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JUDGE JOHN W. POPE, DIV. I

STATE OF NEW MEXICO
COUNTY OF VALENCIA
THIRTEENTH JUDICIAL DISTRICT COURT

THE SOCORRO ELECTRIC COOPERATIVE INC,

Plaintiff,

vs.

No. D1314 CV 2010-849

CHARLENE WEST, individually, and as a member of the Socorro Electric Cooperative, all UNNAMED MEMBER/OWNERS of the Socorro Electric Cooperative, Inc. individually, and as members of the Socorro Electric Cooperative, The MOUNTAIN MAIL Newspaper, individually, and as a member of the Socorro Electric Cooperative and the EL DEFENSOR CHIEFTAIN Newspaper, individually and as a member of the Socorro Electric Cooperative,

Defendants.

SUMMONS ISSUED

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, The Socorro Electric Cooperative, Inc. ("SEC") by their counsel of record, Dennis Francish, and in support of their Complaint for Declaratory Judgment and Injunctive Relief allege as follows:

INTRODUCTION

1. This is a civil action for declaratory judgment pursuant to the Declaratory Judgment Act, NMSA 1978 § 44-6-2. In this action, the SEC seeks to resolve an actual case or controversy regarding its rights established under its current By-laws, corporate law and certain By-law changes that are unworkable and ambiguous.

2. The SEC provides powers to approximately 13,000 members of the SEC making it impossible to individually name each defendant. Therefore, Plaintiff requests the Court allow it to effect service by publication upon the unnamed defendants.

3. The SEC seeks a declaratory judgment that it is not a public entity and is therefore not subject to the provisions and requirements of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act, that as a private entity, the Board of the SEC is not obligated to follow the provisions and requirements of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act, and that the Board is not required, obligated or entitled to follow a directive of the membership that is in conflict with state law.

JURISDICTION, VENUE AND REMEDY

4. The SEC is a private not-for-profit corporation that serves a geographical area of the State of New Mexico that includes portions of Cibola, Catron, Socorro, Sierra and Valencia Counties. The SEC is a rural electric cooperative that is owned by its members and serves members and non-members in its service area. The SEC is a public utility pursuant to New Mexico law and is regulated by The New Mexico Rural Cooperative Act, NMSA 1978 62-15-1 *et seq.*

5. All of the Defendants reside or hold their principal place of business in the State of New Mexico in Cibola, Catron, Socorro, Sierra and Valencia Counties.

6. The events complained of herein took place in the State of New Mexico in Cibola, Catron, Socorro, Sierra and Valencia Counties, and against persons and property located in Cibola, Catron Socorro, Sierra and Valencia Counties, New Mexico.

7. This Court has the authority to issue the declaratory and injunctive remedies sought in this action pursuant to the Declaratory Judgment Act, NMSA 1978 § 44-6-2.

8. The Declaratory Judgment Act is a special proceeding that grants the district courts the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. The Declaratory Judgment Act is intended to be liberally construed and administered as a remedial measure. *San Juan Water Comm'n v. Taxpayers & Water Users of San Juan County,* 116 N.M. 106, 109, 860 P.2d 748, 751 (1993).

FACTUAL ALLEGATIONS

9. All previous paragraphs are incorporated herein.

10. The SEC was organized in 1945 for the purpose of supplying adequate and dependable power to the City of Socorro and the rural areas that surround it. Since that date, the SEC has built over 2,700 miles of line in Cibola, Catron, Socorro, Sierra and Valencia Counties.

11. Member/Owners run the SEC through elected representatives called trustees. The Board of Trustees ("Board") manages the business of the SEC on behalf of the members. There are currently ten (10) members of the SEC Board, and several thousand member/owners.

12. The members elect trustees at district meetings, and the trustees are responsible for establishing policy, conducting business and reviewing operations to ensure that the SEC operates within the framework of the established policies and the law. The day to day operations are the responsibility of a manager employed by the SEC Board.

13. Any person, firm, limited liability company, partnership, sole proprietorship, association, corporation, or body politic or subdivision thereof may become a member of the SEC by filing a written application or statement for membership, agreeing to purchase electric

energy from the SEC and agreeing to comply with and be bound by the Articles of Incorporation and By-Laws of the SEC and any rules and regulations adopted by the Board of Trustees.

