

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

Petitioner,

v.

Case No. _____

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

**EMERGENCY VERIFIED PETITION OF
PUBLIC SERVICE COMPANY OF NEW MEXICO FOR WRIT OF MANDAMUS,
REQUEST FOR EMERGENCY STAY,
AND REQUEST FOR ORAL ARGUMENT**

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February 27, 2019

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STATEMENT OF COMPLIANCE

In conformity with Rule 12-504(G) NMRA, the body of this Petition contains 5,949 words.

REQUEST FOR ORAL ARGUMENT

Because of the significant matters of public interest at stake in the matter, PNM respectfully requests oral argument on this Petition.

INTRODUCTION

Petitioner Public Service Company of New Mexico (“PNM”), pursuant to Rule 12-504 NMRA, seeks an emergency writ of mandamus vacating the unlawful Abandonment Order¹ issued by the New Mexico Public Regulation Commission (“NMPRC”) on January 30, 2019. The Abandonment Order improperly requires PNM to file an application and supporting testimony by March 1, 2019, to abandon PNM’s interests in Units 1 and 4 of the San Juan Generating Station (“SJGS”).² The NMPRC also orders PNM to act in contravention of the Public Utility Act (“PUA”). For the reasons that follow, PNM asks the Court to:

- Grant an emergency stay to allow consideration of the Petition;
- Issue a writ vacating the Abandonment Order; and
- Prohibit the NMPRC from compelling PNM to file SJGS-related applications, so that after June 14, 2019, PNM may voluntarily apply to the NMPRC for any necessary regulatory approvals.

PNM exhausted its administrative remedies by filing a *Motion and Supporting Brief for Rehearing* (“Motion for Rehearing”) on February 7, 2019, requesting that the NMPRC vacate the Abandonment

¹ *Order Initiating Proceedings on PNM’s December 31, 2018 Verified Compliance Filing Concerning Continued Use of and Abandonment of Juan Generating Station* (“Abandonment Order”) attached as Exhibit “A”.

² Abandonment Order at 14-16.

Order.³ The NMPRC never considered the Motion for Rehearing, which was deemed denied on February 27, 2019, pursuant to NMSA 1978, Section 62-10-16 (1941), two days before the order's deadline for PNM to file the abandonment application. Because the NMPRC's arbitrary deadline for a mandatory application is imminent, PNM requests that the Court issue an emergency stay before the March 1, 2019 deadline to preserve the status quo and allow the Court time to fully consider this Petition.

Although PNM recognizes the NMPRC has discretion to investigate matters within its statutory authority, the Abandonment Order exceeds that authority by compelling PNM to file an immediate application for abandonment of SJGS. The plant will continue to operate and serve PNM's customers for three more years, through June of 2022, and PNM currently lacks substantive information needed for a complete application. The implications of forcing one of the state's electric utilities to file an incomplete application to abandon SJGS are significant. SJGS is a key in PNM's generation fleet, representing 21% of PNM's total generation capacity. Although it is PNM's intent to transition from SJGS to new generation, SJGS is presently needed to serve PNM's more than 500,000 customers.

³ Pursuant to NMRA 12-504(B)(2) PNM's Motion for Rehearing is attached as Exhibit "B" and the Responses to the Motion attached as follows: Sierra Club, Exhibit "C"; Western Resource Advocates ("WRA"), Exhibit "D"; Coalition for Clean Affordable Energy, Exhibit "E"; Utility Division Staff, Exhibit "F"; New Mexico Industrial Energy Consumers, Exhibit "G"; and New Energy Economy, Exhibit "H".

SJGS has approximately 200 employees. PNM is a partial owner and operating agent for SJGS, but the plant has four other owners whose contractual rights must be respected. Except for the City of Farmington (“Farmington”), all of the other owners have stated they do not wish to continue operating the plant beyond 2022, and their agreements require a planning process to ensure an orderly plant shut-down. The interests of these stakeholders are impacted by the NMPRC’s Abandonment Order.

