


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**PUBLIC SERVICE COMPANY
OF NEW MEXICO,**

Petitioner,

v.

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**

**NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO
PNM'S EMERGENCY VERIFIED PETITION
FOR WRIT OF MANDAMUS, REQUEST FOR EMERGENCY STAY,
AND REQUEST FOR ORAL ARGUMENT**

Mariel Nanasi
Attorney for New Energy Economy
343 East Alameda St.
Santa Fe, NM 87501
505-989-7262

March 19, 2019

TABLE OF CONTENTS

STATEMENT OF COMPLIANCE.....iv

INTRODUCTION.....1

I. Standard of Review: The Commission’s Order is reasonable and lawful, and is not fraudulent, arbitrary or capricious and thus, must stand.....6

II. The Public Regulation Commission has the Constitutional authority and responsibility to regulate monopoly electric utilities.....7

III. Because the Public Regulation Commission is constitutionally authorized to regulate the closure of the SJGS, it is not usurping the legislature’s authority in doing so.....13

IV. The Public Regulation Commission Is Not Violating a Regulated Utilities Free Speech Rights By Ordering It To File Pleadings and Provide Information Required by Law.....16

V. PNM’s Application is just the first step in this process, not the last, and the decision will not be made on the application alone.....18

VI. PNM will have to provide the parties access to the information it relies on to make decisions about abandoning the coal plant.....20

VII. PNM is not entitled to any stay of the Commission’s Order.....21

TABLE OF AUTHORITIES

Federal Case

Consolidated Edison Co. of N.Y., Inc. v. Federal Energy Reg. Comm'n,
823 F.2d 630, 637 (D.C. Cir. 1987).....8

New Mexico Constitution

N.M. Const., art. XI, Section 2 7
N.M. Const. art. IV, Section 34 15

New Mexico Cases

Behles v. New Mexico Pub. Serv. Comm'n (In re Timberon Water Co.),
114 N.M. 154, 836 P. 2d 73, 75 (1992) 6
El Paso Elec. Co. v. N.M. Pub. Reg. Comm'n,
2010-NMSC-048, 149 N.M. 174 12
Elane Photography vs. Willock,
2013-NMSC-040, 309 P.3d 53 (2013)..... 17
Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n,
1993-NMSC-032, 115 N.M. 678.....6, 18
In re Public Service Co. of New Mexico,
Case No. 2382, 166 P.U.R. 4th 318 (1995)..... 4
In re. Pub. Service. Co. of New Mexico,
1991-NMSC-083, 815 P.2d 1169 1, 8
Llano, Inc. v. Southern Union Gas Co.,
75 N.M. 7, 399 P. 2d 646 (1964)..... 6
Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission,
90 N.M. 325, 563 P. 2d 588 (1977) 7, 8
New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n,
2018 NMSC-0243, 8,14,15
PNM v. PSC,
1991-NMSC-083, 815 P.2d 1169 (1991)..... 19
Qwest v. NMPRC,
2006-NMSC-042..... 8
State ex rel. Sandel v. N.M. Pub. Util. Comm'n,
1999-NMSC-019, 127 N.M. 272 16
Tenneco Oil Co. v. N.M. Water Quality Control Comm'n,
1986-NMCA- 033, 105 N.M. 708 22

New Mexico Regulatory Cases

NMPRC Case No. 13-00390-UT3, 5, 19, 21
NMPRC Case No.15-00205-UT..... 4
NMPRC Case No.15-00261-UT..... 15, 19
NMPRC Case No.15-00312-UT..... 3
NMPRC Case No.16-00105-UT..... 4
NMPRC Case No.16-00276-UT..... 15, 19
NMPRC Case No.17-00129-UT..... 3, 4
NMPRC Case No.18-00099-UT..... 4

New Mexico Statutes And Rules

NMAC 1.2.2.12(B) 18
NMAC 1.2.2.21(B)(3)..... 18
NMAC 17.1.2.9 (A) 19
NMSA 1978, §8-8-4(B)(5), (7) (1999) 16
NMSA 1978, §62-1-1 9
NMSA 1978, §62-6-4 (2003) 16
NMSA 1978, §62-9-1..... 10
NMSA 1978, §62-9-2..... 11
NMSA 1978, §62-9-5..... 8, 9, 12, 17
NMSA 1978, §62-9-6..... 10
NMSA 1978, §62-10-2 (1941) 16

Case From Another Jurisdiction

City of Corpus Christi v. Public Utility Com'n, 51 SW 3d 231, 239 - Tex: Supreme Court, 2001 13

STATEMENT OF COMPLIANCE

In conformity with Rule 12-504(G) NMRA, the body of this Petition contains 5,992 words.

INTRODUCTION

New Energy Economy opposes the Emergency Writ of Public Service Company of New Mexico (“PNM”), a regulated monopoly utility, because fundamentally the company seeks to avoid New Mexico Public Regulation Commission (“PRC” or “Commission”) oversight and skirt the adjudicatory process whose constitutional purpose is to evaluate the abandonment/procurement of resources, and their related financial and environmental ramifications, on behalf of the public interest. The Commission’s supervision of “public utility facilities is the cornerstone of New Mexico’s regulatory scheme. In return for monopoly market power in its industry, the utility must submit to Commission regulation.” *In re. Pub. Serv. Co.*, 1991-NMSC-083, 815 P.2d 1169, 1176-1177.

