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.

PETITIONER'S RESPONSE TO MOTION TO DISMISS

Petitioner CPNM, Inc., by and through counsel of record, Jason Marks Law, LLC, Jason Marks, Esq., hereby makes its Response in opposition to Petitioner's Motion to Dismiss, filed June 22, 2015.

At issue in the Motion is whether the Petition is properly filed as an appeal under Rule 1-075 NMRA, or whether Petitioner's appeal of the Department's rulemaking can only be brought as a declaratory action. The Department's Motion stands on two legs: The first is an attempt to redefine "administrative proceeding" to exclude rulemaking, contrary to both common sense and case law. *See, e.g.*, *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, ¶¶ 32-33, 274 P.3d 53, 61 (rejecting an attempt to distinguish between adjudications and rulemaking for the purposes of Court of Appeals jurisdiction). For its second leg, the Department attempts to make an analogy to *Tri-State Generation & Transmission Association, Inc. v. D'Antonio*, 2011-NMCA-014, ¶ 22, 149 N.M. 386, which held that "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." But *Tri-State's* holding on the applicability of Rule 1-075 was on law unique to the State Engineer, and rulemaking challenges in that case were solely

maters of pure law (statutory construction). Indeed, the fundamental flaw with the Department's Motion is that it fails to recognize that matters brought forth in the Petition, in which CPNM contends the Department decisions are not substantial evidence and are arbitrary and capricious, can only be adjudicated if the Court is sitting in an appellate capacity, as occurs with Rule 1-075.

1. The Department's rulemaking is an administrative proceeding for the purposes of appellate review.

The plain language of Rule 1-075(B) NMRA specifies that the rule governs appeals of a "final decision or order of an agency." The rule further presumes that there will be "proceedings" related to the petition for relief. Rule 1-075(C)(2). The rule in no place expressly restricts its scope to quasi-judicial administrative decisions or proceedings, or even implies such a restriction.

That rulemaking proceedings are "administrative proceedings" is undisputed (aside from in Respondents' Motion). *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, 149 N.M. 207, 211, 247 P.3d 286, 290("It is uncontradicted that they participated in the administrative proceedings until the regulations were adopted"); *Vill. of Angel Fire v. Wheeler*, 2003-NMCA-041, ¶ 15-18, 133 N.M. 421, 426 (legislative decisions are administrative proceedings, construing appeal under Rule 1-074); *see also New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 10, 149 N.M. 42, 46 ("Most of our recent cases addressing the interaction of declaratory judgment actions and administrative proceedings involved administrative adjudications . . . "; i.e., the remainder are rulemakings).

The Supreme Court addressed similar issues in *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, ¶ 32, 274 P.3d 53, in the context of the Court of Appeals' appellate jurisdiction. As in our case, the respondent agency argued a distinction in appellate procedure for adjudicatory versus rulemaking cases, but the Supreme Court advised that "This Court has never crafted a

separate rule for appeals from administrative rule making." *Id.* The Court also held "decisions" of administrative agencies include rulemaking. *Id.* ("'decisions' and 'actions' of administrative agencies, each of which adequately describe administrative rule making"). It making this holding, the Supreme Court quoted *Wylie Bros. Contracting Co. v. Albuquerque–Bernalillo Cnty. Air Quality Control Bd.*, 80 N.M. 633, 639, 459 P.2d 159, 165 (Ct.App.1969), adding emphasis: "the *decisions* of administrative agencies of the state described by Article VI, Section 29 of the Constitution of New Mexico, include *regulations* adopted by a board") (emphasis by the Supreme Court, internal quotation marks omitted). It would be quite strange for "decisions of an administrative agency" to have a different meaning for appeals to the district courts.

New Energy Economy v. Vanzi also makes clear, contra to Respondent's implications (Motion at 2), that an active participant in a rulemaking such as CPNM is a "party" in an administrative proceeding, for the purposes of an appeal. 2012 -NMSC-005 at ¶¶ 37-39.