The NMPRC is acting arbitrarily in characterizing the need for a compulsory application as immediately urgent. The NMPRC disregards uncontroverted evidence that SJGS will operate for at least three more years, and that PNM cannot file a compliant application under NMPRC abandonment standards by the artificially prescribed deadline. In 2015, when the NMPRC approved the Modified Stipulation in Case No. 13-00390-UT, it directed PNM to evaluate the need for the plant to serve customers beyond 2022. PNM’s 2017 Integrated Resource Plan evaluation showed customers benefit economically if PNM abandons and replaces its interests in SJGS in 2022. The NMPRC accepted the 2017 IRP in December 2018, and directed PNM to consider the comments and concerns of stakeholders in its further evaluations.⁴

⁴ Case No. 17-00174-UT, which is before this Court on appeal in Docket No. S-1-SC-37482.

No compelling or exigent circumstances require PNM to immediately apply for abandonment. The NMPRC acknowledges that PNM has not finished selecting proposed replacement resources, a necessary prerequisite for the abandonment of SJGS. Nonetheless, the NMPRC insists that PNM proceed with an incomplete filing on the justification that PNM could try to remedy deficiencies through future amendments. In doing so, the NMPRC ignores applicable statutes and regulatory principles, violates PNM's Constitutional rights and sets PNM up for failure.

STATEMENT OF JURISDICTION

Jurisdiction over this Petition is pursuant to Article VI, Section 3 of the New Mexico Constitution, which confers original jurisdiction over mandamus against all state commissions and authority to issue writs as necessary to carry out this Court's jurisdiction. *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n* ("*Sandel*"), 1999-NMSC-019, ¶10, 127 N.M. 272 (stating the Court's power to vacate NMPRC orders by issuing a writ of mandamus derives from Article VI, Section 3 of the New Mexico Constitution). The Court has jurisdiction to stay NMPRC orders pursuant to NMSA 1978, Section 62-11-6 (1983).

GROUND TO EXERCISE ORIGINAL JURISDICTION

The Abandonment Order is not a final order subject to appeal pursuant to NMSA 1978, Section 62-11-1 (1993) because not "all issues of law and fact have been determined" and the case is not "disposed of to the fullest extent possible."

Tri-State Generation & Transmission Ass’n, Inc. v. N.M. Pub. Regulation Comm’n, 2015-NMSC-013, ¶ 36 (citation omitted). An appeal at the conclusion of the NMPRC proceeding will be ineffective to protect PNM’s rights and prevent the harms addressed below. State district courts have concurrent original jurisdiction pursuant to NMSA 1978, Section 62-12-2 (1941). However, this case presents fundamental constitutional questions of great public importance such that the Court should exercise its original jurisdiction over this matter. *See Sandel*, 1999-NMSC-019, ¶11.

FACTUAL BACKGROUND

The NMPRC opened this docket on January 10, 2019, following PNM’s Compliance Filing⁵ submitted in Case No. 13-00390-UT on December 31, 2018, pursuant to the NMPRC-approved Modified Stipulation. Under those settlement terms, PNM was to seek NMPRC review of any agreement that would commit PNM to continue using SJGS to serve PNM’s retail customers after 2022. The Compliance Filing confirmed PNM was not proposing to enter into new agreements because resource analyses showed that the early retirement of SJGS in 2022 and replacement with more flexible, environmentally sustainable resources provided economic benefits for customers. All SJGS owners, except Farmington,

⁵ *Verified Compliance Filing Concerning Continued Use of San Juan Generating Station to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation* (“Compliance Filing”).

provided contractual notices that they did not intend to continue operations beyond July 1, 2022, when the current SJGS ownership agreement expires, and PNM notified the SJGS coal supplier that the existing coal supply agreement would not be extended beyond its termination date of June 30, 2022.

Under the SJGS ownership agreement, Farmington has certain rights to obtain the interests of the other SJGS owners to continue operations beyond 2022. Further, the ownership agreement requires the SJGS owners to arrange for the orderly closure of the plant in 2022. PNM confirmed that necessary replacement resources to be proposed for SJGS have not been selected and PNM does not yet have all of the supporting information needed for a complete abandonment application. PNM affirmed to the NMPRC that it would have sufficient information to file an application for abandonment and approval of replacement resources in the second quarter of 2019.