PNM does not dispute that it is abandoning the San Juan Generating Station (“SJGS”) in 2022; yet it has filed this petition as a last ditch effort to avoid the constitutionally mandated regulatory authority of the PRC to oversee this abandonment, along with the financial consequences, including clean up costs, and procurement of the replacement resources that will be necessary. Indeed, while PNM concedes that the PRC has broad regulatory authority over the operations of the utility company to ensure that the actions of this regulated utility are in the best interest of the state of New Mexico and ratepayers, it makes a series of meritless

arguments to attempt to curtail this most important of all regulatory proceedings from under the PRC.

It is critically important that this abandonment case proceed with no further ado in order to ensure that the people of New Mexico, and particularly the people most impacted by both the operation and the closure of the San Juan coal plant, have the opportunity to fully explore and understand the impact of the coal plant's operations and closure, and to develop the best plan for New Mexico moving forward without SJGS. This is a massive moment in New Mexico's history - with the potential for enormous benefits for the health and economy of our state and, literally, the earth. We must proceed transparently, carefully and deliberately in order to achieve this potential. PNM seeks to:

- 1) abandon its coal shares at the San Juan Generating Station ("SJGS");
- 2) obtain 100% financial remuneration from ratepayers in cost recovery for SJGS undepreciated investments;
- 3) insulate the corporation from *any* future plant decommissioning and mine reclamation costs beyond 2022 – meaning PNM will request full ratepayer recovery for any clean up costs even though it should have recouped these expenses beforehand when the plant was “used and useful”¹ and there is no blanket post abandonment cost reimbursement

¹ “[I]t is not clear that full recovery of the ... undepreciated costs ... and a return

entitlement because it offends the generally accepted regulatory principle of “cost causation”;²

- 4) obtain a certificate of convenience and necessity (“CCN”) for replacement power resources if PNM can meet the burden of proving that its requested resources: a) provide a “net public benefit” and; b) that the resources are the most cost effective among feasible alternatives.³

on those costs until the costs are fully recovered would be reasonable. The existing meters would no longer be used to provide service and would therefore no longer be used and useful. PNM is correct that the used and useful concept in New Mexico is flexible and that it does not *per se* require the total exclusion of the costs of non-used and useful plant from rates. But the ratemaking treatment for such plant must still fairly balance the interests of investors and ratepayers. In the San Juan abandonment case, for example, the Commission approved a stipulation that provided for PNM’s recovery of 50% of the undepreciated costs of the two San Juan units it proposed for abandonment -- not the 100% recovery PNM seeks here. See Final Order, Case No. 13-00390-UT, 12/16/2015, pp. 21-22.” Case No. 15-00312-UT, Recommended Decision, 3/19/2018, p. 73, unanimously approved Final Order, 4/11/2018.

² The cost of the facility extension or upgrade shall be paid by the customer and included in rates if approved by the Commission within the time period that the asset is used. 15-00312-UT, Recommended Decision, p.76, unanimously approved by Final Order, 4/11/2018. (“Ratemaking treatment outside of a rate case is disfavored as being contrary to the policy of piecemeal ratemaking.”)

³ The generally-stated burden of proof in a CCN case is to show by a preponderance of the evidence that granting a CCN results in a net benefit to the public. *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm’n*, 2018- NMSC-024, ¶14; Case No.13-00390-UT, Final Order at p.4, (12-16-15. Additionally, a utility must show that the resource it proposes is the most cost effective among feasible alternatives. Case No.17-00129-UT, Recommended Decision, p. 65,10/17/2017, Final Order Partially Adopting Recommended Decision, 11/15/2017, overturned on other grounds. This bedrock consumer protection principle has been articulated and reiterated by the PRC repeatedly: 15-00312-UT, 3/19/2018, Recommended Decision, p. 104, unanimous approval in Final Order,

The Commission made it clear years ago in another PNM case with environmental and long-term cost implications for its customers that a utility cannot satisfy its burden of proving that a particular resource be approved unless it identifies and compares its preferred resource against alternative resources. Only then can it provide the Commission, the public, and parties with reliable, non-speculative evidence, that its proposed resource is its most cost-effective option amongst those alternatives. *In re Public Service Co. of New Mexico*, Case No. 2382, 166 P.U.R. 4th 318 (1995), Recommended Decision, p. 38, adopted by Final Order. Having adequate time to evaluate replacement power requests, among other complex decisions, is precisely why the PRC is proactively exercising its duty to ensure comprehensive due diligence. Only with this kind of participation and involvement can it be said that the PRC can fulfill its obligation, consistent with the public interest, to ensure that its decisions provides tangible and quantifiable benefits to ratepayers.

No more time should be given to PNM's obfuscation and instead, this case should proceed according to the PRC's procedural schedule⁴ and mandates of the

4/11/2018. ("The failure to evaluate alternatives prevents the Commission from determining that PNM's plan is the most cost effective option of feasible alternatives."); 16-00105-UT, Final Order, 5/24/2017, ¶10; 15-00205-UT; 17-00129-UT, 18-00099-UT; *Re Public Service Company of New Mexico*, Case No. 2382, 166 P.U.R.4th 318, 337, 355-356 (1995).

⁴ This Court intervened and granted PNM a temporary stay to file its abandonment application; this Court should remand, reiterating PRC authority to "continue

PRC which has the authority, expertise, and constitutional obligation to regulate PNM's proposed abandonment of the San Juan Generating Station.

