on how these are to be determined and implemented). EIB 11-16(R) PL 49 – Goodyear Direct at 4:6-9; EIB 11-16(R) Tr. Deliberations at 66:1 to 67:12.

11) A contract is required between "the person, the department and the owner of the offsetting source" § 20.2.100.11(C) (not clear about the entities (person vs. owner) or how the NM Environment Department would enter into such contracts). EIB 11-16(R) PL 49 - Goodyear Direct at 4:6-9; EIB 11-16(R) Tr. Deliberations at 66:25 to 67:12; EIB 11-16(R) Tr. at 1805:12-14 (Forrister).

12) "compliance limit", § 20.2.100.12 NMAC (internally inconsistent). EIB 11-16(R) Tr. Deliberations at 67:19 to 70:8.

¹³ Also, Mr. Goodyear noted: "The determination of what constitutes best available control technology, and how and by whom it is determined, has the potential to create confusion, conflict, and legal disputes between NMED, industry and environmental groups." See EIB 11-16(R) PL 49-Goodyear at 3:22-4:5]

13) "direct expenditures" § 20.2.100.12 NMAC (there is no definition). EIB 11-16(R) Tr. Deliberations at 67:19 to 70:8.

14) "good faith", § 20.2.100.12 NMAC (there is no definition and lacks a clear, objective standard) EIB 11-16(R) PL 49 - Goodyear Direct at 4-5; EIB 11-16(R) Tr. Deliberations at 67:19 to 70:8.

15) "reasonably and effectively", § 20.2.100.12 NMAC (there is no definition and lacks a clear, objective standard) see EIB 11-16(R) PL 49 - Goodyear Direct at 4-5; see EIB 11-16(R) PL 49 - Goodyear Direct at 5:23; EIB 11-16(R) Tr. Deliberations at 68:2 – 70:8.

16) "carbon dioxide price" (§ 20.2.100.12 NMAC) versus "carbon dioxide maximum expenditure price" (§ 20.2.100.7(D) NMAC). (Carbon dioxide maximum expenditure price is in the definition section of Part 100 but is never used. Carbon dioxide price is used in § 20.2.100.12 but does not have a definition. This creates ambiguity). EIB 11-16(R) Tr. Deliberations at 72:1 – 14.

C. Conclusion.

Part 100 is deeply flawed. In addition to the Board's own reading of Part 100, the Board heard substantial testimony from the NM Environment Department and Petitioners that Part 100, generally, is vague, unclear, ambiguous and has substantial omissions. See above and also EIB 11-16(R) PL 54 - Forrister Direct at 16:2-4; EIB 11-16(R) PL 52 - Ihle Direct at 30-32; EIB 11-16(R) PL 49 – Goodyear Direct at 3:6-17; 4:6-9; 4:20 to 5:13.

The poor drafting of the rule creates significant issues with interpretation and has left gaping operational holes in enforcement and regulation. Some of the clauses in Part 100 are ambiguous or simply incomprehensible. In addition, Part 100 likely violates the Board's statutory boundaries.

Of particular importance to the Board is the fact that the NM Environment Department, the state's responsible regulatory agency under Part 100, did not draft the rule and is unclear as to how to interpret, implement or enforce it.

In NEE's and WRA's closing brief, they suggest that the Board could consider amendments to Part 100. However, there was no testimony offered during the proceedings as to suggested amendments. To address the monumental drafting and policy problems associated with Part 100, any proposed amendments would require a new petition with suggested substantial changes and the Board would want to at least have input from NMED, the agency who has to implement and enforce Part 100.

The Board determines that the wording in Part 100 is unacceptable and so systemically problematic that, along with other reasons, Part 100 must be repealed.