In its Initial Order⁶ docketing this case, the NMPRC directed interested parties to address whether the NMPRC should grant PNM's request to accept the Compliance Filing and take no further action pending a future abandonment filing for SJGS, or whether the NMPRC should initiate an abandonment proceeding and

⁶ *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of San Juan Generating Station to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation* ("Initial Order")

require PNM to file testimony in support of its abandonment of SJGS.⁷ PNM and several interested parties filed responsive pleadings to the Initial Order.

The NMPRC issued the Abandonment Order on January 30, 2019, and although titled to consider both continuation and cessation of SJGS operations, instead requires PNM file an abandonment application pursuant to NMSA 1978 Section 62-9-5 (2005) of the PUA.⁸ The NMPRC defined the scope of the case as encompassing “all issues relevant to an abandonment proceeding under NMSA 1978, § 62-9-5 and any other applicable statutes and NMPRC rules, including § 62-6-12.”⁹

PNM requests an immediate emergency stay of the Abandonment Order and that the order be vacated on the grounds stated below.

GROUND IN SUPPORT OF PETITION

I. The NMPRC Lacks Authority to Force PNM to File for Abandonment of SJGS.

SJGS is a certificated generation resource that is presently serving, and needed to serve, PNM’s retail customers. PNM has no plans to retire these units before mid-2022. In order for PNM to cease using SJGS to serve customers, PNM must first secure suitable replacement power which has not yet been selected. Contrary to the NMPRC’s assertions, no “irrevocable” steps have been taken to

⁷ Initial Order, ¶ 11 at 4.

⁸ Abandonment Order at 14.

⁹ *Id.*

abandon SJGS, just as no irrevocable steps have been taken that require its continued operation.

The abandonment statute, Section 62-9-5, provides in pertinent part that “[n]o utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission . . . without first obtaining the permission and approval of the commission.” Although this Court has held that the Legislature’s delegation of authority over utility abandonment is broad (*Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm’n*, (“*PNM v. PSC*”) 1991-NMSC-083, ¶ 12, 112 N.M. 379, nothing in Section 62-9-5 contemplates that the NMPRC would affirmatively initiate a compulsory proceeding for abandonment; the Court will not read into a statute language which is not there. *Sandel*, 1999-NMSC-019, ¶ 17 (“[W]hile courts ordinarily afford a degree of deference to an agency’s interpretation of a statute the agency is charged with administering, such deference does not give the [NMPRC] the authority to pour any meaning it desires into the statute.” (citations omitted)). There is no textual support in Section 62-9-5 for the NMPRC’s authority to require PNM to apply to abandon a necessary resource before PNM can demonstrate that “continuation of service is unwarranted” and “the present and future public convenience and necessity” do not require the use of the facility. Section 62-9-5.

Section 62-9-6 addresses the NMPRC's authority with respect to matters under Sections 62-9-1 through 62-9-6 and, with one specific exception¹⁰ not applicable here, contemplates that NMPRC action on these matters depends on a utility initiating a filing as opposed to the NMPRC dictating a filing by a utility. NMSA 1978, § 62-9-6 (1967). When the Legislature intends that the NMPRC initiate a particular type of proceeding, it expressly provides so in statute. For example, unlike NMSA 1978, Section 62-6-28 (2007), which specifically states the NMPRC "shall open a docket" to consider incentives to encourage clean energy projects, the power delegated under Section 62-9-6 provides only that the NMPRC will *review* whether a utility should be permitted to abandon property.

