


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**PUBLIC SERVICE COMPANY
OF NEW MEXICO,**

Petitioner,

Vs.

Case No. S-1-SC-37552

**NEW MEXICO PUBLIC REGULATION
COMMISSION,**

Respondent.

**In the Matter of Public Service Company
Of New Mexico's Abandonment of San
Juan Generating Station
NMPRC Case No. 19-00018-UT**

**RESPONSE OF NEW MEXICO PUBLIC REGULATION COMMISSION
IN OPPOSITION TO VERIFIED PETITION FOR WRIT OF
MANDAMUS FILED BY PUBLIC SERVICE COMPANY
OF NEW MEXICO**

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Respondent New Mexico Public Regulation Commission (“PRC” or “Commission”) submits this response in opposition to the Verified Petition for Writ of Mandamus (“Petition”) filed by Public Service Company of New Mexico (“PNM”) seeking an order vacating the January 30, 2019 *Order Initiating Proceeding On PNM’S December 31, 2018 Verified Compliance Filing Concerning Continued Use Of and Abandonment Of San Juan Generating Station* (“1/30/19 Order”).

SUMMARY OF ARGUMENT:

Issuance of a writ of mandamus is an extraordinary form of relief appropriate only “when the petitioner presents a purely legal issue concerning the *non-discretionary* duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.” *State ex rel. Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 11 (emphasis added).

PNM’s Petition should be denied because the authority to initiate the 2018 Review Hearing is an inherently discretionary matter within the Commission’s express authority under NMSA 1978, § 62-9-5 requiring abandonment of any

portion of a utility's facilities can be made only by "first obtaining the permission and approval of the commission."

Further, the 2018 Review Hearing is expressly required by Paragraph 19 of the Modified Stipulation agreed to by PNM and approved as part of the 12/16/2015 Final Order which resolved PNM's abandonment of San Juan Generating Station ("SJGS") Units 2&3 in Case 13-00390-UT.¹ PNM announced its intent to abandon SJGS in its 2017 Integrated Resource Plan ("IRP") in case 17-00174-UT, but its 12/31/18 Filing made pursuant to the stipulation revealed it had taken possibly irrevocable steps in furtherance of abandonment as substantially all of its co-owners had provided similar notice of their intention to abandon SJGS.

Consistent with § 62-9-5 and principles of due process, the scope and timing of the 2018 Review Hearing is intended to provide both opponents and proponents of a proposed abandonment of SJGS a meaningful opportunity to present their respective positions on PNM's decision to abandon SJGS. The 1/30/19 Order only seeks to enforce the Modified Stipulation and §62-9-5. A writ denying the PRC's exercise of such authority where PNM agreed to the 2018 Review Hearing, but

¹ That Final Order was defended by PNM and upheld by this Court in appeal No. S-1-SC-35,697. The Court identifies the 2018 Review Hearing as a benefit of the stipulation in its opinion. *New Energy Econ. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC- 24, ¶19 & 20.

now seeks to delay the required abandonment filing until after it has taken irrevocable steps ensuring its chosen outcome would effectively abrogate clear statutory authority to approve or deny a proposed abandonment.

While PNM asserts the PRC arbitrarily set a deadline that PNM cannot meet because it lacks substantive information necessary to complete its application, the terms of the Modified Stipulation and PNM's subsequent IRP filing confirm PNM was well aware of the impending 2018 Review Hearing and its obligation to present testimony and evidence concerning both any proposed abandonment of SJGS and proposed replacement generation resources in that hearing.

PNM's legally unsupported assertion that the Commission is obligated to defer enforcing existing orders and existing law in favor of unfiled legislation is reveals the apparent reason for PNM's delay in making its 12/31/2018 Filing and preparation for the 2018 Review Hearing. PNM's true interest has been to seek a reduction in Commission oversight over its SJGS abandonment through legislative changes. PNM has focused its efforts on bills, unsuccessfully in the 2018 Legislative session (Senate Bill 47), and recently with Senate Bill 489 in the 2019 Legislative session (SB 489²) which would abrogate much of the Commission's

² This Court may take notice that Senate Bill 489 was not filed until February 7, 2019 - after the 1/30 Order was filed.

existing oversight over abandonment issues such as PNM's recovery of undepreciated investment and selection of replacement resources.

