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.

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

Respondents the New Mexico Department of Health (the "DOH") and Retta Ward, in her official capacity as Secretary of the Department of Health ("Secretary Ward" and, collectively with DOH, the "Respondents"), by and through their counsel of record, Miller Stratvert P.A. (Jennifer D. Hall and Stephen B. Waller), hereby submit this Reply in support of their Motion to Dismiss Petitioner CPNM, Inc.'s Petition for Writ of Certiorari and Declaratory Relief, which motion was filed on June 22, 2015 (the "Motion"). In further support of their Motion and in reply to the Response filed by Petitioner CPNM, Inc. ("CPNM") on July 7, 2015 (the "Response"), Respondents state as follows:

1. **CPNM has not disputed that CPNM's only prior involvement in this matter was CPNM's participation in the rulemaking process.**

Part 1 of the Motion shows that CPNM's Petition for Writ of Certiorari and Declaratory Relief filed on March 16, 2015 (the "Rule 1-075 Petition") is not challenging the outcome of any administrative or quasi-judicial proceeding to which CPNM was a party. *See* Motion at 2-3. Although CPNM argues that the rulemaking process which resulted in the February 2015 Rules was itself an "administrative proceeding" (*see generally* Response at 2-3), CPNM has still not

identified any other proceeding that is purportedly the basis for CPNM's petition for writ of certiorari under Rule 1-075. CPNM has therefore conceded that CPNM is appealing *only* from the rulemaking process itself, rather than from any quasi-judicial proceeding to which CPNM or any of its members was a party in a pending case before DOH or any other department or agency.

2. CPNM has failed to identify any case in which a Rule 1-075 proceeding was utilized to challenge a New Mexico regulation in the absence of any prior proceeding other than the very rulemaking that created that regulation.

Although CPNM's Response cites a number of New Mexico cases (discussed in Part 3 below) in support of various arguments, CPNM's Response does not identify *any* case in which a proceeding under Rule 1-075 was utilized to challenge an administrative rule or regulation in a situation where the only proceeding being "appealed from" was the rulemaking process itself, rather than any administrative or quasi-judicial proceeding to which the Rule 1-075 appellant was a party. CPNM has therefore failed to provide this Court with any example of a District Court conducting a Rule 1-075 proceeding in the manner sought by CPNM.

3. CPNM's cited cases regarding Board rulemaking have no bearing on a Rule 1-075 proceeding or this Court's evaluation of Respondents' Motion.

The cases cited in CPNM's Response primarily involve appeals from rulemaking proceedings conducted by the New Mexico Environmental Improvement Board ("EIB"). However, the differences between EIB rulemaking and DOH rulemaking are so numerous and substantive that the cases cited in CPNM's Response have no bearing on this Court's interpretation of Rule 1-075.

First, EIB and DOH are differently situated within New Mexico state government. DOH is a Department of the Executive Branch. In contrast, the EIB has powers, duties, and responsibilities that are "explicitly exempt from the authority of the Secretary" of the New

Mexico Environment Department and are thus also "independent of the governor." *See New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 14, 149 N.M. 207, 247 P.3d 286, *citing* NMSA 1978, § 74-1-4 (establishing the EIB). CPNM's arguments about rulemaking being a form of "legislative fact-finding" (*see* Response at 5, *citing New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 9, 149 N.M. 42, 243 P.3d 746) may pertain to EIB, but they do not pertain to DOH rulemaking.

Second, the rights of appeal from rulemaking proceedings are substantially different for EIB and DOH. NMSA 1978, § 74-1-9(H), which is part of the statute that established the EIB, explicitly provides that "[a]ny person who is or may be affected by a regulation adopted by the [EIB]" has a statutory right to appeal to the New Mexico Court of Appeals. In contrast, there is no similar statutorily created right of appeal from the DOH rulemaking. Moreover, by filing its Rule 1-075 Petition, CPNM has inherently conceded that CPNM has no statutory right to appeal, since Rule 1-075(A) explicitly states that this Rule applies only where there is not a statutory right to an appeal or other statutory right of review. *See* Rule 1-075A (stating that Rule 1-075 "governs writs of certiorari . . . when there is no statutory right to an appeal or other statutory right of review"). Rule 1-075(A) further expressly states that Rule 1-075 "does not create a right to appeal or review by writ of certiorari." Finally, an appeal under Rule 1-075 is to a District Court, rather than to the Court of Appeals.