Importantly, this Court interpreted abandonment under Section 62-9-5 as a "voluntary act" that entails the relinquishment by a utility of all of "its right, title, claim, and possession" in a facility "with no intention of reclaiming it." *United Water N.M., Inc. v. N.M. Pub. Util. Comm'n*, 1996-NMSC-007, ¶¶ 14, 16, 121 N.M. 272 ("[W]e read the abandonment statute, Section 62-9-5, as logically referring only to voluntary actions by a public utility."). PNM is not presently relinquishing any rights in SJGS or its continued operation to serve retail customers. The requirement in the Abandonment Order that PNM immediately

¹⁰ The exception is where a utility is engaged or is about to engage in construction or operation without having secured a certificate of public convenience and necessity ("CCN").

apply to abandon its property renders the statutory abandonment proceeding anything but voluntary.

In determining the scope of the NMPRC's authority, the Court looks to the PUA as a whole. *Sandel*, 1999-NMSC-019, ¶ 13. PNM acknowledges the NMPRC 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). Rather than docketing an investigation, the NMPRC has compelled PNM to commence the proceeding through an application.

This Court has ruled that the NMPRC, although a constitutionally created body, “may exercise only its statutorily authorized jurisdiction.” *El Paso Elec. Co. v. N.M. Pub. Reg. Comm’n*, 2010-NMSC-048, ¶ 6, 149 N.M. 174. While the NMPRC can assess the prudence of a utility's actions in determining whether to abandon or continue operating a given resource,¹¹ the plain language of Section 62-9-5, as interpreted by this Court, confirms that the NMPRC cannot exercise

¹¹ See NMPRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, ¶ 66 at 23 (reviewing PNM's alleged imprudence in continued participation and investment in the Four Corners Power Plant).

unfettered and unilateral power as it attempts in its Abandonment Order. *See El Paso Elec. Co.*, 2010-NMSC-048, ¶6 (emphasizing that an agency’s determination of its own jurisdiction deserves little deference from the court).

II. The Abandonment Order Violates the First Amendment to the U.S. Constitution and New Mexico Constitution Article II, Section 17.

The NMPRC ordered that “[a]n abandonment proceeding . . . is hereby initiated,” and not only required PNM to file an application for abandonment, but precisely detailed the contents of this filing.¹² Thus, the NMPRC is compelling PNM to espouse NMPRC views rather than PNM’s own positions, which is inconsistent with the tenets of the First Amendment to the U.S. Constitution as well as Article II, Section 17 of the New Mexico Constitution.¹³ PNM should be allowed to make a filing that fully addresses its positions including replacement resources it proposes to use to serve its customers over the next many years, an issue of current societal and economic importance to New Mexico.

First Amendment rights include the right *not* to speak. As the U.S. Supreme Court recently confirmed in *Janus v. American Federation of State, County &*

¹² *Id.*, ¶ B at 14-15.

¹³ “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” The California Constitution’s free speech protections, which are phrased almost identically to those of New Mexico, were recently held to prohibit an attempt to compel the speech of a corporation operating in a regulated industry. *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 746 (Cal. Sup. Ct. 2000).

Municipal Employees, Council 31, the First Amendment “forbids abridgment of the freedom of speech. We have held time and again that freedom of speech ‘includes...the right to refrain from speaking at all.’” 138 S. Ct. 2448, 2463 (2018) (emphasis added) (citations omitted). “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.” *Id.* at 1263; *see also, W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding it unconstitutional to require students to salute the flag under threat of punishment).

The Abandonment Order clearly seeks to compel speech by requiring PNM to support abandoning SJGS before PNM is prepared to do so. Compulsion need not be in the form of a direct threat, such as a punishment, but can be in the form of indirect discouragement. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (citations omitted). The Abandonment Order repeatedly notes that PNM acts “at its own risk” in conduct taken subsequent to the order.¹⁴ Importantly, the entire context – namely, the issuance of an order mandating an involuntary application by a public utility company under the agency’s oversight – makes clear there is an implicit threat of regulatory punishment by the government.

¹⁴ Abandonment Order, ¶ 11.

