new energy economy
Addressing the Climate Challenge
With Bold Solutions

January 25, 2018

Re: SB47 and HB 80

Dear Majority Leader Senator Wirth and House Speaker Brian Egolf,

Senate Bill 47 and House Bill 80 reflect PNM's desire to use the New Mexico Legislature as a mechanism to avoid regulatory consideration of highly controversial and questionable actions by PNM. Furthermore, the proposed legislation would be unconstitutional under Article IV Sec. 34 of the New Mexico Constitution.

Specifically:

1) **This legislation seeks a blank check from ratepayers** for undepreciated investments, decommissioning and reclamation at San Juan, Four Corners, and Palo Verde, which would literally be in the billions of dollars and cause an economic meltdown in New Mexico.

2) **This legislation would insure higher energy costs**. The Bills would accomplish an end-run around the statutory and regulatory requirement that power be generated at "least cost" because the bills would impose a requirement that PNM own the power generation facilities – solar, wind, gas – that will replace the coal generation to be closed. Long-term agreements by third parties are demonstrably lower cost than PNM-owned facilities. PNM's claim that owning these facilities will allow it to protect jobs and the economy in the Four Corners area is without support, and there is no reason to expect that other solar companies would not create those same jobs, in those same places, as could easily be required.

3) **This legislation is unconstitutional.** Even if the Bills did not seek to avoid the regulatory process and even if they did not impose unjustified costs on the ratepayers, the Bills, if they became law, would be unconstitutional, because the issue of cost recovery was before the PRC and is now before the New Mexico Supreme Court.

   The New Mexico Constitution, Art. IV, § 34, states as follows:

   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.

The Law Would Be Unconstitutional.

Based on the originally filed and draft revision bills, Senate Bill 47 and House Bill 80, demonstrates that the bill are unconstitutional to the extent that they addresses cost recovery for PNM's reinvestments in and life extension of the Four Corners Power Plant

("Four Corners") and the San Juan Generating Station ("San Juan") coal plants and Palo Verde Nuclear Generating Station ("Palo Verde") that serve PNM's customers.

New Energy Economy's pending appeal in the New Mexico Supreme Court, Case No. 36,115, directly addresses the question of imprudence and PNM's investment in Four Corners and whether this resource be permitted to serve PNM retail customers. New Energy Economy's brief-in-chief and response and PNM's answer, explicitly address PNM's investment, imprudence, and cost recovery from ratepayers for Four Corners.[1] Additionally, the pending rate case, Case No. 16-00276-UT, at the New Mexico Public Regulation Commission ("NM PRC") also involves the question of PNM's capital expenditures, imprudence, and cost recovery from ratepayers for Four Corners.

Further, PNM's significant re-investment and expenditures in San Juan is also on appeal in two pending cases: 1) New Mexico Supreme Court, Case No. 35,697, involving PNM's acquisition of 132 more megawatts of coal and all its attendant costs (pollution controls, decommissioning, reclamation, etc.) purchased from exiting California co-owners. To the extent PNM seeks cost recovery for *any* of these expenditures in the bill these matters are at issue before the New Mexico Supreme Court in the above-mentioned pending cases.

The Legislature cannot make changes to law regarding issues in pending cases because this is specifically prohibited by the New Mexico Constitution. The New Mexico Constitution, Art. IV, § 34, states as follows:

> 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.

According to our New Mexico Supreme Court, in *Marquez v. Wylie*, 434 P. 2d 69 (1967), "[b]ased upon the above section, we recently held that *an attempted change by the legislature* of Rule 41(e) (§ 21-1-1 (41) (e), N.M.S.A. 1953) *could not apply to a pending case*." (emphasis supplied).

This constitutional provision was designed to prevent a change such as is being attempted by PNM here and is not subject to question.

The definition of "pending" in the context of the purpose behind article IV, section 34 was clearly set forth in the seminal case of *Stockard v. Hamilton,* 25 N.M. 240, 245, 180 P. 294, 295 (1919):

> The evident intention of the Constitution is to prevent legislation interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the state, and which have not been concluded, finished, or determined by a final judgment. This provision of the Constitution was inserted for the purpose of curing a well-known method, too often used in the days when New Mexico was under a territorial form of

[1] Briefs available upon request.

> government, to win cases in the courts by legislation which changed the rules of evidence and procedure in cases which were then being adjudicated by the various courts of the state.

Brazos Land v. Board of Cty. Com'rs, 848 P. 2d 1095, 1097-8, (N.M. Ct. App. 1993) ("[T]he purpose of article IV, section 34, … is to prevent legislative interference with adjudication of pending cases.")