Third, EIB and DOH have entirely different procedures for promulgating regulations. As the New Mexico Supreme Court has explained, EIB rulemaking is initiated only when "someone . . . file[s] a petition proposing a new rule, an amendment to a rule, or a repeal of a rule." *See New Energy Econ. v. Vanzi*, 2012-NMSC-005, ¶ 14, 274 P.3d 53 (citing NMSA 1978, § 74-1-9(B) and noting that petitioner New Energy Economy "caused the rule-making process to

begin"). In contrast, DOH regulations are developed pursuant to the State Rules Act, without any statutory requirement for an outside petition. Thus, while *Vanzi* analyzed the question of whether New Energy Economy (as the petitioner/proponent for particular EIB regulations) had been sufficiently involved in the rulemaking process to be considered a "party" for purposes of the statutory right to appeal to the New Mexico Court of Appeals, that analysis has no bearing on the question of whether CPNM was a "party" to the DOH rulemaking process or whether CPNM's Rule 1-075 Petition is a proper method of seeking review of an administrative rule-making process. *See Vanzi*, 2012-NMSC-005, at ¶ 32 (analyzing the term "parties" in Rule 12-601(B) NMRA, but making no mention of Rule 1-075).

CPNM's cited cases involving EIB rulemaking (*Vanzi*, *Martinez*, and *Shoobridge*) therefore have no relevance to Rule 1-075 or Respondents' Motion. Likewise, CPNM's other cited cases are also inapplicable to an evaluation of Respondents' Motion. *See Vill. of Angel Fire v. Wheeler*, 2003-NMCA-041, ¶ 1, 133 N.M. 421 (analyzing a Rule 1-074 appeal from legislative action by a municipality, not a Rule 1-075 appeal); *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, 118 N.M. 470, 882 P.2d 511 (analyzing a statute providing for limited judicial review of an arbitrator's decision*); Los Chavez Cmty. Ass'n v. Valencia Cnty.*, 2012-NMCA-044, 277 P.3d 475 (analyzing whether a county commissioner was required to recuse herself from a zoning proceeding involving a cousin).

CPNM's discussion of *Moriarty Municipal Schools v. Public School Insurance Authority*, 2001-NMCA-096, 131 N.M. 180, 34 P.3d 124 (a case not cited in Respondents' Motion) also has no relevance because the *Moriarty* decision did not analyze the distinction between quasi-judicial proceedings and rulemaking proceedings in the context of Rule 1-075. Instead, *Moriarty* held that when an administrative agency (the Authority) made a decision to deny a demand for

indemnification "with no hearing and no opportunity for Moriarty to present witnesses, documentary evidence, or argument, or to make a record for judicial review[,]" the Authority had acted improperly and was therefore subject to both the appellate jurisdiction and the original jurisdiction of the District Court upon review. *See id.* at ¶¶ 34-35. The *Moriarty* decision regarding options for appealing from an improperly-conducted administrative proceeding does not support the general proposition that administrative actions (such as rulemaking) conducted in the absence of quasi-judicial proceedings may be the subject of a petition for review pursuant to Rule 1-075.

4. Because CPNM has provided no relevant authority to the contrary, the plain language of Rule 1-075 supports the conclusion that CPNM's Petition should be dismissed for lack of jurisdiction.

In *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Board*, 1969-NMCA-089, 80 N.M. 633, 459 P.2d 159, the New Mexico Court of Appeals explained that "[t]he word 'case' has many meanings, depending on the context in which it is used." *See id.* ¶ 21. Likewise, the use of the word "proceedings" in various New Mexico court decisions and Rules does not mean that all such uses have the same meaning, or that all such "proceedings" provide their participants with the same rights of appeal.

As noted in Part 2 above, CPNM has not identified any case in which a party (other than a party appealing from a quasi-judicial administrative proceeding) has invoked Rule 1-075 to challenge a New Mexico regulation. Furthermore, Rule 1-075's references to "an aggrieved party" and review of "a final decision or order of an agency" plainly refer to such quasi-judicial actions involving specified parties, rather than to an agency's rulemaking and adoption of generally-applicable regulations. Had the New Mexico Supreme Court intended for Rule 1-075 to encompass direct challenges to administrative regulations in the absence of prior quasi-judicial proceedings, the Court could have and would have done so. The Court did not, and the language

of Rule 1-075 therefore provides no support for CPNM's attempt to argue that CPNM's participation in DOH rulemaking makes CPNM a "party" or renders DOH's adoption of administrative rules a "final decision or order" for purposes of Rule 1-075.

WHEREFORE, for the reasons stated above and in their Motion, 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,

MILLER STRATVERT P.A.

By */s/ Jennifer D. Hall*

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I hereby certify that on the 21st day of July, 2015, I filed the foregoing electronically, which caused the following counsel of record to be served by electronic means by virtue of the Court's electronic filing system:

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