This Court should apply a strict scrutiny standard in review of the NMPRC requirement that PNM be compelled to “speak” before it is ready. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 283 (4th Cir. 2013). To survive strict scrutiny, a state action compelling speech must be narrowly tailored to promote a compelling Government interest which are “only those interests of the highest order.” *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002). Therefore, “only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.” *Id.* (citations omitted). State action is narrowly tailored “if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

The NMPRC claims that it must compel PNM to file for abandonment because, in its view, PNM “already initiated abandonment six months ago.”¹⁵ It claims that allowing PNM to choose when and how it files a petition for abandonment “could foreclose options for both the [NMPRC] and interested stakeholders that could damage the public interest.”¹⁶ Despite this assertion, the NMPRC does not identify how an abandonment application rather than other processes protects these supposed options or prevents damage to the public interest as alleged; the NMPRC thus does not “specifically identify an ‘actual problem’ in

¹⁵ Abandonment Order, ¶ 11.

¹⁶ *Id.*

need of solving.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (citations omitted).

Even if the Abandonment Order furthered a compelling government interest, it is not narrowly tailored to serve that interest, as required. *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266, 274 (D.D.C. 2012). This narrow tailoring requires a proportionally scoped “fit between the legislature’s ends and the means chosen to accomplish those ends.” *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted). Dictating how and when PNM must apply for SJGS abandonment, and thereby compelling a private actor to voice the agency’s specific opinions, is neither responsive nor narrowly tailored to the NMPRC’s undefined interest.

Regardless of the legitimacy of the interests the NMPRC sought to advance, several options less restrictive than compelled speech were available. *See Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 190 (4th Cir. 2013). The NMPRC has extensive general supervisory, investigatory and enforcement authority. *See, e.g., Plains Elec. Generation & Transmission Co-op., Inc. v. N.M. Pub. Util. Comm’n*, 1998-NMSC-038, 126 N.M. 152; Sections 62-1-2, 62-12-1, 62-6-4. Both in Case No. 13-00390-UT and in the docket below, the NMPRC found it could review whether it would be in the public interest for SJGS to continue to serve customers after current contracts expire in 2022. PNM need not be forced to

immediately file an abandonment application in order for the NMPRC to undertake that inquiry. Thus, the NMPRC had less restrictive means to fulfill its regulatory duties other than unlawfully compelling PNM to apply to abandon an operating public utility asset. *Cf. United Water*, 1996-NMSC-007, ¶¶ 14, 16.

III. The Abandonment Order Improperly Disregards the NMPRC's Own Requirements and Policies for a Sufficient Abandonment Application.

PNM bears the burden of proving that it is entitled to abandonment. *PNM v. PSC*, 1991-NMSC-083, ¶ 10. Under NMPRC rules, where an application is not properly supported by necessary evidence, the application is subject to dismissal. *See* 1.2.2.21(B)(3) NMAC, 1.2.2.12(B) NMAC; *see also*, Rule 17.1.2.9(A) NMAC (requiring a utility to submit “all direct testimony and supporting exhibits intended to be introduced into evidence” in support of a CCN at the time the application is filed).

In deciding whether the abandonment of utility plant results in a net public benefit under Section 62-9-5, the NMPRC consistently applies the four factors used in *Commuters' Committee v. Penn. Pub. Util. Comm'n.*, 88 A.2d 420, 424 (Pa. Super. Ct. 1952). These factors have been upheld by the New Mexico Supreme Court. *PNM v. PSC*, 1991-NMSC-083, ¶ 10. The *Commuters' Committee* factors are: (1) the extent of the carrier's loss on the particular branch or portion of the service and the relation of that loss to the carrier's operations as a

whole; (2) the use of the service by the public and the prospects for future use; (3) *balancing* of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of service; and (4) the availability and adequacy of substitute service. *Commuters' Comm.*, 88 A.2d at 424.

PNM cannot adequately meet its burden of proof under the *Commuters' Committee* test as part of a March 1 application because the impacts of discontinuance of service are still being developed, and service from SJGS remains warranted unless adequate replacement resources are identified and available. The NMPRC has previously denied abandonment of generation facilities where, as here, a utility could not demonstrate the availability of adequate replacement resources. *See* Case No. 13-00390-UT, *Certification of Stipulation*, at 121-22 (NMPRC April 8, 2015); *PNM v. PSC*, 1991-NMSC-083, ¶ 10. The Abandonment Order nonetheless requires PNM to file an incomplete application on the basis that deficiencies can be cured through amended or additional applications at later dates.¹⁷ In so ordering, the NMPRC improperly disregards its own rules and precedent. *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 8, 115 N.M. 678 (explaining that the NMPRC is bound by and limited to its existing rules and regulations).