If this legislation is approved during the pendency of the cases cited below it would in effect change the rights and remedies of the parties.

I. PNM's Four Corners Coal Investments Are At Issue In Pending Cases

The question of PNM's investment, imprudence, and cost recovery from ratepayers regarding Four Corners expenditures is the subject of PNM's current rate case, NM PRC Case No. 16-00276-UT. In 16-00276-UT, two Hearing Examiners issued a Certification of Stipulation on October 31, 2017, that stated:

> The Hearing Examiners find that the appropriate remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the $90.1 million of the SCR[2] investment and the $58 million of the additional life-extending capital improvements is the disallowance of all costs associated with the investment and improvements. This follows the precedent established in PNM's last rate case as a remedy for PNM's imprudence on the balanced draft investment[.]

Certification of Stipulation, 16-00276-UT, October 31, 2017, p. 68.

On December 20, 2017, the Commission issued an Order accepting and extending the Hearing Examiners' Certification of Stipulation of October 31, 2017.

> The Commission agrees with the Certification that the remedy […] is insufficient to address the scope of PNM's imprudence. However, the Commission also finds that PNM's imprudence extended not just to the decision to install SCR and make additional investments in FCPP, but to PNM's determination that continued use of FCPP as baseload generation was necessary. … Accordingly, the Commission finds that the Certification's limited remedy of disallowing the return on PNM's SCR and other FCPP capital expenditures is an appropriate remedy for *this* phase of the FCPP review. …The Commission therefore finds that the ratemaking treatment of the costs at FCPP not addressed here will be determined, either in a continuation of the current proceeding … or in PNM's next filed rate proceeding.
> (emphasis supplied).

[2] SCR stands for Selective Catalytic Reduction, which are pollution controls.

The Final Order from the Commission is expected this month, and New Energy Economy has already expressed publicly that it will appeal the decision because, after the Commission upheld the Hearing Examiners finding of PNM's imprudence with respect to Four Corners specifically articulated in the Certification of Stipulation on December 20, 2017, **it reversed itself with respect to the finding of imprudence**, despite no new evidence, let alone, substantial evidence – the required legal standard. The Final Order is pending.

If New Energy Economy prevails Four Corners could be excluded from rate base. If the Legislature awarded cost recovery to PNM regardless, then SB47 would reverse the remedy and make the New Mexico Supreme Court ruling meaningless.

II. PNM's San Juan Coal Investments Are At Issue In Pending Cases

At issue in New Mexico Supreme Court, Case No. 35,697, is the PRC's approval of PNM's purchase of 132 additional megawatts of coal at the San Juan Generating Station from other co-owners that were abandoning their coal shares. New Energy Economy argued that PNM failed to meet its burden of proof to satisfy the legal standard that further investment in coal was the most cost-effective resource among feasible alternatives and, hence, that this life-extending investment was an undue financial burden on ratepayers and would not result in rates that are fair, just, reasonable and in the public interest. NMSA § 62-8-1. Briefing occurred in 2016, oral argument occurred on January 25, 2017, and the parties are awaiting a decision.

If the New Mexico Supreme Court reverses the PRC approval of PNM's acquisition of 132 additional megawatts of coal at San Juan it would exclude those costs and associated liabilities from ratepayer bills. If the Legislature awarded cost recovery to PNM in SB47 it would reverse the remedy and make the New Mexico Supreme Court ruling meaningless.

III. PNM's ownership bias of resources is anti-competitive and not cost effective for ratepayers

Case No. 17-00129-UT was an adjudicatory proceeding to determine, in part, whether PNM should be allowed to procure 50 megawatts (MWh) of solar facilities under a "turnkey" agreement with Affordable Solar, by which PNM will own and operate the facility and begin serving customers in 2019 at an estimated cost of $72,861,898. PNM's project would require Affordable Solar to construct the facilities on PNM property and transfer ownership to PNM upon completion.

New Energy Economy and others took issue with the terms PNM required of bidders in PNM's Request for Proposal ("RFP") because they were calculated to, and did effectively eliminate from consideration any proposals that would result in other than PNM owning and operating the resulting facility. **The effect of these provisions was to violate the law by preventing consideration of less costly alternatives for ratepayers**. The NM PRC

Hearing Examiner found that PNM failed to show that its choice of a PNM facility was the most cost-effective alternative among feasible alternatives as the law requires.