At the time of this filing, the Governor has yet to sign SB 489 into law. Moreover, SB 489 still requires an abandonment proceeding and does not expressly relieve PNM of its obligation to participate in the 2018 Review Hearing under the Modified Stipulation and Final Order in 13-00390-UT even though it may alter the issues considered in such hearing. The Commission acknowledges its obligation to assess the impact of SB 489 on the 2018 Review Hearing concerning PNM's proposed abandonment of SJGS in the event SB 489 is signed into law. It will do so based on input from PNM and the intervening interested parties in that case as due process requires. It would be improper for this Court to insert itself into this proceeding as PNM retains all remedies available in law through appeal or writ to challenge any determination made by the Commission after such review. Therefore, this Court should deny PNM's petition seeking issuance of the requested writ.

FACTUAL BACKGROUND:

PNM's Petition omits a number of crucial documents "necessary and appropriate to inform the Court adequately regarding the circumstances out of which the petition arises as required by NMRA 12-504(B)(2), including the

Modified Stipulation and PNM's 12/31/18 "compliance" Filing. Those documents, attached hereto, demonstrate that under the terms of the Modified Stipulation and the Commission's Final Order, PNM was required to make a filing between July 1, 2018 and no later than December 31, 2018, complete with "supporting testimony and exhibits," so that an expedited hearing - the "2018 Review Hearing," could be conducted to address the extent to which SJGS would continue to serve New Mexico retail customers. (See Exhibit A – Modified Stipulation excerpted from the PRC Final Order in Case 13-00390-UT). PNM made the filing required by paragraph 19 on the last permissible day - December 31, 2018; notwithstanding that it initiated abandonment by giving notice to the other SJGS participants that it did not intend to continue use of SJGS almost six months before. (Exhibit B – PNM 12/31/18 Verified Compliance Filing Filed Pursuant to Paragraph 19 of the Modified Stipulation)

Because under §62-9-5 a determination that ANY portion of capacity at SJGS would no longer serve retail customers would constitute an abandonment, the 2018 Review Hearing necessarily required that abandonment, including replacement resources, be addressed in that hearing. Accordingly, Paragraph 19 of the Modified Stipulation required PNM to issue an all resource request for proposals (RFP) to identify those replacement resources in time for the 2018 Review Hearing. (Exhibit A, p. 6, ¶19).

After July 1, 2018, but no later than December 31, 2018, PNM shall make a filing with the Commission, and serve all parties to this case, to determine the extent to which SJGS should continue serving PNM's retail customers' needs after June 30, 2022. The filing shall be made before PNM has made a binding commitment to a post-2022 coal supply agreement, but after PNM has received firm pricing and other terms for the supply of coal at SJGS, unless PNM proposes not to pursue a coal supply post-2022. The filing shall include PNM's recommendation and supporting testimony and exhibits. The Signatories agree to support expedited Commission review and decision within six months after the date of PNM's filing. PNM shall not enter into a binding coal supply agreement prior to the conclusion of the case docketed to determine the extent to which SJGS should continue serving PNM customers, unless the agreement allows PNM to withdraw or adjust the terms depending on the outcome of the docket. PNM's 2017 IRP shall incorporate information from any recent RFPs that PNM has concluded. PNM shall provide participants in the IRP process and in the 2018 Review reasonable access to inputs, assumptions and constraints regarding Strategist® runs, and will perform a reasonable number of Strategist® runs using practical assumptions as requested by them. PNM will issue an RFP as soon as practicable after the filing of the 2017 IRP that will request proposals identified in the IRP as the most cost-effective portfolio using the assumption that SJGS does not continue to operate past 2022 ("non-SJGS alternative"). The RFP shall allow bidders to propose renewable resource options beyond those included in the non-SJGS alternative. PNM will consult with the Signatories prior to issuing the RFP. PNM's filing pursuant to this paragraph will incorporate, to the extent applicable, the results of the non-SJGS alternative resource RFP into the resource modeling.

Id.