¹⁷ Abandonment Order, ¶ 9.

IV. The Unwarranted March 1, 2019 Filing Deadline Usurps the Role of the Legislature in Policymaking.

The March 1 deadline for the abandonment application ignores the significant circumstance that the Legislature is considering energy policy legislation that could impact PNM's filing. The NMPRC is dismissive of this concern and characterizes it as speculative. In fact, specific bills have been introduced to adopt energy policies that economically transition the state's energy resources to increased renewable portfolio standards and, among other things, address the regulatory treatment of the costs of abandonment of coal generation resources and associated undepreciated investment resulting from the replacement of these resources with renewable energy resources. If such energy policy legislation is enacted during the current legislative session that ends on March 16, 2019, it will directly impact PNM's analyses relating to the abandonment of SJGS and its replacement resources.

In determining the timing of a SJGS abandonment application, it is reasonable for PNM to consider how such legislative policies, that will be known within a matter of weeks, might impact not only the circumstances of a proposed plant shutdown but also PNM's proposed replacement resource portfolio, which in that past the NMPRC has treated as a critical predicate to permitting a resource abandonment. In requiring PNM to file an abandonment application by March 1, 2019, the NMPRC appears to be trying to foreclose PNM from having certainty

about possible near-term changes in energy policy and their impacts on its application.

The NMPRC's failure to properly acknowledge a potentially imminent new energy policy legislation also raises separation of powers issues. The New Mexico Constitution imposes a strict division of powers among the three branches of government. N.M. Const. art. III, § 1; *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343. It is the role of the Legislature, not administrative agencies, to declare policy and establish the primary standards to which the agency must conform. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22; *see also Sandel*, 1999-NMSC-019, ¶ 17 (“The administrative agency’s discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.”). The NMPRC, “may exercise only its statutorily authorized jurisdiction.” *El Paso Elec. Co.*, 2010-NMSC-048, ¶ 6. The Abandonment Order, with its arbitrary March 1 deadline, should not be allowed to undermine the Legislature’s central role in establishing energy policy for the state.

To that end, responsive pleadings filed with the NMPRC indicated that two Commissioners were motivated to compel a March 1 deadline before legislation is enacted during the current legislative session,¹⁸ which suggests that forcing PNM to file an abandonment application now was intended as a tactic to invoke Article

¹⁸ *Western Resource Advocates’ Response to PNM’s Motion for Rehearing*, ¶ 5 attached as Exhibit “D”.

IV, Section 34¹⁹ of the New Mexico Constitution as a tool to prevent any new legislation from applying to SJGS. Such alleged tactics would manifest a blatant disregard of the separation of powers and the role of the Legislature in setting energy policy and defining the authority of the NMPRC. Moreover, Article IV, Section 34 is not to be used “as a sword to prevent what would otherwise be legitimate governmental action.” *Santa Fe Trail Ranch II, Inc. v. Bd. of Co. Comm'rs of San Miguel Co.*, 1998-NMCA-099, ¶ 11, 125 N.M. 360 (Rejecting attempt by real estate developer to thwart a County Commission’s moratorium on development by filing a pre-emptive lawsuit).

Furthermore, PNM is engaged in efforts before the Legislature on these energy policy legislative proposals. Requiring PNM to file an abandonment application for purposes of avoiding the application of new legislation favored by PNM infringes on PNM’s rights to petition the government guaranteed by the First Amendment to the United States Constitution. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (“To hold that . . . the people cannot freely inform the government of their wishes . . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights.”); *see also Cal. Motor Transp. Co. v. Trucking*

¹⁹ “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.”

