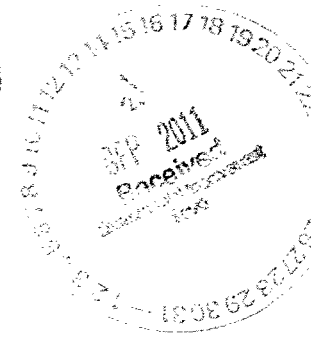


STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REPEAL
OF REGULATION
20.2.100 – GREENHOUSE GAS REDUCTION PROGRAM

No. EIB 11-16(R)



MOTION TO STRIKE PARTS OF PETITIONERS' STATEMENT OF REASONS

At a recorded hearing before the Hearing Officer on September 7, 2011, the petitioners' counsel stated that the prior proceedings in which Environmental Improvement Board (EIB) adopted the Rule(s) are "entirely separate" from the current proceedings.¹ Petitioners' counsel, along with the Hearing Officer and EIB's counsel, also stated that EIB would not be reviewing the Rules at issue in this proceeding as if EIB were an appellate court. Finally, petitioners' counsel stated that EIB could repeal the Rules based strictly on policy grounds.

New Energy Economy, Inc. (NEE) disagrees that the prior proceedings are separate from the current proceedings; it also disagrees that EIB can repeal a regulation based solely on policy grounds. The current proceedings were not commenced out of thin air. They were commenced specifically to "resolve" the appeals arising from the prior proceedings. Moreover, the applicable statutes require EIB to base its regulatory decisions not just on policy, which may change from administration to administration, but on substantial evidence. However, NEE fully agrees that EIB cannot and should not sit in review of its former decisions like an appellate court, because this would violate the Separation of Powers Doctrine.

In derogation of their stated position, petitioners' Statement of Reasons include numerous allegations that refer to the prior proceedings, that overlap with petitioners' pending appeals, or that otherwise invite EIB to encroach on the appellate jurisdiction of the Court of Appeals. In light of the alleged "separateness" of the current and former proceedings and the constitutional

¹ The prior proceedings are identified in paragraph 5 of the Order Establishing Procedures.

limit on EIB's power, such allegations are now either wholly irrelevant to petitioners' case or beyond EIB's authority to consider. The record should not be cluttered by these extraneous allegations, nor should the parties be forced to consider or rebut them.²

Accordingly, NEE requests that the Hearing Officer strike **Paragraph 13** and **Paragraphs 19-22** of petitioners' Statement of Reasons. These paragraphs contain numerous allegations referring to the prior proceedings, which petitioners contend are "entirely separate" from the current proceedings.

In addition, to avoid encroaching on the jurisdiction of the Court of Appeals, the Hearing Officer should also strike all allegations in the Statement of Reasons that implicate issues in petitioners' pending appeals. Petitioners filed docketing statements in the Court of Appeals that raised numerous issues regarding EIB's adoption of the Rules now under consideration:

- A.** Is the Regulation unlawful because: (i) the EIB does not have legislative authority to regulate the emission of GHG by promulgating a climate change rule, including a trading program; (ii) it conflicts with other initiatives for GHG reduction, including, for example, the stringency limitations in the Air Act, the federal PSD regulations, New Mexico Public Regulation Commission regulations and provisions of the New Mexico Renewable Energy Act and the Efficient Use of Energy Act?
- B.** Did the EIB abuse its discretion in adopting a regulation: (i) that will not result in the abatement of air pollution in New Mexico; (ii) before the EIB had established an ambient standard for GHG?
- C.** Does the Regulation violate due process of law: (i) because it is unduly vague and lacks necessary details and definitions; (ii) where the stakeholder process that preceded the Petition was unduly abbreviated and PNM and other parties were afforded insufficient preparation time for the hearing?
- D.** Is the Regulation supported by substantial evidence in the whole record even though: (i) the Regulation would have no discernable impact on climate change or its effects in New Mexico; (ii) the NMED failed to demonstrate the technical practicability or economic reasonableness of the Regulation; (iii) the Regulation creates a complex regulatory structure for which insufficient

² The allegations are not only in conflict with the Petitioners' stated position, many of them are incorrect. Therefore, NEE and the other opponents of repeal will be burdened with rebutting them unless they are stricken.

implementation time is allowed; (iv) the costs of the Regulation vastly outweigh any benefits; (v) the NMED's economic analysis supporting the Regulation is flawed; and (vi) the Regulation would have significant adverse consequences for the New Mexico economy, such as lost jobs and reduced gross state product, lower tax revenues and increased utility rates?

