

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF STAFF'S PETITION)
TO INITIATE AN INQUIRY INTO THE)
SERVICE AND RATE IMPACTS OF PUBLIC)
SERVICE COMPANY OF NEW MEXICO'S)
"AGREEMENT IN PRINCIPLE" TO RETIRE)
SAN JUAN GENERATING STATION UNITS)
2 AND 3 BY 2017)**

Case No. 13-00200-UT

Utility Division Staff,

Petitioner.

**PUBLIC SERVICE COMPANY OF NEW MEXICO'S
REPLY TO NEW MEXICO ATTORNEY GENERAL'S
RESPONSE TO STAFF'S PETITION**

Public Service Company of New Mexico ("PNM"), by and through its attorneys, hereby files its Reply to the New Mexico Attorney General's Response to Staff's Petition ("AG Response") as follows:

1. PNM was not served with the AG Response on July 3, 2013, as reflected on the Certificate of Service attached to the AG Response. PNM discovered the AG Response on the Commission's website the morning of July 8, 2013. The AG Response was added to the Commission's website on July 8, 2013, although the date stamp for filing is not legible on the copy available to PNM.

2. The AG Response is based on the unsupported statement that "[i]f the PRC does not get involved in the process until PNM files a case relating to SJGS, the Commission could be pre-empted from a decision-making role because of the actions of other state and federal agencies...." AG Response at 1. The statement is not accurate and should not induce the Commission to act prematurely in this matter.

3. It must be emphasized that EPA has acknowledged that there are several “regulatory approvals, including...approvals of PNM’s applications to the N.M. Public Regulation Commission relating to implementation of the Revised [State Implementation Plan (“SIP”)], which if not forthcoming, could make completion of a Revised SIP, or EPA’s approval of the Revised SIP, impractical or impossible.” Letter from Ron Curry to Pat Vincent-Collawn and F. David Martin at 2 (Feb. 15, 2013) (attached to Errata Notice to Staff’s Petition); *accord*, Term Sheet, §§ 1(f) (PNM must “diligently seek all necessary regulatory approvals to allow for retirement of SJGS Units 2 and 3 by December 31, 2017”), 2 (nothing in the Revised SIP “shall relieve SJGS from its obligations to comply with all applicable federal, state, and local laws and regulations”) (attached to Errata Notice to Staff’s Petition).

4. The Commission does not have to act “first” to maintain its jurisdiction, contrary to the AG Response. In NMPRC Case No. 05-00406-UT involving PNM’s Application for abandonment of the Las Vegas Generating Station, PNM had committed to the New Mexico Environment Department (“NMED”) to seek decommissioning of the Las Vegas plant during the course of obtaining an air quality operating permit from NMED. Certification of Stipulation at 9 (April 19, 2007). However, Staff, the AG and the New Mexico Industrial Energy Consumers (“NMIEC”) opposed abandonment on a number of grounds. Certification of Stipulation at 9-10. The result of the case was an unopposed Stipulation, approved by the Commission, that delayed closure of the Las Vegas plant to assure that abandonment was in the public interest. Certification of Stipulation at 11. This case demonstrates that prior action at NMED calling for plant

abandonment does not supercede the Commission's authority to authorize abandonment if the present and future public convenience and necessity warrants it.

5. Pre-emption analysis considers such factors as whether the state and federal authority is conflicting such that compliance with both is impossible, or where federal regulation is so pervasive there is no room for state regulation. *E.g., Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203-204 (1983). It is not dependent on timing of the conflicting actions. In *Public Service Company of New Hampshire v. U.S. Nuclear Regulatory Commission*, 582 F.2d 77, 86 (1st Cir. 1978), the state agency's action was first in time and then superceded by the later action of the federal agency, although the state agency action was not truly pre-empted because it was conditioned on later federal action. And in *Pacific Gas and Electric Company*, the U. S. Supreme Court ruled that the state agency's jurisdiction was not pre-empted even though it had not yet acted. *Pacific Gas and Electric Company*, 461 U.S. at 202, 205.

6. In this situation, the NMED, the New Mexico Environmental Improvement Board ("EIB") and the U. S. Environmental Protection Agency ("EPA") have authority under the Clean Air Act to regulate emissions from San Juan Generating Station ("SJGS"). The EPA has already acted to set an emissions limit on each unit of SJGS that requires the installation of selective catalytic reduction technology ("SCR"). PNM must comply if it is to continue to operate each unit of SJGS. But, as already explained to the Commission in presentations to keep it updated on developments, SCR is very costly. So the Term Agreement arrives at an alternative solution, yet to be acted on by EIB and EPA, that holds promise for meeting the Clean Air Act requirements in a less costly

manner. But this new approach requires Commission approval to abandon Units 2 and 3 and obtain certificates of public convenience and necessity for replacement power, in addition to the environmental approvals required of EIB and EPA. There is absolutely no indication that the Commission's authority will be preserved or impaired by the timing of when the matter is initiated with the Commission.

7. As already demonstrated, all four units of SJGS can continue to operate if SCR is installed, should the Commission not authorize abandonment of Units 2 and 3. Once PNM has been able to develop all the information necessary to allow the Commission to evaluate the agreement and alternatives, the Commission will be in the best position to exercise its authority properly. The Commission, Staff and intervenors will have ample time to examine PNM's filing and its ramifications since Commission approval is not expected to be needed before the last quarter of 2014.

8. As pointed out by PNM in its Response to Staff's Petition for an Inquiry, filed on June 24, 2013, PNM is concerned that establishing a docket for a formal inquiry would result in the necessity to prematurely supply data that are constantly evolving as PNM refines and revises model assumptions and updates forecasts in preparation for its comprehensive filing, resulting in confusion now and after the comprehensive filing is made. As described more fully in PNM's Response, PNM is currently engaged in the resource-intensive and time-consuming process of preparing the necessary case documents in anticipation of proceedings for required regulatory approvals by the Commission and other regulatory agencies, none of which are completed and all of which are in early preparation stages subject to constant revisions as they are updated and refined in preparation for the comprehensive filing. PNM is not in a position to respond


refined in preparation for the comprehensive filing. PNM is not in a position to respond to most, if not all, the AG's suggested topics of inquiry until the analyses described at the open meeting of July 3, 2013, is completed. Waiting for the comprehensive filing rather than establishing a premature formal inquiry will save time and resources for all parties, including the Commission and Staff, by allowing discovery to proceed in a more focused manner after the comprehensive filing is made, rather than attempting a broad, shotgun approach to seeking information, much of which may become obsolete or superceded by updated and refined information that will be timely provided through the application PNM is required to file to obtain Commission approval for its plan. PNM is willing to work with Staff and the AG over the next couple of months to assure that its comprehensive filing addresses the areas they believe should be addressed. However, they should advise PNM of any model runs they wish submitted with the filing no later than the end of September so that the analyses can be properly performed and any necessary testimony and exhibits developed.

WHEREFORE, PNM respectfully requests the Commission to deny Staff's Petition and, consistent with PNM's Response to Staff's Petition, require PNM to make monthly update presentations to the Commission at the Commission's last open meeting each month until PNM files its application for approval of its plan to comply with the agreement.

Respectfully submitted this 14th day of July, 2013,

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