This case centers on PNM's decision to abandon the final two units at SJGS, a coal fired power plant in San Juan County. PNM closed two of the four units of the power plant in 2017 and agreed in a stipulated order adopted by the PRC to make a filing by no later than December 31, 2018 announcing its intentions for the remaining two units (pursuant to ¶19 of the Modified Stipulation in PRC Case No. 13-00390-UT). PNM made that filing on the very last day (12/31/18) and stated that it had already taken steps to abandon the plant by giving notice to other SJGS co-owners and the San Juan Coal Company that it would not extend its participation in SJGS or renew the coal supply contract. Moreover, as noted in the Commission's 1/30/2019 Order, p.6, PNM reported that the 12/31/18 filing became a "triggering event" that required PNM to record a pre-tax impairment of its investment in SJGS and required that PNM re-measure its liability for coal mine reclamation. With this information, the Commission decided to docket an abandonment case, which will begin discovery and investigation process into PNM's actions, and the Commission ordered PNM to file its initial application for abandonment by March 1, 2019. Rather than complying with that Order, PNM first

regulation" of monopoly electric utilities and, here, require PNM file for abandonment because the PRC deems it necessary to fulfill its obligation to the public interest.

filed a motion for re-consideration and has now filed its so-called “emergency” petition, attempting to circumvent or, at the very least, delay, the regulatory authority of the PRC at the same time that PNM is moving along a path that has enormous consequences for the future of our state.

I. Standard of Review: The Commission’s Order is reasonable and lawful, and is not fraudulent, arbitrary or capricious and thus, must stand.

This Court has clearly set forth the complete standard of review of a Public Regulation Commission’s Order in *Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n*, 1993-NMSC-032, 115 N.M. 678:

Judicial review of a Commission’s order is limited to a determination of whether the Commission acted fraudulently, arbitrarily, or capriciously, and whether the Commission’s order is supported by substantial evidence. *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 11-12, 399 P.2d 646, 651 (1964). The burden is on [petitioner] to show that the order of the Commission is unreasonable or unlawful. Section 62-11-4; *Behles v. New Mexico Pub. Serv. Comm’n (In re Timberon Water Co.)*, 114 N.M. 154, 156, 836 P.2d 73, 75 (1992). This Court has no power to modify the order appealed from, but “shall either affirm or annul and vacate the same.” Section 62-11-5... We are “powerless to change, modify or amend an order by holding part of it lawful and reasonable and another part or parts unlawful or unreasonable.” *Id.* The limitations on our power to amend or modify Commission orders are soundly grounded in the separation of powers. Amending or modifying Commission orders would be substituting our judgment for that of the Commission, and we thus would be acting legislatively and not judicially. *Id.* at 169, 241 P.2d at 836.

PNM has not shown, and cannot show, that the Commission has acted unlawfully, or unreasonably, let alone arbitrarily or capriciously. Instead, the Commission has issued a careful, well-reasoned Order that explains its position and gives thoughtful instructions on how this case will proceed.

II. The Public Regulation Commission has the Constitutional authority and responsibility to regulate monopoly electric utilities.

Article XI, Section 2 of the New Mexico Constitution, entitled “Responsibilities of Public Regulation Commission,” provides:

The public regulation commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; and other public service companies in such manner as the legislature shall provide. The public regulation commission shall have responsibility for regulating insurance companies and others engaged in risk assumption as provided by law until July 1, 2013. (As added November 5, 1996; as amended November 6, 2012.)

The Constitutional mandate is clear: it is the Public Regulation Commission’s duty to regulate electric utilities. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission*, 90 N.M. 325, 563 P.2d 588, 593 (1977) (The words “shall ... be charged with the duty” indicate that the provision is mandatory rather than discretionary.) When reviewing the duties of the

Commission, the New Mexico Supreme Court found that this duty was not only “clear,” but “all-inclusive,” stating:

It is difficult to conceive of a more clear and all-inclusive grant of power to a governmental agency. The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a “thumbs-up or thumbs-down” judgment after the dust of battle settles in the arena.

Id. at 594.

PNM has acknowledged that “the New Mexico Supreme Court has held that the Legislature’s delegation of authority over utility abandonment is broad.” (PNM’s Exhibit B, PNM’s Motion for Rehearing, at p.9) The last time PNM challenged the Commission’s authority to regulate abandonment, and specifically NMSA §62-9-5, the New Mexico Supreme Court held that the Commission was required to continue regulation and “by delegating abandonment power to the Commission in such broad terms, our legislature expected that the Commission would develop an appropriate test to fit the regulatory climate.” *In re. Pub. Serv. Co.*, 1991-NMSC-083, 815 P.2d 1169, 1172. (“The issue before us is not, as PNM would have it, whether the Commission may consider factors not expressly required by the statute, but ‘whether its *reasons* for doing so in its chosen manner are permissible ones.’” *citing, Consolidated Edison Co. of N.Y., Inc. v. Federal Energy Reg. Comm’n*, 823 F.2d 630, 637 (D.C. Cir. 1987)

. The Commission’s oversight of public utility facilities and associated ratemaking determinations are “accorded considerable deference” because “[t]he PRC’s decisions requir[e] expertise in highly technical areas.” *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm’n*, 2018- NMSC-024, ¶25. *See also, Qwest v. NMPRC*, 2006- NMSC- 042, ¶¶ 20, 25-27, 143 P.3d 478; *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission*, 90 N.M. 325, 563 P.2d 588, 593

(1977).