Public Service Company of New Mexico's Docketing Statement (N.M. Court of Appeals Case No. 30,902) (Exhibit A).³ Consistent with its power under the New Mexico Constitution and the applicable statutes, the Court of Appeals will resolve the forgoing issues and every other issue that may call into question EIB's adoption of the Rules. Therefore, the Hearing Officer should strike from the Statement of Reasons **Paragraphs 8-13, 15, 16, and 18-22**, because these paragraphs either repeat the same issues raised in petitioners' docketing statements, verbatim, substantially overlap with these issues, or otherwise call into question the validity of EIB's adoption of the Rules.

WHEREFORE, NEE requests the Hearing Officer to strike from the record in this proceeding **Paragraphs 8-13, 15, 16, and 18-22** of petitioners' Statement of Reasons.

Respectfully submitted:

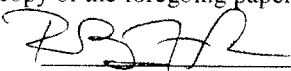
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CERTIFICATE OF SERVICE: I certify that I caused a copy of the foregoing paper to be emailed to Petitioners' attorneys and Stephen Vigil on 8/14, 2011.


R. Bruce Frederick

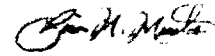
³ Petitioners filed docketing statements in their appeals of Rule 350 but not Rule 100. However, they have raised virtually the same issues regarding both Rules.

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO

FILED

APR 13 2011



PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

vs.

Case No. 30,902

**NEW MEXICO ENVIRONMENTAL
IMPROVEMENT BOARD,**

Appellee.

**PUBLIC SERVICE COMPANY OF NEW MEXICO'S
DOCKETING STATEMENT**

**APPEAL FROM THE NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

PUBLIC SERVICE COMPANY OF
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I. NATURE OF PROCEEDING

This is an appeal by appellant Public Service Company of New Mexico (“PNM” or “Company”) from the appellee New Mexico Environmental Improvement Board’s (“EIB”) promulgation of a new regulation. The new regulation (the “Regulation”) is found at 20.2.350 NMAC and is entitled “Greenhouse Gas Cap and Trade Provisions.” The Regulation should be set aside because it is arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record and otherwise not in accordance with the law.

II. DATE OF JUDGMENT; TIMELY FILING OF APPEAL

On November 15, 2010, the EIB filed the Regulation with the State Records Office under the State Rules Act, NMSA 1978, §§ 14-4-1 to 11. The basis for the EIB’s promulgation of the Regulation is set out in its Order and Statement of Reasons for Adoption of Regulations (“Statement of Reasons”), dated November 10, 2010. Copies of the Regulation and the Statement of Reasons were attached to PNM’s Notice of Appeal.

NMSA 1978, § 74-1-9(H) (1971) and NMSA 1978, § 74-2-9(A) & (B) (1992) provide that notices of appeal to the Court of Appeals from actions of the EIB shall be filed within thirty (30) days after the filing of regulations under the State Rules Act. PNM’s Notice of Appeal was filed in this case on December 14, 2010 and is therefore timely.

III. STATEMENT OF THE CASE

A. Summary of Proceedings

This case commenced on June 4, 2010, when the New Mexico Environment Department (“NMED”) filed a Petition for Regulatory Change (“Petition”), petitioning the EIB to adopt a new regulation establishing a greenhouse gas (“GHG”) cap and trade program. As described in the Petition, a cap and trade system is intended to reduce air emissions through a market mechanism in which GHG emissions are capped at a specified level which declines over time. Sources with GHG emissions are allocated a specific number of allowances tied to their GHG emissions. Those sources that are subject to the cap and trade system (such as utility companies) are required to surrender allowances to match total emissions. Since the total number of allowances decreases, sources must either reduce their GHG emissions or purchase allowances from other sources in order to comply with the applicable cap. The NMED asked the EIB to schedule a public hearing on its Petition for September 2010.