VIII. NEW MEXICO ENVIRONMENT DEPARTMENT SUPPORTS REPEAL

A. The NM Environment Department requests that Part 100 be repealed. Unlike the Cap and Trade Rule, Part 350, which was drafted by the NM Environment Department and brought to this Board in 2010, the NM Environment Department did not participate in the drafting of Part 100. This rule was proposed by NEE as an alternative way for New Mexico to achieve reductions of greenhouse gases originating in New Mexico if the state cap and trade rule was no longer in force. Mr. Butch Tongate, Deputy Secretary, the New Mexico Environment Department, confirmed that, "[t]he Environmental Department did not participate in the development of Part 100." See EIB 11-16(R) - Tongate Direct at 1:20-21. Also, the New Mexico Environment Department did not provide any technical testimony in EIB 08-19. The NM Environment Department's cap and trade Rule (Part 350 which has been repealed) was intended to reduce greenhouse gas emissions on a regional level. The NM Environment Department supported repeal of Part 350, however, because, in large part, most of the regional players dropped out of a cap and trade system. The NM Environment Department also supports repeal of Part 100 because it is a single-state greenhouse gas emissions program, and GHGs should be regulated at a Federal level. Mr. Tongate testified:

[Since] carbon dioxide and other greenhouse gases are dispersed globally, meaningful action on this issue can only occur at the federal level.

EIB 11-16 PL 49, Butch Tongate, Direct at 2:4-6.

Despite the significant role that the NM Environment Department plays in the in the implementation and enforcement of Part 100, the NM Environment Department did not appear or offer technical testimony in the EIB 08-19(R) rulemaking proceedings. Nor did the NM Environment Department provide its perspective regarding the rule and how it would be implemented, apart from a brief letter to the Board, submitted on July 16, 2010.

The only regulatory testimony provided in support of proposed Part 100 in the 08-19(R) proceedings was from Mr. Richard Spratt, witness for WRA. Mr. Spratt is the former Director of Utah Division of Air Quality and is now a consultant. See EIB 08-19(R) PL 154, Spratt Direct at 3-4. Mr. Spratt had never been employed with the NM Environment Department; he had no discussions with the NM Environment Department regarding the staffing and resources that would be necessary for implementation of proposed Part 100; he was not aware of the NM Environment Department's procedures for adopting rules and procedures; and he did not know the NM Environment Department's sources of funding or its budget for the fiscal year. See EIB 08-19(R) Tr. Vol. V, 190:13-22; 192:18-25; 250:23-252:15. Mr. Spratt's testimony was no substitute for the perspective of the NM Environment Department, the New Mexico agency that is tasked with implementing and enforcing Part 100.

In contrast, to EIB 08-19(R), the NM Environment Department fully participated in the current repeal proceedings and offered extensive testimony in support of repealing Part 100.

Testimony by Mr. Tongate, Mr. Goodyear, and others indicate that:

- The NM Environment Department does not support a single-state standalone GHG reduction architecture. See EIB 11-16(R) PL 49 - Tongate, Direct at 1:29-2:6.
- GHG emissions are being addressed at the federal level. EIB 11-16(R) Tr. 1676:5-1678:16 (Holmstead).

- The NM Environment Department is of the opinion that unnecessary economic harm to New Mexico will result from the implementation of Part 100. See EIB 11-16 PL 49 - Tongate Direct at 3:16-21.
- The NM Environment Department is of the opinion that the reduction in emissions of greenhouse gas under Part 100 will result in no meaningful impact on the climate of New Mexico. See EIB 11-16(R) PL 49 - Tongate Direct at 2:15-16.
- The language in Part 100 lacks precision and specificity and has significant omissions. See EIB 11-16(R) PL 49 – Goodyear Direct at 1:15-20.
- The NM Environment Department opposes Part 100 and supports repeal of Part 100 based on the Department's implementation problems with Part 100. See EIB 11-16(R) PL 49 – Goodyear Direct at 4:7-13.

The Board recognizes the importance of the fact that the NM Environment Department's testimony in this proceeding is the first time this Board has had the opportunity to consider the NM Environment Department's position on Part 100. The Board places great weight upon the fact that the NM Environment Department, the agency who has to implement and enforce Part 100, strongly supports repeal of Part 100.