Thus, contrary to PNM's position, the Commission clearly has the authority to docket this abandonment case and order it to proceed. Acting pursuant to its constitutional duty and the regulatory framework set forth in the Public Utility Act, NMSA 62-1-1 *et seq*, the Commission docketed an abandonment case to ensure a timely, effective, and fair process in this critical event in New Mexico's energy future.

PNM relies on the specific section of the public utility act dealing with abandonment, NMSA 62-9-5, to argue that the Commission does not have the authority to order PNM to file an abandonment application; yet there is nothing in the statute to support its position. The statute reads, in full:

No utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission, or any service rendered by means of such facilities, without first obtaining the permission and approval of the commission. The commission shall grant such permission and approval, after notice and hearing, upon finding that the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility; provided, however, that ordinary discontinuance of service or use of facilities for nonpayment of charges, nonuser or other reasons in the usual course of business shall not be considered as abandonment. In considering the present and future public convenience and necessity, the commission shall specifically consider the impact of the proposed abandonment of service on all consumers served in this state, directly or indirectly, by the facilities sought to be abandoned.

This statute simply states that PNM cannot abandon SJGS without the permission of the PRC, and it sets forth the standard for the PRC to apply when considering whether to permit abandonment. There is nothing in the statute that describes the procedure to make this determination, except that notice and a hearing are required. There is nothing that says that the PRC cannot order PNM to file an abandonment application once PNM has made it clear to the Commission that it intends to proceed with one. Basically, PNM's dispute is one of timing – it does not want to file the abandonment application now; it wants to wait. And rather than just saying that, it is couching its argument in a supposed lack of authority of the PRC to order PNM to proceed now so that the PRC can timely control this process and make sure that all parties have the opportunity to fully and duly consider the many complex issues involved. PNM's first attempt to maneuver around §62-9-5, falls flat, with a simple reading of the statute itself.

Next, PNM turns to NMSA 62-9-6 for the incorrect proposition that PNM must “initiate” the filing and that the PRC may only “review” a filing; nothing could be further from the truth about the powers of the PRC set forth in NMSA 62-9-6. That statute, cited below in full, gives the PRC broad authority to regulate and issue orders that are “just and reasonable”:

Before any certificate may be issued under Sections 62-9-1 through 62-9-6 New Mexico Statutes Annotated, 1978 Compilation, a certified copy of its articles of incorporation or charter, if the applicant be a corporation, shall be on file in the office of the commission. Every applicant for a certificate shall

give such reasonable notice of its application as the commission may require and shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the consent and franchise from the municipality wherein construction and operation is proposed. The commission shall have power, after hearing, to issue said certificate, as prayed for, or to refuse to issue the same, or to issue it for the construction or operation of a portion only of the contemplated facility, line, plant or system, or extension thereof, or for the partial exercise only of said rights or privilege, and may attach to the exercise of the rights granted by said certificates such terms and conditions in harmony with the Public Utility Act, as amended, as in its judgment the public convenience and necessity may require. Except as otherwise provided in Section 62-9-2 New Mexico Statutes Annotated, 1978 Compilation, in determining whether any certificate shall issue as prayed for, the commission shall give due regard to public convenience and necessity including, but not limited to, any reasonable service agreement between the applicant and another utility and unnecessary duplication and economic waste. Whenever a public utility is engaged or is about to engage in construction or operation without having secured a certificate of public convenience and necessity as required by the provisions of the Public Utility Act, as amended, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the public utility complained of to cease and desist from such construction or operation until the commission makes and files its decision on said complaint or until the further order of the commission. The commission may after hearing, after reasonable notice, make such order and prescribe such terms and conditions in harmony with the Public Utility Act, as amended, as are just and reasonable.

PNM protests that abandoning the plant must be a voluntary act on its part.

PNM has made it clear that it is abandoning the plant. It has done that voluntarily.

Now, the Commission has the authority to oversee and manage that action to ensure that PNM complies with the law in doing so. If the way in which PNM intends to go about the abandonment and replace the power is not in the best interest of the state, the PRC can require PNM to proceed in a different way as

long as it is within the public interest. In exercising its broad authority, certainly the PRC has the power to order that the process begin, now that PNM has made its intentions clear. That is all that PRC has ordered – that the process begin – with the filing of the application.

PNM recognizes that “the NMPRC can assess the prudence of a utility’s actions in determining whether to abandon or continue operating a given resource” (Petition at p.10), while at the same time it refuses to recognize that the PRC can set the schedule for making that assessment. Likewise, while PNM recognizes that the legislature has granted the PRC authority to regulate abandonment proceedings in 62-9-5, PNM relies on a wholly irrelevant case, *El Paso Elec. Co. v. N.M. Pub. Reg. Comm’n*, 2010-NMSC-048, ¶6, 149 N.M. 174, for the proposition that the court does not have to give deference to the PRC when it is acting outside of its authority. Petition at pp.10-11. The *El Paso Electric* case simply held that the PRC does not have authority to regulate franchise fees and franchise agreements that utility companies make with local governments. Again, since the PRC does have authority to regulate abandonment proceedings, it also has the authority to control its docket and the timing and process involved in those proceedings, such as ordering that the proceedings commence once a utility has made its intention to abandon clear and has already taken steps towards abandonment.