While PNM now dubs its December 31, 2018 filing a “compliance” filing, the Modified Stipulation contemplated that PNM would make a substantive filing sufficient to provide the basis for the contemplated 2018 Review Hearing. In its

August 4, 2017 IRP filing, PNM acknowledged these obligations under the Modified Stipulation:

In addition, PNM committed in the Stipulation to the following:

....
PNM will pursue several actions associated with the SJGS abandonment. The next step will be issuing an all-source request for proposals. The intent of the RFP is to refine the mix of replacement resource types identified in this IRP (natural gas peaking, renewable energy and, potentially, energy storage) to specific projects that could be proposed for NMPRC approval in later filings. Bidders will be free to submit bids for any type and size of resource at any proposed location

....
The RFP will also request bids at SJGS. PNM will make its final determination on the scope and content of the RFP after discussion with the parties to Case No. 13-00390-UT as required by the final order in that case. Upon receipt of all bids (including those requested by PNM and any other credible proposals), PNM will repeat the capacity expansion, economic dispatch and reliability analyses performed for this IRP to identify the best combination of resources and locations from the alternatives presented. ***This work will be completed in advance of PNM making the filing required by the final order in Case No. 13-00390-UT on the extent to which SJGS should continue serving PNM's retail customers' needs after June 30, 2022.***

Exhibit D, Excerpt from PNM Corrected IRP - Case 17-00174-UT, pp 147-148.

PNM's 12/31/18 Filing invoked the Commission's discretion by requesting that the filing be accepted as a "compliance filing" in lieu of the more substantive filing required by the Modified Stipulation, urging: "Because PNM is not proposing to enter into any agreements that would extend the operation of SJGS

beyond 2022, PNM is not requesting any formal approvals or determinations from the Commission in this filing. *PNM requests only that the Commission accept this Compliance Filing in fulfillment of the filing requirement in Paragraph 19 of the Modified Stipulation* and allow this docket to remain closed.” (Exhibit B)

Prior to ruling on PNM’s request to accept the 12/31/18 Filing as a “compliance” filing, the Commission requested the positions of the parties in cases 13-00390-UT and 17-00174-UT. (see Exhibit C – 1/10/19 Order Requesting Response)

With the exception of those environmental groups³ coordinating with PNM to promote SB 489, response filings opposing PNM’s request to delay the 2018 Review Hearing were received from New Energy Economy (NEE) (Exhibit E); Southwest Generation Operating Company (SWG) (Exhibit F); the San Juan County Entities (“SJC Entities”)(comprised of the Board of County Commissioners for the County of San Juan, the City of Farmington, and certain San Juan legislative representatives) (Exhibit G); as well as a joint response filed by almost all parties representing ratepayer interests, including the New Mexico Attorney General (AG); PRC Utility Division staff (Staff); the Albuquerque Bernalillo Water Utility Authority (ABCWUA); and the New Mexico Industrial Energy Consumers (NMIEC)(Exhibit H and I).

³ Western Resources Advocates (WRA), Coalition for Clean Affordable Energy (CCAEE) and the Sierra Club (SC).

Accordingly, the Commission's 1/30/19 Order rejected PNM's proposition that because PNM had determined that it would abandon use of SJGS after 2022 there was no need for the 2018 Review Hearing as originally scheduled and that an abandonment filing should be deferred for an additional six months. The Commission found that to comply with due process the 2018 Review Hearing must provide both opponents and proponents of abandonment a meaningful opportunity to litigate their views as required by §62-9-5. The Commission rejected the argument that the 2018 Review Hearing was intended to provide a forum only for opponents of any continued use of SJGS. Far from compelling PNM to abandon SJGS against its will, the timing of the hearing and the scope of issues are intended to provide both set of intervenors a meaningful opportunity to address whether PNM should be permitted to proceed with its planned abandonment of its interest in SJGS or whether SJGS should continue to serve New Mexico ratepayers.

ARGUMENT

PNM's argument that the Commission exceeded its statutory authority by "forcing" PNM to file for early abandonment of SJGS against its will borders on the absurd. PNM is bound by the terms of the Modified Stipulation and Final Order in 13-00390-UT to participate in the 2018 Review Hearing and initiated this proceeding itself while invoking the Commission's discretion on whether to have that hearing when it made its 12/31/18 Filing.