Unlimited, 404 U.S. 508, 612 (1972) (“Certainly the right to petition extends to all departments of the Government.”).

V. Requiring PNM to Provide All Parties With Proprietary Licenses to Computer Models Used by PNM is Contrary to Law and Precedent.

The Abandonment Order unlawfully requires PNM to pay for all parties’ access to proprietary licenses to all computer models used by PNM in support of its filing.²⁰ PNM estimates that if just ten parties avail themselves of the licensing, it could cost PNM in the range of approximately \$500,000 to \$1,000,000. Whether PNM can recover these costs was left to a future rate case.²¹

The requirement that PNM pay other parties’ licensing costs directly violates NMRA 1978, Section 62-13-3(A) of the PUA, which states “[e]xcept as otherwise provided by law, in all proceedings before the commission and in the courts, each party to the controversy shall bear his own costs and no costs shall be taxed against either party.” The NMPRC has expressly recognized that imposing the costs of one party on another is “contrary to the ‘American rule’ and Section 62-13-3.” *In the Matter of Public Service Company of New Mexico's Application For a Certificate of Public Convenience and Necessity and Related Approvals For an 80 MW Gas-Fired Generating Plant Located at the San Juan Generating Station*, No. 16-00105-UT, 2017 WL 2403734, at *1 (NMPRC May 24, 2017).

²⁰ Abandonment Order, ¶ C at 15-16.

²¹ *Id.*

Additionally, this Court has directly addressed whether a utility is required to conduct resource modeling for another party and definitively ruled that this is not required. *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶¶ 36-37. (holding that PNM was under no obligation to conduct generation resource modeling for other parties and thereby assist the witness of its adversary). Therefore, the NMPRC does not have lawful authority to require PNM to pay for other parties' resource modeling costs.

VI. It is Impossible for PNM to Comply with the Abandonment Order by March 1, 2019.

PNM cannot adequately comply with the requirements of the Abandonment Order by the March 1, 2019 deadline. Based on past NMPRC standards, PNM cannot file a complete or defensible application for abandonment because PNM does not presently have the necessary information to do so. Although not yet finished, PNM has been diligently pursuing, and continues to diligently pursue, the actions and tasks necessary to present a complete application for SJGS abandonment by updating cost analyses, and identifying and selecting necessary replacement resources to be proposed to the NMPRC. To that end, PNM has been evaluating, with the assistance of an outside consultant, more than 300 bid proposals received for numerous replacement resources and pursuing the studies and evaluations that need to be completed before PNM can provide the NMPRC with reliable estimates and costs related to SJGS abandonment and replacement

resources. Not only will this multifaceted, complex evaluation process not be completed before the March 1 deadline, it may immediately be impacted if new renewable and clean energy standards are enacted and become effective on June 14, 2019, as a result of legislative action.

It is not within the NMPRC's purview to try to force PNM to do the impossible. *See Com. Dep't of Env'tl. Res. v. Pennsylvania Power Co.*, 461 Pa. 675, 696 (1975). (recognizing that the regulated entity was unable to comply with the agency order and impossibility was a defense to sanctions). Similarly, in the context of civil contempt, the contemnor must have "an ability to comply." *In re Hooker*, 1980-NMSC-109, ¶ 4, 94 N.M. 798. The Abandonment Order and its associated filing requirements are impossible for PNM to adequately comply with through the filing of a complete and defensible application by the set deadline.

REQUEST FOR IMMEDIATE STAY

The March 1 deadline for PNM to file its abandonment application is only two days away. PNM filed for rehearing and requested relief from this arbitrary deadline, but that request was deemed denied by statute on February 27, 2019, twenty days after rehearing was sought, through NMPRC inaction. The potential consequences of failing to comply with the deadline and information requirements

under the Abandonment Order can be severe.²² Therefore, in order for PNM to avoid the irreparable harm described below and to allow the Court to fully consider the Petition, PNM requests an immediate temporary stay of the Abandonment Order. An immediate stay is the only remedy to avoid harm to PNM and to ensure that no harm to the public interest ensues. Pursuant to Rule 12-504(D) the Court may act on a request for stay prior to the filing of responses.

