

STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

THE SOCORRO ELECTRIC COOPERATIVE, INC.
Plaintiff,

v.

CHARLENE WEST, et al
Defendants.

Case No: D-1314-CV-2010-849
Judge: Albert J. Mitchell, Jr.

And

CHARLES WAGNER, individually and as
representative of the class of "unnamed
Defendants", being owner/members of the
Socorro Electric Cooperative, Inc.

Cross Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
et al.,

Cross Claim Defendants.

**RESPONSE TO MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER
JURISDICTION UNDER NEW MEXICO RURAL ELECTRIC COOPERATIVE ACT**

Carol Auffrey and Herbert Myers,¹ individually and as class representatives,
("Defendants"), file this Response to Motion to Dismiss for Lack of Subject-Matter Jurisdiction
Under New Mexico Rural Electric Cooperative Act and show the following:

¹ Carol Auffrey and Herbert Myers file on behalf of the member/owners on the assumption that the Court will grant Defendants' Motion for Leave to File an Amended Cross-Claim.

ARGUMENT

1. On January 25, 2012, Socorro Electric Cooperative, Inc., et al. (“SEC” and “Plaintiffs”) filed, among other motions, Plaintiffs’ Motion to Dismiss for Lack of Subject-Matter Jurisdiction Under New Mexico Rural Electric Cooperative Act (“Motion”).

2. On June 29, 2010, the SEC initiated this litigation when it filed suit against all “unnamed member/owners of the Socorro Electric Cooperative, Inc.”, among other parties, requesting declaratory judgment. See, Compl., generally.

3. In response to SEC’s suit and SEC’s and its trustees’ unlawful acts and conduct, Defendants filed this cross-claim on August 24, 2010.

4. In this motion, Plaintiffs incorrectly rely on § 62-15-9(H) to assert that they are immune from suit as a matter of law. That statute states that, with regards to a cooperative, “no action shall be brought . . . unless the complaint is verified and alleges with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiffs desires from the board of trustees . . .” Plaintiffs are incorrect and are not immune from suit under that provision.

5. First, the statute cited by the Plaintiffs does not provide absolute immunity as suggested. It is a procedural statute which sets out the procedure for a member to bring a claim against the cooperative and/or a trustee. This is not a bar to suit but a road map for bringing one.

6. Second, the requirements of the statute cannot be met in the context of a class action brought by the cooperative’s members. There are 9,800 members who make up the putative class. To require each member to give notice and an opportunity to cure as require by section 62-15-9(H) would make class action litigation impossible to initiate.

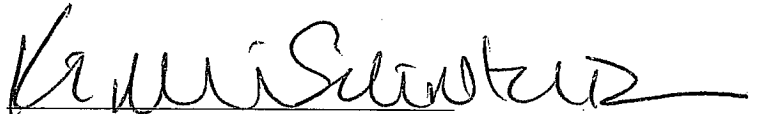
7. Third, it is the Plaintiffs who brought this litigation. Defendants filed their Cross-Claim in response to the unlawful conduct and actions of the board of directors of SEC. Thus,

this is not an "action" contemplated by section 62-15-9(H). Once sued by the SEC a member can no longer be barred from bringing a responsive "action" against the SEC or the trustee that has sued him. The futility of seeking voluntary relief from the party suing you is obvious.

WHEREFORE, Defendants request that the Court find that Plaintiffs' Motion is without merit and grant such other and further relief to which Defendants may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served on the persons identified below on the date and in the manner stated.

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