

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2015-00659

CPNM, INC.,

Petitioner,

v.

N.M. DEPARTMENT OF HEALTH and
RETTA WARD, in her Official Capacity as
Scty. of the N.M. Department of Health,

Respondents.

**RESPONDENTS' MOTION TO DISMISS CPNM, INC.'S
PETITION FOR WRIT OF CERTIORARI AND DECLARATORY RELIEF**

Respondents the New Mexico Department of Health (the "Department") and Retta Ward, in her official capacity as Secretary of the Department ("Secretary Ward" and, collectively with the Department, the "Respondents"), by and through their counsel of record, Miller Stratvert P.A. (Jennifer D. Hall and Stephen B. Waller), and pursuant to Rule 1-075(P)(6) NMRA, hereby submit their Motion to Dismiss Petitioner CPNM, Inc.'s Petition for Writ of Certiorari and Declaratory Relief filed on March 16, 2015 (the "Rule 1-075 Petition"). As grounds for this motion, Respondents state as follows:

On March 16, 2015, CPNM, Inc. ("CPNM") initiated two actions in the First Judicial District Court. In the instant case, CPNM filed its Rule 1-075 Petition. In a separate, pending case numbered D-101-CV-2015-00658, CPNM filed its Petition for Declaratory and Injunctive Relief (the "Petition for Declaratory Judgment"). These two filings of March 16, 2015 are collectively referred to herein as the "Petitions."

The two Petitions are substantially identical, and CPNM expressly and candidly acknowledged on page 5 of each Petition that it filed both Petitions because of perceived uncertainty about the proper avenue to seek review of administrative rulemaking.

This Court should dismiss the Rule 1-075 Petition because under New Mexico law a petition for declaratory judgment is the only proper procedure for CPNM to bring the claims asserted in its Petitions.

1. **CPNM's Rule 1-075 Petition challenges the Department's recent rulemaking, but does not challenge the outcome of any administrative proceeding to which CPNM was a party.**

CPNM's Rule 1-075 Petition expressly states that CPNM is seeking review of certain Department rules adopted on February 16, 2015, which was only 28 days prior to the March 16, 2015 filing of this Petition. *See* Rule 1-075 Petition at 1 (referencing "an appeal of certain Medical Cannabis Program administrative rules in 7.34.3 NMAC and 7.34.4 NMAC adopted February 16, 2015"); *id.* ¶¶ 4–6 (referencing proposed rules, notices of public hearing, a public hearing, and Secretary Ward's decision adopting administrative rules); *id.* at 5 (requesting a finding that "the Department acted contrary to law in *promulgating the specific rules* cited in this Petition" (emphasis added)).

The Rule 1-075 Petition does not contain any allegation that there was any administrative proceeding to which CPNM was a party. Although the Rule 1-075 Petition attaches a copy of Secretary Ward's Statement of Reasons for adopting the proposed repeal and replacement of rules including sections 7.34.3 and 7.34.4 of the New Mexico Administrative Code, the Rule 1-075 Petition does not reference or attach any quasi-judicial administrative decision (final or otherwise) by the Department or any other agency. The Rule 1-075 Petition makes vague references to "administrative proceedings" or "agency proceedings" (*see id.* ¶¶ 8, 10), but it is clear from the Rule 1-075 Petition that the referenced events occurred only in connection with the Department's administrative rulemaking, rather than in connection with any agency-level administrative proceedings in which CPNM or any of its members was a party. *See id.* ¶ 8

(referencing “[t]he record of the administrative proceeding” but describing proposed rules, notices of public hearings, and other documents relating to public hearings, with no mention of any agency-level administrative proceeding or any agency decision in such case); *id.* ¶ 11 (alleging that CPNM “participated in the December 29, 2014 public hearing and submitted detailed written technical comment in to the record,” with no allegation of any participation by CPNM in any quasi-judicial proceeding).

In short, it is clear from CPNM’s own Rule 1-075 Petition that CPNM is only challenging the Department’s recent rulemaking, and is not seeking an appeal from any decision rendered in any quasi-judicial proceeding to which CPNM was a party.

2. CPNM’s Rule 1-075 Petition should be dismissed because an action under Rule 1-075 is not a proper method of challenging administrative rulemaking.

By its terms, Rule 1-075 NMRA permits a party to “seek review of a *final decision or order of an agency*” and requires the party to attach “a copy of the *final decision or order* sought to be reviewed[.]” *See* Rule 1-075(B)-(C) (emphasis added). The plain language of Rule 1-075 makes clear that a petition for writ of certiorari to the district court is only appropriate when there has already been an agency-level, quasi-judicial proceeding that resulted in a final decision or order regarding a party to that proceeding. Here, where CPNM has not alleged that it was party to any such quasi-judicial proceeding, Rule 1-075 is inapplicable to CPNM’s claims.