The 1/30/19 Order is not inconsistent with PNM's proposed timetable in abandoning SJGS by 2022. §62-9-5 does not set any time limit on completing an abandonment proceeding or require immediate abandonment upon approval; abandonment may be approved to occur at a point in the future.⁴ The 1/30/19 Order timed the hearing to provide all interested parties a meaningful opportunity to participate and preserve the Commission's ability to exercise its authority under §62-9-5, rather than cede to PNM unilateral discretion on abandonment decisions. The 1/30 Order found a need for contemporaneous oversight in the 2018 Review Hearing to protect ratepayers in matters such as decommissioning and reclamation expenses based on PNM's prior actions addressing environmental remediation expenses associated in case 13-00390-UT. Paragraphs 18 and 33 of the same Modified Stipulation required that "the prudence and reasonableness" of PNM's \$90.6 M investment in balanced draft technology at SJGS would be determined in a later PNM rate case. (see Exhibit A, ¶¶ 18, 33). Yet, in 15-00261-UT, PNM nonetheless asserted the PRC was precluded from reviewing the prudence and

⁴ While there is a time limitation for issuance of certificates of convenience and necessity (CCN) for replacement resources, the PRC is not necessarily obligated to issue actual CCN's for specific replacement resources as part of an abandonment proceeding. PNM's IRP notes that its RFP included projects "that could be proposed for NMPRC approval in later filings."

reasonableness of that balanced draft investment by the Environment Department's inclusion of balanced draft in PNM's air permit.⁵

That PNM's goal is to avoid the contemporaneous and meaningful scrutiny of its abandonment actions contemplated by the 2018 Review Hearing is evident from PNM's argument that the PRC lacks authority to require "pre-approval" of its plans and is limited to after-the-fact enforcement actions.

At the same time PNM acknowledges that § 62-9-5 expressly requires PNM to obtain PRC "permission and approval" for abandonment, it argues the PRC lacks authority to "force PNM *to file* for abandonment of SJGS." Yet, on page 10 of its Petition, PNM again acknowledges that the PRC's "general powers include the authority to issue orders to assure implementation of and compliance with the PUA, to conduct investigations, and conduct necessary hearings in the administration of its authority." PNM bizarrely argues: "Rather than docketing an investigation, the NMPRC has compelled PNM to commence the proceeding through an application." PNM appears to argue the PRC is restricted to after-the-fact penal enforcement actions following a refusal by PNM to comply with an admitted statutory obligation, and is barred from issuing an order requiring PNM to comply with such obligation. PNM seeks to buttress this argument by asserting the

⁵ Case 15-00261-UT and the issue of PNM's balanced draft investment is currently on appeal before this Court in S-1-SC-36,115.

PRC “can assess the prudence of a utility’s actions in determining whether to abandon or continue operating a given recourse” as it did in case 16-00276-UT.

PNM’s arguments misconstrue the PRC’s statutory powers. While the PRC assuredly does have the power to “punish” PNM’s improper actions by denying recovery of imprudent or unreasonable expenses in rates, such measures are ineffective at protecting the rights of intervenors and the public, especially where a statute expressly confers an affirmative duty by the utility to apply for permission from the Commission prior to a decision to abandon becoming effective and irrevocable. By contrast, in 16-00276-UT the Commission assessed whether PNM acted imprudently by failing to consider the alternatives to renewing participation in Four Corner Power Plant (“FCPP”) when faced with the contractual opportunity to discontinue participation in FCPP. In that instance, there was no affirmative statutory duty on PNM to seek PRC approval prior to making that decision as is required here by § 62-9-5.⁶

Furthermore, NMSA 1978, § 62-12-1 provides express authority for the Commission to affirmatively enforce the public utility act and its orders through

⁶ In case 16-00276-UT, the Commission initially found PNM had acted imprudently and denied recovery in rates of PNM capital investments and expenses associated with FCPP. On rehearing the Commission temporarily vacated the finding of imprudence but indicated the issue would be addressed again in PNM’s next rate case. Section H (2)(c) of SB 489 appears to now eliminate the Commission’s power to address PNM’s imprudence at FCPP by requiring that the expenses at issue be included in amounts securitized in bond offerings.

district court action in addition to authority to issue penalties under NMSA 1978, §62-12-4. Such actions may be brought “for the purpose of having such violations *or threatened violations* stopped *or prevented* by either mandamus or injunction.”