14. An annual meeting of the members is held between April 1 and May 30 each year for the purpose of passing on reports for the previous fiscal year, and transacting such other business as may come before the meeting.

15. District meetings of the members are held in each district sometime during the month of October or November only in the years when there is an election of trustee(s), for the purpose of electing trustee(s), passing on reports for the previous fiscal year and transacting such other business as may come before the meeting.

16. The SEC By-Laws require that the SEC be operated on a cooperative, non-profit basis for the mutual benefit of its patrons and members at all times.

17. The By-Laws may be altered, amended or repealed by the members at any regular or special meeting, provided that the notice of the meeting contains a copy of the proposed alteration, amendment or repeal.

18. On April 17, 2010 the SEC held its annual meeting of the members whereupon the membership voted in changes to the SEC By-Laws.

19. One of the changes that the membership adopted amended Article VI, Section 1 of the By-Laws to state that the regular meeting of the Board of Trustees "shall be open to the member/owners and representatives of the press with timely notice of the meeting advertized in monthly bill mailings and local newspapers. A section of the meeting agenda shall be reserved for member participation during which member/owners may address the board without prior approval of the board."

20. A second change that the membership adopted amended Article VI, Section 5 of the By-Laws to state "Open Meetings Act. The SEC voluntarily agrees to abide by the Open Meetings Act and Inspection of Public Records Act."

21. A third change that the membership adopted amended Article VIII, Section 8 of the By-Laws to state "The Socorro Electric Cooperative Board of Trustees and Management shall guarantee Transparency of actions with open access to SEC books, records, audits to members, for a proper, non-commercial purpose with the exception of those records which would violate the Privacy Act." This is vague and ambiguous as the Board is not aware of what "Privacy Act" to which the amendment refers.

FIRST CLAIM

22. All previous paragraphs are incorporated herein.

23. The amendment to Article VI, Section 1 of the By-Laws stating that the regular meeting of the Board of Trustees "shall be open to the member/owners and representatives of the press with timely notice of the meeting advertized in monthly bill mailings and local newspapers. A section of the meeting agenda shall be reserved for member participation during which member/owners may address the board without prior approval of the board" will prevent the Board from effectively carrying out the business of the SEC and prevent the Board from meeting its obligation to its members. The Board operates within the corporate laws of the State of New Mexico. There is no legal basis for members or the press to participate in a Board meeting.

24. The SEC is not a public body subject to providing the public, members, owners or the press with timely notice of its meetings other than the annual meeting. The SEC is not a

"board, commission, administrative adjudicatory body, or other policymaking body of any state agency, any agency or authority of any county, municipality, district or subdivision" pursuant to NMSA 1978 §10-15-1(B).

25. The method for members to communicate with the Board is through their elected Trustee(s). To provide the opportunity for every member to speak at each Board meeting without the prior approval of the Board would adversely impact the ability of the Board to conduct business on behalf of the members and essentially grind the meetings to a halt. No corporate business can be effectively conducted in the presence of the press.

26. The SEC has no objection to SEC members making comments or complaints known to the Board prior to the Business section of the Board meeting. However, at the conclusion of the comments portion, non-Board members must leave the remainder of the Board meeting to the direction and operation of the Board. The Board should not be required to conduct a meeting with the media present throughout.

SECOND CLAIM

27. All previous paragraphs are incorporated herein.

28. The amendment to Article VI, Section 5 of the By-Laws stating "Open Meetings Act. The SEC voluntarily agrees to abide by the Open Meetings Act and Inspection of Public Records Act" is a violation of New Mexico state law.

29. The New Mexico Open Meeting Act, ("NMOMA") NMSA 1978 §10-15-1 *et. seq.* requires that public/governmental business be conducted in full public view, that the actions of public bodies be taken openly, and that the deliberations of public/governmental bodies be open to the public.

30. The NMOMA states in part at NMSA 1978 §10-15-1(A), "... 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."

31. The NMOMA defines the public meetings subject to the Act at NMSA 1978 §10-15-1(B) as "any board, commission, administrative adjudicatory body, or other policymaking body of any state agency, any agency or authority of any county, municipality, district or subdivision, held for the purpose of formulating public policy, ...".

32. The SEC is not a governmental agency, it is not a public body as described in NMSA 1978 §10-15-1(B), and is therefore not required to follow the requirements of the NMOMA. To require otherwise imposes a hardship on the Plaintiff.

