STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

THE SOCORRO ELECTRIC COOPERATIVE, INC.
Plaintiff,

No. D1314-CV-2010-849

v.

CHARLENE WEST, et al.,

Defendants.

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., PAUL BUSTAMANTE, individually and in his Capacities as President and Trustee of SEC; DAVE WADE, individually and in his Capacities as Vice-President and Trustee of SEC; LUIS AGUILAR, individually and in his Capacities as Secretary and Trustee of SEC; MILTON ULIBARRI, individually and in his Capacities as Treasurer and Trustee of SEC; LEROY ANAYA, individually and in his Capacity as a Trustee of SEC; JACK BRUTON, individually and in his Capacity as a Trustee of SEC; LEO CORDOVA, individually and in his Capacity as a Trustee of SEC; PRESCILLA MAULDIN, individually and in her Capacity as a Trustee of SEC; MANUEL MARQUEZ, individually and in his Capacity as a Former Trustee of SEC; DONALD WOLBERG, individually and in his Capacity as a Trustee of SEC; JUAN GONZALES, individually and in his Capacity as a Former Trustee of SEC; HAROLD BACA, individually and in his

Capacity as a Former Trustee of SEC; HERMAN ROMERO, individually and in his Capacity as a Former Trustee of SEC; and LEOPOLDO PINEDA, JR., individually and in his Capacity as General Manager of SEC,

Cross Claim Defendants

PLAINTIFF'S BRIEF ON PRIMARY ISSUES OF RELIEF

Per the Court's Order Regarding Scheduling, entered on December 22, 2010, Plaintiff Socorro Electric Cooperative, Inc. (hereinafter, "SEC" or "Cooperative"), by and through its attorneys of record presents this Brief on Primary Issues of Relief. Specifically, the Court has requested briefing on the following issues:

1) Whether or not the Open Meetings Act applies to the Cooperative;
2) Whether any issues over and above the provisions of the Open Meetings Act should apply to the Cooperative; and,
3) Whether or not the inspection of public records relief requested by the Cooperative should be applied.

Plaintiff addresses each of these issues in order.

I. STATEMENTS AND ARGUMENTS OF LAW

A. The Open Meetings Act does not apply to the Cooperative

As a matter of public policy, the New Mexico State Legislature enacted the Open Meetings Act, §10-15-1, *et seq.* (NMSA 1978), to support the principle that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." §10-15-1(A). By its own language, the Act applies only to meetings of boards, commissions, and policymaking bodies "of any state

agency, any agency or authority of any county, municipality, district, or any political subdivision." §10-15-1(B). While Plaintiff SEC fully supports the public policy underlying the Open Meetings Act, the simple fact is that the SEC is not a state, county or municipal entity, nor is it a political subdivision. It is a private, nonprofit, member-owned *corporation*, whose principal purpose is providing retail electric energy to its members and to members of the public. As a cooperative corporation, Plaintiff SEC is organized under, and governed by, the Rural Electric Cooperative Act ("RECA") §62-15-1, *et seq.* (NMSA 1978). The RECA specifically provides that "cooperative nonprofit membership corporations may be organized" for certain specific purposes, including supplying electric power and energy in rural areas. §62-15-2. As a nonprofit corporation generating and supplying electric power, the SEC is additionally regulated as a public utility by the New Mexico Public Regulation Commission ("PRC"). See, Public Utility Act, §62-3-3(G) (NMSA 1978) (defining "public utility") and §62-6-4(A) (granting PRC jurisdiction over public utilities).

While Plaintiff SEC operates under significant governmental oversight and regulation, this does not fundamentally alter the fact that the SEC is a *private corporation*. Similarly, the fact that the SEC operates under a cooperative model with "member-owners" rather than "investors" does not change the SEC's private, corporate nature. Even the RECA itself specifically recognizes that rural electric cooperatives are *corporations* which have perpetual existence, can sue and be sued in their own name, can adopt a corporate seal, can own and operate plants, property and machinery, etc. See, §62-15-3 (NMSA 1978) (describing powers of a cooperative).