III. Because the Public Regulation Commission is constitutionally authorized to regulate the closure of the SJGS, it is not usurping the legislature's authority in doing so.

PNM's argument that the PRC should wait for potential action from the legislature before moving forward on this case is unavailing. Nothing about this case precludes PNM from lobbying the legislature for laws that it believes benefits it. And nothing about this case precludes the legislature from passing laws about energy policy in New Mexico, such as increasing the renewable energy standard, amending the public utility act so that local governments can produce their own power, and creating financing tools, like "securitization".⁵ However, if, the legislature passes a law that impinges on the Constitutionally mandated duty of the PRC to regulate public utilities, and then it would be the legislature, not the PRC, that is violating the Constitution.

Not only does the Constitution provide the Commission with the duty to regulate public utilities (see Section I above), but the Constitution also makes it clear that the legislature must not impinge on the decision making authority of a

⁵ *City of Corpus Christi v. Public Utility Com'n*, 51 SW 3d 231, 239 - Tex: Supreme Court, 2001. (As part of that restructuring, the PURA permits existing utilities to recover "regulatory assets" and "stranded costs" through securitization financing. Securitization is accomplished through a financing order issued by the Public Utility Commission that authorizes a utility to issue a financing order that establishes "transition charges" to be paid by retail customers in a utility's service area that allow recovery of "qualified costs.")

duly authorized adjudicating body. According to Article IV, Section 34 of the New Mexico Constitution:

No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

Thus, while the legislature is mandated to set the general framework within which the Commission shall regulate utility companies, the legislature does not have the authority or the expertise to determine the outcome or the procedure of a pending case. Any legislation that attempts to take that authority away would be unconstitutional. Rather than accusing the Commission of having ulterior motives in docketing this case, PNM should recognize the constitutional duty and authority and expertise of the Commission to regulate.

To put it another way, contrary to what PNM argues about the Commission usurping the legislature's role to enact "energy policy," the legislature may continue to enact laws that are simply about "energy policy" (i.e., increasing the renewable portfolio standard). However, the legislature cannot and should not enact laws that influence or determine the outcome of a case, without fact finding in matters requiring expertise,⁶ such as a law that removes Commission oversight and requires 100% cost recovery for undepreciated assets regarding one or both of

⁶ *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018- NMSC-024, ¶25.

PNM's coal facilities,⁷ or PNM entitlement to 100% cost recovery for any decommissioning costs associated with a coal facility. Those are not policy issues – those are fact specific issues which require “substantial evidence” consistent with standard due process requirements (discovery, expert witness testimony, cross-examination, briefing, etc.) in order to form the basis of a well-developed record that are well within the purview of the Commission and would impact other pending cases, not just this abandonment case, that it alone has the expertise to decide.

⁷ This is particularly relevant where the PRC has already ruled that in PNM's 2019 rate case the question of whether PNM's investment in the Four Corners Power Plant (“FCPP”) was prudent and concomitant cost recovery or disallowance is squarely at issue. “The issue of PNM's prudence in continuing its participation in FCPP shall be deferred until PNM's next rate case.” NM PRC Case No. 16-00276-UT, 1/10/2018, p.35, B. Given that only “prudently incurred investments” are ripe for cost recovery from ratepayers, (15-00261-UT, Corrected Recommended Decision, 8/15/16, pp.88-89) there is a possibility that the PRC might determine that consumers are *not* responsible for *any* undepreciated FCPP investments at all because PNM made its 2013 re-investment in FCPP without *any* financial analysis.

SB 489 states: “no order of the commission shall disallow recovery of any undepreciated investments or decommissioning costs associated with the facility.” p.82. This PNM financial giveaway will mean that PNM will be paid in full for its imprudent investments and the PRC authority will be nullified regardless of *any* investigation or regulatory oversight. This is a particularly problematic part of the law because it means that there won't be any corporate accountability - a “no matter what” consumers pay and PNM goes Scott free clause. This changes and undermines current law, and flies in the face of the “substantial evidence” standard set by the New Mexico Supreme Court. *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018- NMSC-024, ¶¶24,25.

IV. The Public Regulation Commission Is Not Violating a Regulated Utilities Free Speech Rights By Ordering It To File Pleadings and Provide Information Required by Law.

Having exhausted its argument that the PRC does not have the statutory authority to act as it has, PNM turns to an even weaker argument that the PRC is violating PNM's free speech rights by ordering it to file a pleading containing certain information. If such action is a violation of free speech rights, then every time a court orders a party to file a pleading, make an explanation or defend its position, the court would be violating the First Amendment. As PNM acknowledges in its writ:

In determining the scope of the NMPRC's authority, the Court looks to the PUA as a whole. *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, 127 N.M. 272, ¶13. PNM acknowledges the PRC has general and exclusive power and jurisdiction to regulate and supervise public utilities with respect to rates and service. NMSA 1978, §62-6-4 (2003). These 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. NMSA 1978, §8-8-4(B)(5), (7) (1999); NMSA 1978, §62-10-2 (1941). Petition at p.10. Having recognized the broad authority of the PRC to regulate PNM, it is strange that PNM then cites a series of First Amendment cases that have nothing to do with a court proceeding, let alone a

Commission proceeding, and argues that the PRC cannot order PNM to speak, file pleadings or defend its actions. How else can the PRC regulate?