2. The Court of Appeals' decision in *Tri-State* is clearly distinguishable.

The issue presented in *Tri-State* was whether regulations promulgated by the State Engineer exceeded his constitutional authority. 2011-NMCA-014, ¶ 1.[1] There was no request that the district court review an administrative record to determine whether the Engineer's decisions were supported by substantial evidence or were arbitrary and capricious. *Id.* The grounds on which the Court of Appeals determined that that Tri-State's appeal should not have been brought under Rule 1-075 were that Constitution expressly specifies a different standard of review for State Engineer decisions involving water rights. *Id.* at ¶ 11. For the matters at issue in *Tri-State*, the Constitution mandates *de novo* review in the district court, whereas, under Rule 1-075, the district court's "examination is limited to assessing, in light of the whole record, whether the agency acted arbitrarily or capriciously, whether the agency decision was supported

[1] See also Petitioners Statement of Review Issues, No. D-0725-CV-05-03, Table of Contents, attached as Exhibit 1.

by substantial evidence, and whether the agency acted within the scope of its authority." *Id.* quoting *Clayton v. Farmington City Council*, 120 N.M. 448, 453, 902 P.2d 1051, 1056 (Ct.App.1995). The standard rejected in *Tri-State* is precisely the standard of review the Court is required to follow in the case at bar.

Having determined that the cause of action in *Tri-State* could not be brought under Rule 1-075 on grounds wholly inapplicable to the Department of Health's rulemaking, the Court of Appeals went on to find that a declaratory action was available to *Tri-State*'s petitioners, relying on four examples in which declaratory actions were used in New Mexico to challenge administrative rulemaking. *Id.* at ¶ 21. In none of these examples was a court required to evaluate whether the facts and circumstances in the administrative record supported the agency's decision: *New Mexico Right to Choose/NARAL v. Johnson*, 1999–NMSC–005, ¶¶ 2, 23, 126 N.M. 788 (was rule consistent with New Mexico Equal Rights Amendment); *Howell v. Heim*, 118 N.M. 500, 502, 882 P.2d 541, 543 (1994) (did agency have statutory authority for rule; did rule violate due process clause); *Munroe v. Wall*, 66 N.M. 15, 16, 340 P.2d 1069, 1069 (1959) (was rule consistent with statute); *Johnson v. Francke*, 105 N.M. 564, 565, 734 P.2d 804, 805 (Ct.App.1987) (was "rule" required to be filed with state records' center).

CPNM acknowledges that a declaratory action is a viable form of action for those claims in its Petition that are purely matters of law; e.g., the contention that rules such as the patient monitoring rule at 7.34.3.14 NMAC are contrary to the Department's statutory authority. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 10, 149 N.M. 42, 46 ("the Declaratory Judgment Act provides an alternative means of challenging an administrative entity's authority to adopt a regulation") citing *Smith v. City of Santa Fe*, 2007–NMSC–055, ¶ 15, 142 N.M. 786. However, the Petition also includes contentions that certain rules within the Department's

statutory authority are not supported by substantial evidence in the administrative record, and mixed contentions that some rules are both *ultra vires* and not supported by substantial evidence (expecting the Court to only reach the question of the weight of the evidence if it rules against Petitioner's statutory construction).[2] As such, the case at bar is clearly distinguishable from *Tri-State* and the examples on which it relies, which presented only purely legal issues.

"[A] declaratory judgment action challenging an administrative entity's authority to act ordinarily should be limited to purely legal issues that do not require fact-finding by the administrative entity." *Smith v. City of Santa Fe*, 2007–NMSC–055, ¶ 16, 142 N.M. 786. A declaratory action is not appropriate when it would "foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review." *Id.* at ¶ 15.

The purpose of a hearing in a rulemaking is legislative *fact-finding*. *Shoobridge*, 2010-NMSC-049 at ¶ 9. While legislative fact-finding is distinguishable from adjudicatory fact-finding, *id.*, it is equally improper for a court sitting in it original jurisdiction to displace an agency's legislative fact-finding. *Id.* As is made clear in Petitioner's Statement of Review Issues, in order to determine whether the Department's final decision on its rules is based on substantial evidence and is not arbitrary and capricious, the Court must review Department's fact finding and the administrative record.

In addition, accepting the Department's approach also conflicts with the last factor in the *Smith* analysis, *supra*. There are no time limits on a declaratory action challenge to a rule, which is appropriate when the issues raised are solely matter of statutory authority or constitutionality

[2] See Petitioners Statement of Review Issues, filed June 12, 2015.