PNM’s resort to the similarly absurd claim that the 1/30/19 Order violates PNM’s First Amendment rights by requiring that PNM file an abandonment application required by §62-9-5 betrays the weakness of PNM’s request for issuance of a writ. PNM would have this Court find that despite its status as a regulated utility it can simply choose, as did Bartleby the Scrivener in Herman Melville’s book of the same name, to simply “prefer not” take required actions. As noted above, unlike the employer in Bartleby who is flummoxed by Bartleby’s refusal to work even though he continues to report to his workplace, the Commission has the power to compel PNM to comply with the law and its issuance of the 1/30/19 Order requiring PNM to comply with §62-9-5 prior to initiating further enforcement actions is clearly not barred.

The 1/30/19 Order only requires PNM’s filing to address certain relevant issues. It does not tell PNM what position to take. Taking PNM’s argument literally, the PRC would be required to sit idly by and could not require a utility to make required filings, let alone require information relevant to the inquiry before the Commission. It would have to simply make due with whatever the utility filed. By extension, the use of all government and court forms would be barred as

violative of the First Amendment for requiring the provision of certain relevant information.

As a regulated entity PNM is subject to the Commission's jurisdiction and has an acknowledged duty to make an abandonment filing in a timely manner. The timing of that filing necessarily must comport with the purpose of the statute – to enable the Commission to exercise its authority in a meaningful way – that means with sufficient time to make the required determinations. What PNM asserts here is the right to delay its filing until it has interfered with the Commission's ability to exercise its authority. While the Commission has the authority to enforce its powers through enforcement actions, including substantial fines, those fines may be ineffective as a remedy to protect and put the public and others affected by PNM's breach of its obligations in the same position as they would have been were it not for PNM's breach of its obligations.

In *Public Service Company of New Mexico v. New Mexico Public Service Commission*, 1987-NMSC-124; 106 N.M. 622 (1987), this Court expressly rejected a similar argument by PNM that it could control the timing of its required approvals. In upholding the Commission, the Court deferred to the "Commission's determination that prior approval of Class II transactions is necessary to perform the Commission's investigatory task under Section 62-6-19." 1987-NMSC-124 ¶¶ 13, 14; 106 N.M. at 625. The Court continued: "PNM's interpretation of Section

62-6-19 would strip the Commission of its ability to protect ratepayers from the adverse effects of the holding company restructuring until the impact has occurred. This Court must interpret statutes in a way which will not render their application unreasonable nor defeat the intended objective of the legislature.” Id.

Here, PNM is again seeking to avoid applying for approval from Commission prior to the point where circumstances will render its decision to abandon effectively irrevocable. PNM’s position would effectively render moot the arguments of those who might argue against abandonment of SJGS by asserting SJGS remains the most cost effective asset and should have remained open.

PNM argues the order would “require PNM to apply to abandon a necessary resource before PNM can demonstrate continued service is unwarranted and it no longer requires use of the facility. PNM tries to portray abandonment as something the Commission is forcing PNM to do, that it is not “voluntary.” This ignores fact that PNM has acknowledged it is not merely “planning” to abandon SJGS. It has stated that there are no circumstances under which it would continue to operate SJGS and it s in fact already taking concrete steps toward abandonment of its own interest.

PNM’s assertion that the Commission’s 1/30/19 Order improperly disregards prior policies concerning the requisite sufficiency of an abandonment

application. Yet, inherent in PNM's argument is the fact that that PNM itself identifies these as Commission policies which are by nature discretionary. Moreover, this is not an issue implicating the prohibition in *Hobbs Gas Company v. New Mexico Public Service Commission*, 1993-NMSC-032, 115 N.M. 678, 858 P.2d 54 against the Commission not changing procedures "arbitrarily or capriciously ... without good reasons." Here PNM was under an express obligation to make the required filing and invoked the Commission's discretion to avoid doing so. Its 2017 IRP acknowledged that it should have completed review of the RFPs for replacement resources. The Commission's act in requiring PNM to file and update its assessment of abandonment costs as that process was made directly in response to PNM's failure to be ready to perform its obligations under the Modified Stipulation to participate in the 2018 Review Hearing and to avoid frustration of the rights of the other intervenors by delaying the proceeding as discussed above. PNM's concern that the Commission is setting it up for failure and might dismiss its application for incompleteness is meritless given the Commission's express order to do so. PNM would clearly have an adequate remedy at law on appeal under such circumstance.