The abandonment statute (NMSA §62-9-5) requires the PRC to determine whether “the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility” and “the impact of the proposed abandonment of service on all consumers served in this state, directly or indirectly, by the facilities sought to be abandoned.” Thus, the PRC can and must order PNM to produce information relevant to those determinations, just as it has here.

If one is to take PNM’s First Amendment argument seriously enough to analyze it, a good place to start is with the case of *Elane Photography vs. Willock*, 2013-NMSC-040, 309 P.3d 53 (2013), in which this Court found that the New Mexico Human Rights Act did not violate a photographer’s First Amendment right against compelled speech by requiring that the photographer take wedding photos of a same sex couple just as it would take wedding photos of a different sex couple.

The compelled-speech doctrine on which [petitioner] relies is comprised of two lines of cases. The first line of cases establishes the proposition that the government may not require an individual to speak the government’s message. The second line of cases prohibits the government from requiring a private actor to host or accommodate another speaker’s message. (citations and quotations omitted).

Id. at ¶24.

Clearly, the PRC is neither requiring PNM to speak the government's message, nor requiring PNM to accommodate another speaker's message. PNM has stated its intention to abandon SJGS. Now, it must attempt to do so in compliance with the law, which will be determined by the PRC, after the PRC has collected the information necessary to make that determination. None of the cases cited by PNM have anything to do with a party being ordered to speak in a legal proceeding in order for a decision making body to make a determination that it is required to make. PNM's First Amendment argument is meritless.

V. PNM's Application is just the first step in this process, not the last, and the decision will not be made on the application alone.

PNM's tortured argument that the PRC is violating its own rules by making PNM file an abandonment application, while at the same time acknowledging that the PRC has indicated its willingness for PNM to amend its application, is equally meritless.⁸ PNM refers to three PRC rules, and two of them NMAC 1.2.2.21(B)(3), concerning Petitions for Declaratory Orders, and NMAC 1.2.2.12(B) concerning

⁸ PNM relies on *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, 115 N.M. 678 for this proposition, yet *Hobbs Gas* is irrelevant to the situation at hand. In *Hobbs Gas*, the Court held that "a regulatory body cannot, without prior notice, abruptly depart from past practice on which the regulatee has relied and impose a retroactive refund requirement upon the regulatee;" and that "[t]he Commission acted arbitrarily when, in calculating the amount of gas cost which cannot be passed on in its PGAC, it mandated a purchase/sale ratio of 1.042067, which imputes a 4.2 percent line loss."

motions are irrelevant. The remaining Rule, NMAC 17.1.2.9 (A) does concern an application for a Certification of Public Convenience and Necessity, which will be required here, and it does say that the application must be complete. However, as PNM admits, the PRC has acknowledged that the application can be amended, and PNM has certainly amended previous (rate case and CCN) applications many times.⁹ It is disingenuous for PNM to refer to two cases in which abandonment was denied because it could not identify replacement resources, since those cases were not denied due to an incomplete initial application. In one case mis-relied on by PNM, *PNM v. PSC*, 1991-NMSC-083, 815 P.2d 1169 (1991), PNM filed an application for abandonment and a hearing was held over 5 months later, where PNM was permitted to introduce evidence. The Court denied the abandonment based on the evidence at the hearing, not the evidence in the initial application. *Id.* at pp.1171-1172. Likewise, in the other case mis-relied on by PNM, Case No. 13-00390-UT, *Certification of Stipulation*, at 121-22 (4/8/2015), PNM's request was denied years after the initial application was filed, and after PNM had multiple opportunities to amend, and indeed, did amend its application over and over. Thus, there is nothing in either case cited by PNM that indicates that PNM will be forced to rely on its initial application to support its abandonment case.

⁹ See, 13-00390-UT– PNM amended and supplemented its testimony for SJGS abandonment and CCN application more than ten times; 15-00261-UT (PNM rate case); 16-00276-UT (PNM rate case).

Similarly, PNM argues that it is “impossible” to file an application because it has bids out, it is reviewing proposals and it wants to know if new legislation passes before it files; however, PNM again neglects to mention that it can certainly amend its application in the future and that the PRC and the intervening parties have a legitimate concern that if this case does not get underway now, the state will be locked into PNM’s decision because there will be no time to advance alternative scenarios before the coal plant closes. Indeed, PNM’s argument that it cannot file now because it has not yet identified replacement resources is exactly why PNM should file now – so that the PRC and intervening parties can have some say into what those replacement resources are before PNM says it is too late to do anything different than its original proposal.

Again, nothing that PNM raises precludes the PRC from ordering that this abandonment proceeding get underway, with the filing of an application from PNM which can be amended down the road.

VI. PNM will have to provide the parties access to the information it relies on to make decisions about abandoning the coal plant.

Next PNM complains about having to spend less than one million dollars to pay licensing costs so that intervenors and stakeholders can have access to the computer models used by PNM in support of its filing, including its decisions to abandon its interest in SJGS to serve New Mexico ratepayers and its selection of

proposed replacement resources. Petition at pp. 20-21. This is standard procedure in a case of this magnitude where literally hundreds of millions of dollars are on the line and will bind ratepayers for energy replacement power resource decisions for decades to come. Stakeholders must have the ability to test and examine PNM's models and assumptions that lead it to make its decisions about abandonment and energy replacement power resources. Contrary to what PNM says in its writ, the PRC has not ordered that PNM pay for the costs of other parties modeling. Instead, it has simply ordered that the parties have the ability to review PNM's models. PNM also neglects to mention that it previously stipulated to this arrangement in ¶19 of the Modified Stipulation Case No. 13-00390-UT where PNM agreed to provide the signatories reasonable access to inputs, assumptions and constraints regarding economic and energy modeling runs and required PNM to perform a reasonable number of those runs using practical assumptions.