33. The NMOMA is not intended to apply to and does not apply to private entities, and the SEC cannot adequately and appropriately conduct its business if every meeting of the Board is required to occur subject to the NMOMA.

THIRD CLAIM

34. All previous paragraphs are incorporated herein.

35. The amendment to Article VIII, Section 8 of the By-Laws stating "The Socorro Electric Cooperative Board of Trustees and Management shall guarantee Transparency of actions with open access to SEC books, records, audits to members, for a proper, non-commercial purpose with the exception of those records which would violate the Privacy Act" is a violation of New Mexico state law.

36. Although the courts have held that shareholders in New Mexico have a right to inspect at reasonable times and places, a corporation's books and records for proper purposes,

the information must be limited to information reasonably related to the legitimate business interests of the shareholder. The New Mexico Supreme Court found that "even where a shareholder has demonstrated a reasonable relationship to his role as shareholder and the information requested, the acquisition of requested data can still be thwarted where the corporation can demonstrate the harmfulness of allowing access." *Schein v. Northern Rio Arriba Electric Cooperative, Inc.*, 1997–NMSC–011, 932 P. 2d 490 (1997).

37. A blanket statement that the SEC shall "guarantee" transparency of actions and "open access" to SEC records to members does not allow the SEC the opportunity to refuse such disclosure when doing so would be harmful to the SEC and/or its members. In *Schein*, the court held that "we believe that the district court is in a better position to weigh fairly the competing needs and interests of parties affected by the disclosure of corporate documents." *Id.*

38. The Board of Trustees cannot meet its burden and responsibility to conduct the business and affairs of the SEC in the best interest of the members when it is required to open access to its books, records, audits to members without the reservation of right to determine if such access would be harmful to the SEC and its members.

39. The SEC complies with current New Mexico law on disclosure of corporate records.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, SEC, requests that this Court enter a Declaratory Judgment and Injunction providing the following relief:

1. A Judgment that the Defendant members have no authority to enact changes to the SEC By-Laws that are in conflict with state law;

2. A Judgment that the SEC is a private entity and is not subject to the New Mexico Open Meetings Act;

3. A Judgment that the SEC is a private entity and is not subject to the New Mexico Inspection of Public Records Act;

4. A Judgment that the By-Law amendments requiring the SEC to abide by the New Mexico Open Meetings Act is null and void as a matter of law;

5. A Judgment that the By-Law amendments requiring the SEC to abide by the New Mexico Inspection of Public Records Act is null and void as a matter of law;

6. A Judgment that the By-law amendment requiring the SEC to guarantee transparency and open records is null and void as a matter of law;

7. A Judgment that the Defendants have no authority to force the SEC to abide by the provisions of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act;

8. An injunction enjoining the Defendants from enforcing changes to the By-Laws requiring the SEC to abide by the provisions of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act;

9. An injunction enjoining the Defendants from invoking the provisions of the New Mexico Open Meetings Act and the New Mexico Inspection of Public Records Act during meetings of the SEC Board of Trustees;

10. An injunction enjoining the Defendants from requiring the SEC Board to guarantee transparency and open records;

11. An injunction enjoining the Defendants from requiring the Board to permit members and the press to participate in and be present during regular and special Board meetings;

12. An order awarding the SEC's costs and reasonable attorneys' fees in bringing this action; and

13. Any other relief the Court deems just and proper in this action.

Respectfully submitted,

Dennis R. Francish
Attorney at Law
5400 Lomas NE
Albuquerque, NM 87110
505-265-6765
Attorney for Plaintiff

VERIFICATION

STATE OF NEW MEXICO)
)
COUNTY OF SOCORRO)

Paul Bustamonte President of The Socorro Electric Cooperative,Inc. Plaintiff hereinstates:

I, Paul Bustamonte, being first duly sworn upon oath, depose and state that ~~I am a Plaintiff in this case and~~ that I read the above and foregoing COMPLAINT. I know the contents thereof, and the same is true and correct to the best of my knowledge and belief.

President of The Socorro Electric Cooperative, Inc., on behalf of said Corporation.

SUBSCRIBED AND SWORN to before me this 23rd day of June, 2010, by

June, 2010.

NOTARY PUBLIC

My Commission Expires: 11/21/12