Moreover, PNM's asserted inability to proceed with its obligations to participate in the 2018 Review Hearing in a timely manner appears to stem from PNM's preference to seek legislative changes to existing law applicable to its

proposed abandonment of the SJGS coal plant and thereby relieve itself of PRC oversight of its stranded cost recovery in connection with the early closure of SJGS. PNM itself introduced the issue of the legislation it has promoted into this matter. The Commission merely points out that this Court should bear PNM's motivations in mind when considering the basis for PNM's claimed inability to proceed with the 2018 Review Hearing as contemplated by the Modified Stipulation.

While PNM asserts the PRC has timed its 1/30/19 Order so as to intentionally interfere with PNM's legislative efforts to abrogate PRC authority, the facts above belie this claim. PNM was under an existing requirement by the Modified Stipulation to participate in the 2018 review Hearing. It was its own delay in making the 12/31/18 Filing that placed the Commission's 1/30/19 Order action initiating the Review Hearing in conflict with the 2018 Legislative session. Moreover, throughout the legislative session, the Commission avoided taking any position with regard to SB 489. This is consistent with the Commission's rejection of efforts by intervenors to make PNM's legislative activities during the 2018 Legislative session an issue in case 17-00174-UT.

Finally, PNM's assertion that a writ should issue based on the Commission's requirement that PNM provide license so that all parties may be able to interpret PNM's modeling performed with proprietary Strategist modeling software is

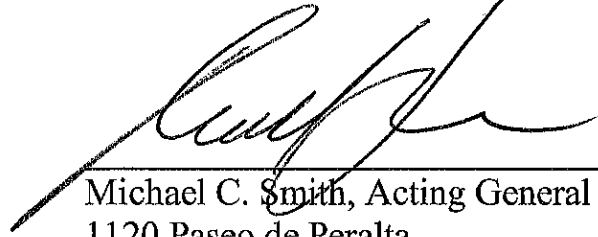
merely an effort to resolve a continuing issue between PNM and intervenors. The Modified Stipulation similarly sought to address the fact that neither the Commission nor the intervenors have been able to adequately assess PNM's claims regarding its evaluation of the cost effectiveness of various resources by requiring that PNM perform modeling runs for intervenors. The Commission's order does not place any additional burden on PNM itself since PNM routinely recovers its litigation costs from ratepayers.

CONCLUSION

It is PNM's request for a writ that seeks to alter the existing status quo under the Modified Stipulation and Final Order in 13-00390-UT. PNM's actual motivation is evident in its argument that a writ is proper to prohibit the PRC from enforcing existing statutory and contractual obligations under the stipulation in favor of what at that time of the 1/30/19 Order were non-existent proposed changes to the law. Accordingly, the PRC's 1/30 Order in no way exceeds PRC's constitutional and statutory authority, compels any speech by PNM in violation of the First Amendment or compels PNM to abandon any of its interest in SJGS at all. This Court should deny PNM's petition for a writ and permit the Commission to continue to exercise its authority by considering the effects of SB 489 on the proceeding ordered by its 1/30/19 Order with the input of the parties.

Respectfully submitted,

NEW MEXICO PUBLIC REGULATION COMMISSION

A handwritten signature in black ink, appearing to read "Michael C. Smith", is written over a horizontal line.

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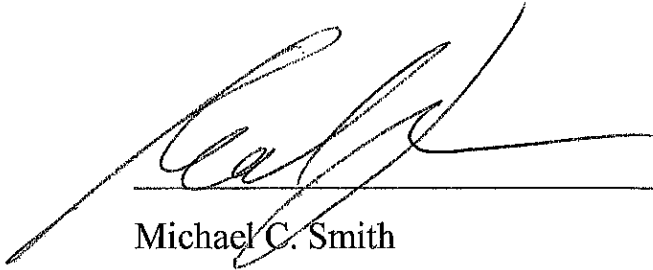
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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2019, a true and correct copy of the foregoing Response of NMPRC in Opposition to Verified Petition for Writ of Mandamus was electronic filed in the Supreme Court's Odyssey filing system, which in turn caused all counsel of record to be electronically served.



Michael C. Smith

STATEMENT OF COMPLIANCE

The word count of the body of this Brief is 4,326 words (as obtained using Microsoft Word, 2010 Version). *See*, NMRA 12-318(F)(3).