If the plain language of the relevant statutes were not enough, the New Mexico Supreme Court, in a case addressing procurement issues, has held that rural electric cooperatives are

neither state agencies nor local public bodies. *Fratello v. Socorro Elec. Co-op, Inc.* 107 NM 378, 381 (NMSC 1988). Federal courts have also recognized that an electric cooperative is "neither a municipality nor a state agency…[it] is not a body public like a municipal corporation and is not subject to public scrutiny through sunshine laws or the political process." *Fuchs v. Rural Elec. Convenience Coop.,* 858 F.2d 1220, 1217-1218 (7th Cir. 1988), cert. denied, 490 U.S. 1020 (1989). There is simply no legitimate argument that the Cooperative falls within the purview of New Mexico's Open Meetings Act, any more than there is a valid argument that the Act would apply to the meetings of any other private corporation in the state.

B. New Mexico Open Meetings Act should not apply to SEC Board meetings.

Within the parameters established by the RECA, the SEC is governed by its Articles of Incorporation and its corporate bylaws. At §62-15-9(G) (NMSA 1978), the RECA provides that the Board of Trustees of a rural electric cooperative exercises all powers of the corporation, except as are conferred to the members by the RECA itself, or by the corporate bylaws. This split between the powers of the Board and the powers of the members is at the heart of the current litigation.

On or about April 17, 2010, at the annual membership meeting, certain members of the SEC attempted to amend the corporate bylaws. For purposes of this Brief *only*, Plaintiff does not dispute that the members followed the formal procedure required to change the bylaws. Plaintiff *does* argue that the amendments are void insofar as they are inconsistent with the overall operational framework enacted by the RECA. See, §62-15-7(NMSA 1978) ("Bylaws…may contain other provisions for the regulation and management of the affairs of the cooperative not inconsistent with this act.") Reasonably believing that the amendments are inconsistent with the

RECA and against the best interests of the SEC, the current Trustees have a statutory duty to oppose these amendments and to refuse to recognize them as binding on the Board. See, §62-15-9.1(A) ("A trustee shall perform his duties…in a manner the trustee believes to be in or not opposed to the best interests of the cooperative.") By and through their actions, the current Trustees have demonstrated that they reasonably believe the amendments are not in the best interests of the cooperative.

Focusing on the two amendments related to meeting procedures and the Open Meetings Act, these amendments make it essentially impossible for the Board to conduct significant, legitimate corporate business. As amended, Article VI, Section 1 of the bylaws requires that entirety of all Board meetings be open both to all members of the cooperative and to all members of the press. Similarly, the amended version of Article VI, Section 5 states that the SEC "voluntarily" abide by the Open Meetings Act. The chilling effect these amendments impose on Board members is self-evident. No corporation can effectively function without the ability to conduct private business, to go into executive session, and formulate business strategy and management decisions without the fear that their business deliberations will be in the newspapers the next day. Under the conditions imposed by the amendments, Trustees cannot effectively discuss corporate business plans and corporate counsel cannot provide confidential advice to the Cooperative.

When Trustees have in the past permitted Cooperative members to sit in on Board meetings, the results have been disastrous. Counsel's private statements to his client appeared in the next issue of the local paper, and threats of defamation lawsuits soon followed, which required the expenditure of corporate time and funds. Similarly, various members who attend these meetings have shown themselves to be extremely disruptive, calling out repeatedly during

meetings in order to delay and interrupt Board business. The Board has been compelled to obtain a temporary restraining order to keep one member from attending Board meetings. On another occasion Board members were compelled to call law enforcement to remove members from the corporate premises, because these members refused to allow the Board to go into executive session. Each of these disruptions, and others not listed here, have been caused by a small number of members who regularly attend each meeting with the apparent intent to disrupt corporate proceedings.

Compelling the Trustees to comply with the Open Meetings Act will inevitably create additional problems and expenses for the Cooperative. As discussed above, the Open Meetings Act was drafted so as to apply to public bodies and governmental agencies. There is simply no meaningful way for a private corporation to "comply" with the requirements of the Act, because so much of the Act was never intended to apply to private companies. For example, how should a private corporation "comply" with the requirement that "[a]ll meetings of any public body…shall be public meetings"? §10-15-1(A) (NMSA 1978). Must the SEC allow "all persons so desiring" to attend and listen to corporate deliberations and proceedings? *Id.* How can the Cooperative "comply" with the requirement that "all provisions of the Open Meetings Act shall be enforced by the attorney general or by the district attorney in the county of jurisdiction"? §10-15-3(B) (NMSA 1978). The inherent confusion generated by attempting to comply with the Act is obvious, and the amended bylaws simply create ripe ground for continual dispute and litigation.