(in a substantive sense), but following that path for all rulemaking challenges means that an aggrieved person could bring a challenge of an agency's fact-finding in a rulemaking years after the record was closed, not just within the 30 days provided by Rule 1-075.[3]

3. The Petitions sounds under the Court's appellate jurisdiction.

The purpose of Rule 1-075 is to provide procedures for constitutional review of an agency's decisions when there is no express statutory right of review. Rule 1-075(A) NMRA. "[J]udicial review of administrative action, statutory *or otherwise*, requires a determination whether the administrative decision is arbitrary, unlawful, unreasonable, capricious, or not based on substantial evidence." *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, ¶ 51, 118 N.M. 470, 485, 882 P.2d 511, 526 (emphasis added). This is a constitutionally required standard of review. *Id.* (This constitutionally required standard of review is distinguishable from review of whether an agency's rules conflict with the Constitution, which is a *de novo* review.) Petitioner's claims that certain rules promulgated by the Department are not authorized by statute can be decided by the Court under its original jurisdiction, but its substantial evidence/arbitrary and capricious claims sound in the Court's appellate jurisdiction. "[A] district court can simultaneously exercise its appellate and original jurisdiction." *Los Chavez Cmty. Ass'n v. Valencia Cnty.*, 2012-NMCA-044, ¶ 10, 277 P.3d 475, 480.

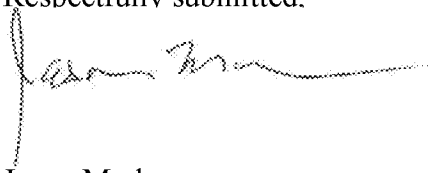
The origin of Respondents' offered distinction between "quasi-judicial, adjudicatory proceedings," which fall within a district court's appellate jurisdiction, and other administrative proceedings (i.e., rulemakings), which Respondents' allege do not, is likely *Moriarty Mun. Sch. v. N.M. Pub. Sch. Ins. Auth.*, 2001–NMCA–096, ¶ 35, 131 N.M. 180, 34 P.3d 124: "the constitutional grant of appellate jurisdiction in all cases originating in inferior courts and tribunals does not apply or preempt original jurisdiction ... when no quasi-judicial, adjudicatory

[3] The parties may each be arguing against interest, in this regard.

proceeding precedes the decision of the administrative board." A challenge to a rulemaking was not before the Court of Appeals in *Moriarty Mun. Sch.* Rather, at issue was internal decision by the NM Public Schools Insurance Authority, which meant there were no "agency proceedings," with a "record on review" as contemplated under Rule 1-075. *Id.* at ¶ 36. The holding in *Moriarty Mun. Sch.* has no applicability to the question of whether a district court can exercise its appellate jurisdiction in a challenge to an agency rulemaking under Rule 1-075. *Ruggles v. Ruggles*, 1993–NMSC–043, ¶ 22 n. 8, 116 N.M. 52, 860 P.2d 182 (matter "unnecessary to [a] decision of the issue before the Court ... no matter how deliberately or emphatically phrased" is mere dicta). As demonstrated herein, the overwhelming weight of authority indicates that a Rule 1-075 appellate review of the Department of Health's rulemaking proceedings is proper.

For the reasons stated herein, Petitioner requests the Court deny Respondents' Motion to Dismiss.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 7 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:

Attorney for Respondents
Jennifer D. Hall

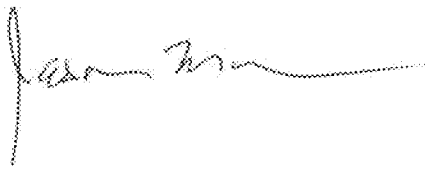

Exhibit 1

STATE OF NEW MEXICO
COUNTY OF SOCORRO
SEVENTH JUDICIAL DISTRICT COURT

Thomas S. Barrington

MIDDLE RIO GRANDE CONSERVANCY DISTRICT, TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., AND NEW MEXICO MINING ASSOCIATION,

Petitioners,

v.

JOHN D'ANTONIO, JR., NEW MEXICO STATE ENGINEER,

Respondent.

No. D-0725-CV-05-03

PETITIONERS' STATEMENT OF REVIEW ISSUES

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