A review of recent PNM projects revealed that PNM-ownership is more costly than projects by third party producers. In Case 17-00129-UT PNM offered evidence that the levelized cost of the solar project at issue which PNM owns is $44.63/MWh. This was decided in November 2017. However, evidence produced showed PNM contracted with a third party to serve Facebook, Inc. data centers, (Case No. 16-00191-UT) for a rate of $39.85/MWh for solar energy. PNM is charging ratepayers 12% more than 2016 Facebook prices. In the current 2018 Facebook case, 18-0009-UT, PNM contracted with a third party to serve Facebook for a rate of $29.98/MWh. PNM ratepayers will pay 49% higher prices than Facebook.

The Hearing Examiner, Carolyn Glick, agreed with the objectors, including NEE. In her Recommended Decision ("RD"), she concluded that PNM had failed to show that the PNM's project was the most cost-effective solar resource procurement among available alternatives because PNM's 2017 RFP process did not give Independent Power Producer (IPP) bidders a fair opportunity to participate and compete in the RFP process with power purchase agreements (PPA). The Hearing Examiner determined PNM's RFP provisions to be unfair and uncompetitive and recommended that PNM immediately reissue an RFP that would correct these defects.

She specifically noted these defects in the RFP proposal and recommended the following finding:

> PNM seeks approval of 50 megawatts of solar photovoltaic facilities. The Project is a turnkey project, meaning that Affordable Solar would construct the facilities and transfer ownership to PNM. The levelized bid cost was $44.63/MWh. The Affordable Solar Project was proposed in response to PNM's 2017 Request for Proposals (RFP). PNM received only six bids in response to the RFP. Two of the bids were for PPA proposals which did not meet the RFP requirements. … This was not a difficult call: the Hearing Examiner recommends rejecting this proposed procurement and ordering PNM to immediately issue a new RFP that gives bidders 90 days to respond to the RFP and offers access to PNM-controlled sites to PPA bidders if PNM offers access to those sites to turnkey bidders. The Hearing Examiner agrees with the opponents that PNM failed to show, as required, that the Affordable Solar Project is PNM's most cost effective solar resource procurement among available alternatives because the 2017 RFP process did not give PPA bidders a fair opportunity to participate and compete. I found that allowing bidders only 31 days to respond to the RFP was insufficient and that the provision in the RFP allowing turnkey bidders, but not PPA bidders, to use PNM-controlled sites was unfair and uncompetitive.

17-00129-UT, Recommend Decision, October 17, 2017, pp. 10-11.

The New Mexico Public Regulation Commission's Final Order approved PNM's ownership despite the Hearing Examiner's recommendation that "it not be approved because PNM has not met its burden of proving that the Project is the most cost effective renewable solar

resource procurement among available alternatives." RD, p. 79. The Utility Division Staff argued against the PRC's decision for just these reasons. *Staff Response to New Energy Economy's Motion for Reconsideration,* Nov. 22, 2017; *See also*, *Albuquerque Bernalillo County Water Utility Authority Response to New Energy Economy's Motion for Reconsideration,* Nov. 22, 2017.

This case is currently on appeal in the New Mexico Supreme Court, Case No. 36,772, where New Energy Economy is arguing that the Commission failed to apply legal standards for approval of utility resource acquisitions.

If the Legislature mandates PNM-ownership of resources it will undermine the bedrock utility law that requires utilities to prove that its resource acquisition is "the most cost effective among feasible alternatives." SB 47 would nullify the rights and remedies of parties in pending Case No. 36,772.

CONCLUSION

In SB 47/HB 80, PNM seeks reimbursement from ratepayers of undepreciated costs and other associated capital investment costs for San Juan, Four Corners, and Palo Verde should PNM abandon those plants in the future. The passage of this bill would allow PNM to win by legislation what it has not won to date by following established judicial procedure. Given that Case No. 16-00276-UT is pending before the PRC (and New Energy Economy has affirmatively stated that it will appeal this decision) and that Cases 35,697, 36,115, and 36,772 are currently pending before the New Mexico Supreme Court, and that SB47 and HB 80 is specifically intended to and will have the effect of interfering with the adjudication of these cases and will substantially affect the rights and remedies of the appealing parties, the plain language of the New Mexico Constitution forbids the legislature from acting at this time and requires, at a minimum, a committee reassignment of SB 47 and HB 80 to the respective judiciary committees in each chamber or that this body reject the bill as unconstitutional on its face.

With Respect,

New Energy Economy

Mariel Nanasi, Attorney at Law
343 East Alameda St.
Santa Fe, NM 87501-2229
505.989.7262