B. Changes in Federal Regulations; State vs. Federal Rules.

The EIB 08-19(R) proceedings started in 2008 and Part 100 was adopted in December, 2010. During that period, there has been a great deal of EPA activity regarding GHG emissions reductions at the Federal level. For example, when Part 100 was first proposed in 2008, the EPA had not even issued its Endangerment Finding. During the two and a half years of the EIB 08-19(R) proceedings, the EPA drafted regulations to reduce greenhouse gas emissions and during 2010, when the hearings took place for EIB 08-19(R), the EPA issued final rules to reduce GHG emissions that ultimately went into effect in 2011. There are other proposed EPA regulations in the works. See EIB 11-16(R) PL 53 – Holmstead Direct at 4-5.

Given that there has been a flurry of recent activity at the federal level concerning GHG emissions regulation, the Board is disinclined to further engage in GHG regulation. GHG emission regulation at the federal level is a fast-moving and dynamic process and one which

requires the Board's attention and awareness. It does not, however, require that the Board insert itself in the process at the state level. The EPA rules regarding GHG emissions reductions are quite extensive and detailed. New Mexico should be wary of acting in the GHG regulatory sphere because the risk of instituting inconsistent regulations is high.

This is precisely the position the NM Environment Department has taken in these proceedings. Mr. Tongate, Deputy Secretary, the NM Environment Department, testified that:

A statewide emission reduction program will not result in any meaningful reductions of carbon emissions, nor will such a program result in localized environmental benefits. Only the federal government has the ability to impose uniform regulations and only the federal government has the authority pursue international agreements on this global issue. Accordingly, it is simply unrealistic and counterproductive to force New Mexicans to carry the burdens more appropriately shared by all, especially when the burdens imposed do not provide any meaningful environmental benefits.

See EIB 11-16(R) PL 49 – Tongate Direct at 2-3.

The Board agrees with Mr. Tongate. The regulation of GHG emissions is properly suited to federal regulation which is active and on-going.

CONCLUSION

The Board voted to repeal Part 100 based on substantial evidence in the record for the following reasons:

- 1) As separate grounds for repeal, the Board has determined that Part 100 sunsetted on January 2, 2011.
- 2) As separate grounds for repeal, Part 100 is more stringent than Federal regulations and thus is in violation of New Mexico statutes.
- 3) As additional grounds for repeal, among other grounds discussed herein:
 - a. Repeal will not cause injury to or interference with health, welfare, visibility and property.
 - b. Repeal will not harm the public interest.
 - c. Part 100 is not technically practical or economically reasonable to reduce or eliminate air contaminants.
- 4) Each of the Board's separate reasons supports the repeal of Part 100. Taken together, the Board's reasons requires the repeal of Part 100.

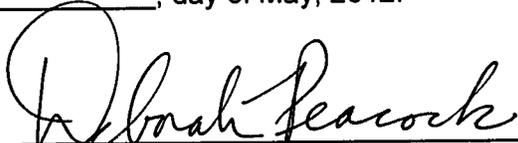
ORDER

As discussed above, the Board has determined that: (1) the voting members are not biased in this proceeding; (2) impermissible *ex parte* contacts involving the voting members have not occurred; and (3) that the voting Board members have given fair and due consideration to the full record of the proceedings in EIB 08-19(R) (the Part 100 adoption and amendment proceedings) and the present proceedings EIB 11-16(R).

Therefore, the Board by unanimous vote of the voting members (5-0), enters the following order for the reasons set forth above:

1. Part 100 sunsetted by operation of law on January 2, 2011, when the EPA's regulations for the reduction of greenhouse gas emissions went into effect. Part 100 has not been in effect since that date.
2. Part 100 is formally repealed in its entirety.
3. Notice of the repeal of Part 100 shall be filed as required under the State Rules Act, NMSA 1978, § 14-4-1, et seq., with the State records center. The filing shall occur contemporaneously with the issuance of this Order and Statement of Reasons.
4. While the Board has determined that Part 100 has sunsetted and has not been in effect since January 2, 2011, the complete formal repeal of Part 100 is effective thirty (30) days from the date of the filing of the notice of repeal pursuant to NMSA 1978, § 74-2-6(F).
5. This Order and Statement of Reasons is the official version of the Board's action on the petition and the reasons therefor. See §§ 20.1.1.406(E) and (F) NMAC.

DONE AND SIGNED this 7th, day of May, 2012.



Deborah Peacock, Chair

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