VII. PNM is not entitled to any stay of the Commission's Order.

While this Court has already granted a partial stay to PNM during the briefing period, NEE respectfully asserts that PNM is not entitled to a stay and that the stay should be lifted because PNM's petition is without merit and the public interest will be harmed if PNM is not obliged to comply with the PRC's regulatory powers.

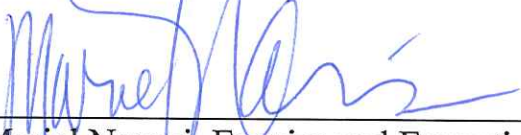
In determining whether to exercise its discretion and grant a stay from an

order of an administrative agency, the Court considers whether the applicant has shown: (1) a likelihood that the applicant will prevail on the merits; (2) irreparable harm to the applicant if the Court does not grant the stay; (3) no substantial harm will result to other interested persons; and (4) no harm to the public interest will ensue. *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, ¶10, 105 N.M. 708. As explained more fully above, PNM should not prevail on the merits of its petition since all of its arguments are without basis. Moreover, PNM will not suffer any harm by simply complying with the PRC's Orders. PNM should file its abandonment application as ordered, comply with discovery orders and participate openly and fully in the abandonment proceedings which will be conducted by the PRC. If PNM is permitted, as it requests, to proceed with its abandonment planning without filing an abandonment application, other interested parties and the public will be substantially harmed. Interested parties will have no way to know what PNM is doing, will not have access to PNM's models or replacement power proposals, and will not have the opportunity to critique or object to proposals while there is still time to present alternative proposals.

WHEREFORE, this Court should not allow PNM to make an end-run around the constitutionally vested power of the Commission, and take advantage of this Court's largess whenever it is nervous about the Commission exercising its authority and obligation to continue regulation on behalf of the public interest.

Respectfully submitted this 19th day of March, 2019.

NEW ENERGY ECONOMY



Mariel Nanasi, Esquire and Executive Director
343 East Alameda St. Santa Fe, NM 87501
505-989-7262

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO PNM'S EMERGENCY VERIFIED PETITION FOR WRIT OF MANDAMUS, REQUEST FOR EMERGENCY STAY, AND REQUEST FOR ORAL ARGUMENT

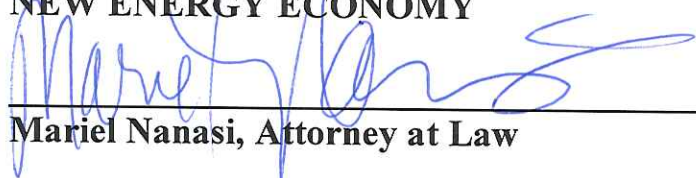
was sent via email on March 19, 2019 to the parties indicated below:

Ryan Jerman	Ryan.Jerman@pnmresources.com ;	Germaine R. Chappell	Gchappelle.law@gmail.com ;
Stacey Goodwin	Stacey.Goodwin@pnmresources.com ;	Richard Mertz	rcmertz7@outlook.com ;
Ryan Anderson	Ryan.Anderson@pnm.com ;	Nicholas Phillips	nlphillips@consultbai.com ;
Mark Fenton	Mark.Fenton@pnm.com ;	Jim Dauphinais	jdauphinais@consultbai.com ;
Richard Alvidrez	Ralvidrez@mstlaw.com ;	Andrea Crane	ctcolumbia@aol.com ;
Joan Drake	jdrake@modrall.com ;	Jennifer Breakell	jbakeell@fmtn.org ;
Caitlin Liotiris	ccollins@energystrat.com ;	Marvin T. Griff	Marvin.Griff@thompsonhine.com ;
Kathleen Fraser	kfraser@energystrat.com ;	Stephen Curtice	stephen@youtzvaldez.com ;
Sarah Cottrell Propst	propst@interwest.org ;	Barry W. Dixon	bwdixon953@msn.com ;
Lisa Tormoen Hickey	lisahickey@newLawgroup.com ;	Peter J. Gould	pgouldlaw@gmail.com ;
Zoe E. Lees	Zel@modrall.com ;	Charles F. Noble	Noble.ccae@gmail.com ;
Thomas Manning	cfreecleanenergy@yahoo.com ;	Steven S. Michel	smichel@westernresources.org ;
Glenda Murphy	gmurphy@westernresources.org ;	Bruce C. Throne	bthroneatty@newmexico.com ;
Jason Marks	lawoffice@jasonmarks.com ;	Mariel Nanasi	Mariel@seedsbeneaththesnow.com ;
Travis Richie	Travis.ritchie@sierraclub.org ;	Rob Witwer	witwerr@southwestgen.com ;
Zach Pierce	Zach.pierce@sierraclub.org ;	Chris Hunter	Chris@cornerstoneresults.com ;
Jane Yee	jyee@cabq.gov ;	Senator Steve Neville	steven.neville@nmlegis.gov ;
Tony A. Gurule	TGurule@cabq.gov ;	Rep. James Strickler	jamesstrickler@msn.com ;
Saif Ismail	sismail@cabq.gov ;	Rep. Sharon Clahchischilliage	Sharon.chahchischill@nmlegis.gov ;
Edward Montoya	eamontoya@cabq.gov ;	Senator Carlos Cisneros	Carlos.cisneros@nmlegis.gov ;
Louis W. Rose	lrise@montand.com ;	Senator William Sharer	bill@williamsharer.com ;
Sharon T. Shaheen	sshaheen@montand.com ;	Rep. Rod Montoya	roddmontoya@gmail.com ;
Randy S. Bartell	rbartell@montand.com ;	Rep. Paul Bandy	paul@paulbandy.org ;
Steven Gross	gross@portersimon.com ;	Rep. Patricia A. Lundstrom	Patricia.lundstrom@nmlegis.gov ;
Martin R. Hopper	mhopper@msrpower.org ;	Charles Gunter	Charles.gunter@state.nm.us ;
Lorraine Talley	ltalley@montand.com ;	Jack Sidler	Jack.sidler@state.nm.us ;
Vicky Ortiz	Vortiz@montand.com ;	Michael C. Smith	Michaelc.smith@state.nm.us ;
Peter Auh	pauh@abcwua.org ;	John Reynolds	John.reynolds@state.nm.us ;
Nann M. Winter	nwinter@stelznerlaw.com ;	Sarah Becker	Sarah.becker@state.nm.us ;
Dahl Harris	dahlharris@hotmail.com ;	Bradford Borman	Bradford.Borman@state.nm.us ;
Jeffrey Albright	Jalbright@lrrc.com ;	Elisha Leyba-Tercero	Elisha.leyba-tercero@state.nm.us ;
Carla Bond	Cbond@lrrc.com ;	Joseph Yar	jyar@nmag.gov ;
Megan A. O'Reilly	Oreilly.ccae@gmail.com ;	Carey Salaz	carey.salaz@pnm.com ;
Don Hancock	srcidon@earthlink.net ;	Gail Evans	gail@newenergyeconomy.org ;
Mark Fenton	Mark.Fenton@pnmresources.com ;	Cholla Khoury	Ckhoury@nmag.gov ;
Steven Michel	smichel@westernresources.org ;	James R. Dittmer	jdittmer@utilitech.net ;
Bruce C. Throne	bthroneatty@newmexico.com ;	Peter Gould	pgouldlaw@gmail.com ;
Charles Kolberg	ckolberg@abcwua.org ;	Nann Winter	nwinter@stelznerlaw.com ;
Thomas Wander	Thomas.wander@pnmresources.com ;	Marcos Martinez	mdmartinez@santafenm.gov ;
Charles Noble	Noble.ccae@gmail.com ;	Jeff Albright	jalbright@lrrlaw.com ;

David Van Winkle	david@vw77.com ;	Patrick Ortiz	Portiz@cuddymccarthy.com ;
Noah Long	nlong@nrdc.org ;	Tom Singer	Singer@westernlaw.org ;
Camilla Feibelman	camilla.feibelman@sierraclub.org ;	Joseph A. Herz	jaherz@sawvel.com ;
Don Hancock	sricon@earthlink.net ;	Glenda Murphy	gmurphy@westernresources.org ;
Nellis Howard	nellis.khoward@sierraclub.org ;	Loretta Martinez	LMartinez@nmag.gov ;
Mariel Nanasi	Mariel@seedsbeneaththesnow.com ;	Dahl Harris	dahlharris@hotmail.com
Lisa Tormoen Hickey	lisahickey@newLawgroup.com ;	Andrea Crane	ctcolumbia@aol.com ;
Sarah Cottrell Propst	propst@interwest.org ;	Michael Dirmeier	mdirmeie@gmail.com ;
John W. Boyd	jwb@fbdlaw.com ;	Vincent DeCesare	vincent.decesare@state.nm.us ;
Josh Ewing	je@fbdlaw.com ;	Charles Gunter	charles.gunter@state.nm.us ;
Bruno Carrara	bruno.carrara@state.nm.us ;	Cydney Beadles	cydney.beadles@state.nm.us ;
Anthony Sisneros	Anthony.sisneros@state.nm.us ;	John M. Stomp III	jstomp@abcwua.org ;
Jack Sidler	jack.sidler@state.nm.us ;	Donald Gruenemeyer	degruen@sawvel.com ;
Richard Blumenfeld	richard.blumenfeld@state.nm.us ;	Louis W. Rose	lrose@montand.com ;
Patrick Lopez	Patrick.lopez@state.nm.us ;	Randy S. Bartell	rbartell@montand.com ;
Rob Witwer	witwerr@southwestgen.com ;	Steve Gross	gross@portersimon.com ;
David Rhodes	rhodesd@southwestgen.com ;	Martin R. Hopper	mhopper@msrpower.org ;
Rachel Brown	rabrown@santafecountynm.gov ;	Maurice Brubaker	mbrubaker@consultbai.com ;
Michael I. Garcia	mikgarcia@bernco.gov ;	Jim Dauphinais	jdauphinais@consultbai.com ;
Robb Hirsch	rhirsch@edlconsulting.us ;	Daniel Dolan	dan@lobo.net ;
Erin Overturf	erin.overturf@westernresources.org ;	Michael Smith	MichaelC.Smith@state.nm.us ;

DATED this 19th day of March, 2019.

NEW ENERGY ECONOMY



Mariel Nanasi, Attorney at Law