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. PNM meets all four elements for a stay.

PNM is likely to prevail on the merits for the reasons set forth in Sections I through VI of this Petition. PNM has demonstrated that the NMPRC is acting outside of its authority, failing to follow its own precedent and rules and violating PNM's rights – all grounds to vacate the Abandonment Order.

The second element for a stay is also met. PNM will suffer irreparable harm if the Court does not grant the requested temporary stay. “An injury that is

²² See §§ 62-12-4 and 62-12-5 (providing for civil penalties for up to \$100,000 per day for non-compliance with an NMPRC order).

irreparable is without adequate remedy at law,” such as an award of damages. *State ex rel. Highway & Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151. “Thus, an irreparable injury is an injury which cannot be compensated for or for which compensation cannot be measured by any certain pecuniary standard.” *Id.* ¶ 19 (internal quotation marks and citation omitted).

The irreparable harm to PNM is twofold. First, the Abandonment Order requires PNM to act contrary to the statutes and regulations under which it operates. It is correct that “[t]he mere fact that an administrative regulation or order may cause injury or inconvenience to the applicant” by itself may not be sufficient “to warrant suspension of an agency regulation by the granting of a stay.” *Tenneco Oil Co.*, 1986-NMCA-033, ¶ 11. Practically speaking in this instance, PNM has been ordered to pay for costs of other parties contrary to statute, and additionally, those parties may rely to their determinant that their costs would be covered. PNM also must file a case that could be found deficient on its face because it does not demonstrate what replacement resources may be available and does not allow PNM to adequately account for changing energy policies that impact those choices. Because PNM cannot meet its burden of proof and satisfy the requirements for an abandonment application by March 1, PNM faces an unfair

and arbitrary regulatory process, and faces the risk of non-compliance with the Order with attendant consequences.

Second, the Abandonment Order deprives PNM of a constitutional right, which justifies the granting of a stay to avoid irreparable injury. As shown in Sections III and IV of PNM's Petition, compelling PNM to file an abandonment application violates its First Amendment rights. The deprivation of a constitutional right itself constitutes irreparable harm. *See Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) (holding that an agreement forcing a motor carrier to adhere to unconstitutional conditions that will also cause economic harm in the interim constitutes irreparable harm). A "constitutional violation, coupled with the damages incurred, can suffice to show irreparable harm." *Id.* Thus, PNM has demonstrated the requisite irreparable harm to justify a stay.

The third element of a stay is also met. If the Court grants the requested stay, other interested parties and the public interest will not endure any harm, substantial or otherwise. The NMPRC failed to articulate any specific harm that would occur if PNM files its application as and when it had planned. Certainly no party will be harmed if PNM does not file an incomplete application for abandonment within the next two days, or until this Court has an opportunity to fully consider the Petition. Such a short delay will not prejudice the NMPRC or any interested party. A filing date in the second quarter of 2019 and after June 14,

2019, as PNM planned, provides sufficient time for the NMPRC to review and timely act to allow for the deployment of replacement resources three years from now. Moreover, the parties and public will benefit from full analyses as well as consideration of any new energy policy emerging from the current 2019 legislative session.

Finally, the fourth element for a stay is met. An immediate and temporary stay pending the Court's ruling on PNM's petition will not harm the public interest. The public interest is served by this Court taking time to review the important matters raised in PNM's Petition, to avoid error leading to an involuntary and deficient abandonment application for a significant generation resource serving PNM's customers, and to prohibit unlawful payment of costs.

Respectfully submitted this 27th day of February 2019.

PUBLIC SERVICE COMPANY OF NEW MEXICO

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was served by e-mail on February 27, 2019, on the following parties:

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VERIFICATION

I, Thomas G. Fallgren, Vice President of Generation for Petitioner Public Service Company of New Mexico, being duly sworn upon my oath, state that I have read the attached Verified Petition and that the factual statements contained in the Petition are true and correct to the best of my knowledge, information, and belief.



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