STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

No. D1314-CV-2010-0849
Judge: Mitchell

CHARLENE WEST, et al.,

Defendants.

And

CHARLES WAGNER, individually
And as class-representative, etc.

Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
ET AL.,

Cross-Claim Defendants.

CROSS-CLAIM PLAINTIFF'S RESPONSE TO BRIEF ON PRIMARY ISSUES

COMES NOW the Cross-Claim Plaintiff, CHARLES WAGNER, individually and as representative of the Class of "unnamed Defendants, being owner/members of the Socorro Electric Cooperative, Inc." by and through the undersigned attorney and for his Response to Plaintiff's Brief on Primary Issues of Relief, states:

A. APPLICATION OF OPEN MEETINGS ACT

Plaintiff misconstrues the effect of the owners/members' vote to amend the bylaws of the Socorro Electric Cooperative, Inc., (SEC) when it states: "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" (Plaintiff's Brief, p. 4.).

Cross-claim Plaintiff does not make this claim and is unaware of any other party hereto making this claim. Plaintiff is simply constructing its own "straw argument" so that it can defeat an argument which no one has advanced.

Plaintiff's subsection "B" gets to the heart of the matter. The facts are that the owners/members approved certain amendments to the bylaws, including the decision to voluntarily comply with the requirements of the New Mexico Open Meetings Act.

The SEC is governed by "trustees". Article V, Sec. 1 of the Bylaws. "Trustees" shall be members of the SEC. Article V, Sec. 3 of the Bylaws. Members agree to be bound by the bylaws. Article I, Sec. 1 of the Bylaws. "Patrons" include members and non-members who purchase electricity from the SEC. See Article VIII, Sections 1, 2 & 3 of the Bylaws.

> "The patrons of the Cooperative, by dealing with the Cooperative acknowledge that the terms and provisions of the Articles of Incorporation and By-Laws shall constitute and be a contract between the Cooperative and each patron, and both the Cooperative and the patrons are bound by such contract, as fully as though each patron had individually signed a

separate instrument contains such terms and provisions." Article VIII, Section 2 (paragraph 6) of the Bylaws.

Significantly, the Trustees now seek to renege on their contract. It is not for this Court, or any court, to re-write the contract which the owners/members have chosen for themselves thorough their exercise of corporate democracy.

There has been no argument that the owners/members failed to pass the amendments in question or that these amendments are beyond the authority of the owners/members to pass. The arguments advanced by Plaintiff amounts to re-arguing the merits of passing the amendments in the first place. It is unclear what "chilling effect these amendments impose" nor is it clear what "fear" these Trustees have, just as it is not clear that the past results have anything to do with the question of whether the owners/members acted within their rights in adopting the amendments at issue.

No argument has been advanced that this exercise of corporate democracy is unavailing to place these restrictions on the governance of the SEC. It is plausible that the owners/members have such a high degree of distrust of the existing Trustees as to desire that their non-profit cooperation be conducted with the stated transparency. Plaintiff's argument is replete with value laden assertions: "essentially impossible"; "chilling effect"; "effectively function"; "effectively discuss"; and etc. Again, these are policy arguments best presented in the context of whether to adopt the bylaws in the first place, arguments which clearly were not persuasive to the majority of the owners/members.

It is equally plausible that the disruptions recited by Plaintiff were, in fact, the embryonic efforts to reform the way in which the SEC conducts its business, culminating in the passage of the amendments, much like "sit-ins" and "protests" and "marches" and "arrests" eventually led to the passage of the Civil Rights Act. Perhaps the amendments are a reaction to the perceived heavy-handed manner in which the Trustee's responded to what was perceived as legitimate inquiries into SEC business. In any event, it is for the owner/members to determine how the Trustees conduct the business of the SEC. It is not the Trustees "paternal" right to tell the owners/members what the Trustees think is best for them and for the conduct of SEC business. The owner/members' Cross-Claim Complaint details only some of the perceived "wrongs" perpetuated, in part, by the lack of transparency and lack of open meetings which have been addressed by these amendments.

Will implementation of these amendments be without "additional problems and expenses" for the SEC? It is impossible to tell. Even if it does, is it not up to the owners/members to take corrective action rather than be told by the Trustees that they cannot do this? Plaintiff goes to extreme examples to paint its picture of "doom and gloom" (a picture best painted before the election, not afterwards): "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?" Simply to pose the question is to reveal the tortured nature of this argument.[1]

B. DISCLOSURE OF INFORMATION

The two amendments relating to the inspection of and access to records are again legitimate expressions of corporate democracy. The owners/members have chosen to impose these requirements on their cooperative. It is submitted that Schein set forth minimums and neither the statutes nor the case law establishes a limit on how much record access is permissible. In fact, Section 53-8-12, B, NMSA 2003, provides, in part: "The by-laws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation."

Again, Plaintiff makes political (or policy) arguments best directed at the owners/members prior to the vote, not post result e..g. "increase the likelihood of continuing conflict and litigation". It is not at all certain that the owners/members having voted in favor of increased access to records would then litigate against Trustees who act in accordance with said amendments. In this respect, Cross-claim Plaintiff, individually and in his representative capacity, denies that "Plaintiff has made all efforts to comply with these disclosures obligations (existing statutes and case law)." Plaintiff's Brief, p. 8. Regardless of the merits of the amendments, it is clear that the owners/members were reacting against the status quo, including the positions

[1] Is this really asserted to be something the SEC must affirmatively "comply" with?

advanced herein by Plaintiff, and nothing suggested by Plaintiff supports the conclusion that this is beyond the right of the owners/members.

There simply cannot be a violation of a "statutory framework", when the owners/members voluntarily amend their contract to include greater rights than otherwise provided: "Public policy encourages freedom between competent parties of the right to contract and requires the enforcement of contracts, unless they clearly contravene some positive law (citations omitted)." *Lynch v. Santa Fe National Bank,* 97 N.M. 554, 560, 627 P.2d 1247 (App. 1981) and *City of Artesia v. Carter*, 94 N.M. 311, 314, 610 P.2d 198 (App. 1980). The inescapable conclusion is that, for better or worse, the owners/members have exercised their freedom of contract (corporate democracy) and these amendments do not contravene positive law.

C. CONCLUSION

It was said long ago, in a different context, that democracy is the worst form of government, except for all the other forms of government. These amendments resulted from an expression of corporate democracy. These amendments contravene no positive law. These amendments are what a majority of owners/members of the SEC have chosen to bind themselves to. Baring an allegation that the voting results were inaccurate, a point affirmatively denied by Plaintiff, it is not for the Trustees to dictate the regulation and management of the affairs of the SEC to the owners/members: the tail simply does not wag the dog.

Cross Claim Plaintiff, individually and in his representative capacity, respectfully requests the Court to deny the relief requested by the Plaintiff and to move to consideration of the other, unresolved, issues of corporate mismanagement, self-dealing and misfeasance by the Trustees, as alleged in the Cross Claim.

Respectfully submitted this 13th day of April, 2011.

/e/ Electronically Submitted

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 13th date of April 2011, a true and correct copy of the foregoing was deposited with the USPS, first class postage prepaid thereon, addressed as follows:

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