The New Mexico Court of Appeals explained in *Tri-State Generation & Transmission Association, Inc. v. D’Antonio*, 2011-NMCA-014, 149 N.M. 386, 249 P.3d 924, that the only proper avenue for challenging administrative rulemaking is a petition for declaratory judgment, rather than an action brought under Rule 1-075. The petitioners in that case, who challenged certain regulations adopted by the Office of the State Engineer, filed a petition for writ of certiorari pursuant to Rule 1-075. The Court explained that the petition seeking review of State

Engineer regulations should not have been filed under Rule 1-075 because “[i]n the present case, there is no dispute that the State Engineer was acting in a rule making capacity as opposed to a quasi-judicial capacity.” *See id.* ¶¶ 10, 12. Instead, noting that “declaratory actions have been used on multiple occasions in New Mexico to challenge administrative agency rule making,” the Court held that “under the current state of statutory law and court rules, the proper avenue by which to challenge rule making affecting water rights by the State Engineer is to invoke the original jurisdiction of the court by filing a complaint for declaratory judgment.” *See id.* ¶ 22; *see also id.* ¶ 28 (noting that “Petitioners’ challenge to the [subject] regulations should be treated as an action for declaratory judgment”).

This holding of the *Tri-State* decision was subsequently applied in New Mexico district court. After the City of Albuquerque enacted a new zoning plan for downtown Albuquerque, two landowners filed a notice of appeal to the district court pursuant to Rule 1-075. District Judge Alan Malott denied the Rule 1-075 petition for writ, finding that neither landowner was “an ‘aggrieved party’ because there is no final decision or order from which to appeal pursuant to either Rule 1-074(C) NMRA . . . or Rule 1-075(B) NMRA (providing for constitutional review by the district court of administrative decisions and orders in the absence of a statutory right to appeal). Enactment of the [subject zoning plan] was not quasi-judicial action from which there was a statutory or constitutional right to appeal under these rules.” *See Carlton v. City of Albuquerque*, No. D-202-CV-2012-02888, Opinion and Order entered 1/31/2013, at 3 (citing the *Tri-State* decision as “concluding that there was no authority under Rule 1-075 to challenge a rule-making, rather than quasi-judicial, action”).

In the instant case, and as described in Part 1 above, there appears to be no dispute that CPNM is challenging actions taken by the Department “in a rule making capacity as opposed to

a quasi-judicial capacity” (see *Tri-State*, 2011-NMCA-014, ¶ 12). In turn, it appears to be undisputed that CPNM’s Rule 1-075 Petition is not directed at any administrative proceedings, let alone any “final decision or order” rendered by the Department in any such proceedings. Accordingly, this Court should dismiss CPNM’s Rule 1-075 Petition and appeal pursuant to Rule 1-075(P)(6) on grounds that the Department’s rulemaking and adopted rules do not constitute a final agency decision that is subject to appeal under Rule 1-075. See *Carlton*, *supra*, at 4 (noting that Rule 1-075(P) provides for a motion to dismiss on grounds that an agency decision does not constitute a final decision).

The New Mexico Supreme Court’s decision in *Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300, is not to the contrary. The plaintiff Smiths applied to the City of Santa Fe for a permit to drill a domestic water well, and their application was denied. The Smiths appealed that denial to the City Manager, then the Public Utilities Committee, and finally to the City Council which upheld the denial of the Smiths’ application. See *id.* ¶¶ 3-4. Instead of seeking district court appellate review of the City’s denial, the Smiths filed a complaint for declaratory relief in district court to challenge the City’s authority to prohibit the Smiths from drilling a well on their property. See *id.* ¶ 5. The Court explained in *Smith* that a declaratory judgment action is an alternative to a Rule 1-075 action if the challenge is limited to “purely legal issues that do not require fact-finding by the administrative entity.” See *id.* ¶ 16. However, that discussion of “fact-finding” was predicated on the fact that in *Smith* there had already been an administrative proceeding regarding the underlying dispute. Nothing in *Smith* suggests that a Rule 1-075 action is appropriate where there has not been any administrative, quasi-judicial proceeding at all. CPNM was not party to any quasi-judicial proceeding, therefore *Smith* does not provide a basis for CPNM to bring the Rule 1-075 Action.

3. CPNM's purported request for declaratory relief in this matter is improper, but in any event CPNM will be able to seek declaratory relief in the separate action pending before Chief Judge Ortiz.

CPNM's Rule 1-075 Petition is styled as a "Petition for Writ of Certiorari *and Declaratory Relief*" (emphasis added). Such a request for declaratory relief is improper in this action because Rule 1-075 does not provide for declaratory relief. Nonetheless, CPNM's separate Petition for Declaratory Judgment remains pending before Chief Judge Ortiz in case number D-101-CV-2015-00658. Therefore, a dismissal of CPNM's Rule 1-075 Petition in the instant case would not prejudice CPNM's ability to seek declaratory judgment in its other pending case.

Prior to filing this Motion, counsel for Respondents electronically mailed a draft of this Motion to counsel for CPNM, Inc. to request concurrence. This Motion is opposed.

WHEREFORE, for the foregoing reasons, the Respondents request that this Court dismiss CPNM, Inc.'s March 16, 2015 Petition for Writ of Certiorari and Declaratory Relief, and grant such other relief as the Court finds just and proper.

Respectfully submitted,

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