For all of these reasons, the amendments to Article VI, Section 1 and Article VI, Section 5 of the SEC corporate bylaws should be deemed void, and the Board should be permitted to

continue to conduct SEC business without complying with the conditions contained in these amendments.

C. Amendments related to disclosure of information should be declared void.

Two additional amendments address matters of records inspection. As amended, Article VI, Section 5 of the SEC bylaws requires the Cooperative to "voluntarily" abide with the Inspection of Public Records Act. Additionally, the amended text of Article VIII, Section 8 of the bylaws states that the Board of Trustees will "guarantee" transparency by providing access to certain records and documents, except for those disclosure of which "would violate the Privacy Act."

Once again, it should be clear that the Inspection of Public Records Act, §14-3-1, *et seq* (NMSA 1978), applies *only* to state agencies. The Act does not, and cannot logically, apply to private corporations However, the New Mexico State Legislature has established laws concerning the presentation of corporate records. In the Non-Profit Corporation Act, §53-8-37 (NMSA 1978), the Legislature clearly stated that "all books and records of a [non-profit] corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time." New Mexico courts have fully supported the disclosure of corporate information. In New Mexico, established public policy "grants generous access to corporate information by shareholders/members." *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 439, 659 P.2d 888, 891 (1983). In the specific context of disclosure of information and records by a rural electric cooperative, in *Schein v. Northern Rio Arriba Electric Cooperative, Inc.,* 1997-NMSC-011, 122 N.M. 800, the New Mexico Supreme Court provided clear, well-articulated guidelines and procedures for the disclosure of information to members of a

cooperative. The *Schein* decision highlighted that information which is requested for a proper purpose must be disclosed and that a cooperative has the burden of proving improper purpose when it seeks to withhold information from disclosure. *Id.* at ¶¶ 11 - 13.

In the current matter, Plaintiff SEC recognizes its duties of disclosure as established by both statute and case law. Plaintiff has made all efforts to comply with these disclosure obligations. However, Plaintiff cannot reasonably comply with vague bylaws that appear to mandate a standard of behavior far in excess of that required by New Mexico law. If the amended bylaws merely reaffirm the standards set out in the Non-Profit Corporations Act and in *Schein*, then these amendments are redundant and have no material impact on the current policies and procedures of the SEC, and the enactment of the amendments does nothing more than increase the likelihood of continuing conflict and litigation between members of the Cooperative and the Trustees. Alternatively, if the amendments truly require the SEC to "guarantee" transparency and open access, then these amendments violate the statutory framework created by the New Mexico Legislature as to the operation of non-profit corporations, and they are therefore void.

To reaffirm, Plaintiff SEC recognizes its duties under *Schein*. Any change to the SEC's bylaws which go beyond the requirements established by *Schein* should be declared void as violating the regulatory framework for rural electric cooperatives and as against public policy.

II. CONCLUSION

By and through its Amended Complaint, Plaintiff SEC has requested that the Court issue a declaratory judgment and provide injunctive relief as to various aspects of the amended bylaws enacted at the SEC's annual membership meeting on April 17, 2010. For the reasons stated

above, Plaintiff believes that the amended bylaws are null and void as a matter of law. Specifically, as a private corporation, the amendments related to the New Mexico Open Meetings Act and the Inspection of Public Records Act are not applicable to the Cooperative. Similarly, the amendment requiring the SEC to "guarantee" transparency and open records improperly violates an existing regulatory scheme and goes against well-reasoned public policy.

Plaintiff SEC therefore requests that the Court grant all relief requested in its Amended Complaint, and grant such other and further relief as the Court finds to be in the interests of justice.

Respectfully submitted,

KENNEDY & HAN, P.C.

"Electronically Filed"
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CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the forgoing document was delivered by 1st Class U.S. mail, as well as by electronic notification, to the following individuals on March 30, 2011:

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