On June 18, 2010, PNM filed a response in opposition to the Petition (“PNM Response”). The PNM Response explained that the NMED proposal would have an adverse impact on rates to PNM’s customers and on the Company’s ability to procure necessary future generation to meet customer needs. The PNM Response questioned the EIB’s legal authority to adopt the NMED proposal and also argued

that the Petition was premature (pending the development of a national policy on climate change); that it lacked several critical elements necessary to achieve a workable and economically sustainable program to reduce GHG emissions; and that climate change initiatives are more appropriately addressed in the legislative context.

The EIB entered a scheduling order (“Scheduling Order”) on June 22, 2010, directing NMED to file written testimony and exhibits in support of its Petition by July 16, 2010 and granting other interested persons until August 16, 2010 in which to file their written testimony and exhibits. The Scheduling Order granted parties until August 30, 2010 to file rebuttal testimony and exhibits. A hearing on the Petition was scheduled to commence on September 20, 2010, only three and a half months after the filing of the Petition.

PNM and other parties opposed to the Petition filed motions to amend the scheduling order and to stay the proceedings. The motion to amend the Scheduling Order (“Motion to Amend”) pointed out that the movants had been given only 30 days (*i.e.*, from July 16 to August 16, 2010) to evaluate the complex NMED proposal, prepare written technical testimony and analyze the economic impact of the NMED proposal. The Motion to Amend argued that the expedited schedule set out in the Scheduling Order did not give parties a reasonable opportunity to participate in the rulemaking proceeding and explained that the schedule

established in this rulemaking proceeding overlapped with concurrent proceedings in a related rulemaking the EIB had docketed to consider a petition for a GHG reduction program filed by New Energy Economy, Inc. (“NEE”).

The Motion to Stay argued that the NMED’s proposal was dependent on still another NMED proposal, for a GHG reporting rule, which was also pending at the EIB, and on federal regulations that had not yet been adopted by the federal Environmental Protection Agency (“EPA”). The Motion to Stay therefore contended that the NMED’s cap and trade proposal violated applicable notice requirements because it referenced and incorporated other regulations which did not yet exist. To ensure compliance with the Environmental Improvement Act (“EIA”) and the Air Quality Control Act (“Air Act”), the Motion to Stay asked the EIB to stay the proceedings until the other relevant regulations had been adopted.

These motions notwithstanding, the EIB proceeded hear the NMED proposal in accordance with the schedule established in the Scheduling Order. On July 16, 2010, the NMED offered the written testimony of ten technical witnesses, consisting of over 1,800 pages of testimony and exhibits, along with a materially revised version of its own proposed GHG rule. PNM and other parties opposed to the NMED proposal filed their written testimony and exhibits on August 16, 2010 and their rebuttal testimony on August 30, 2010. The hearings commenced on September 20, 2010 and continued through September 30, 2010. Post-hearing

briefs and submittals were filed by PNM and other interested parties on October 26, 2010. On November 2, 2010, the EIB, on a 4 to 3 vote, adopted the Regulation. The EIB issued its “Order and Statement of Reasons for Adoption of Regulations” on November 10, 2010.

B. Summary of Facts

The Regulation establishes requirements for participation in a GHG emissions cap and trade program. 20.2.350.6 NMAC. The Regulation applies to persons owning and operating specified facilities in the geographic area of the EIB’s jurisdiction. 20.2.350.2(A) NMAC. It does not apply to sources within the geographic boundaries of the Navajo Nation or Bernalillo County. The EIB has estimated that about 63 large industrial sources in New Mexico would be subject to the Regulation.

Essentially, the Regulation applies to stationary sources with carbon dioxide emissions exceeding 25,000 metric tons annually. *See* 20.2.350.7(F) NMAC; 20.2.350.101(B)(2)(a) NMAC. Emission “allowances” will be issued by the NMED to owners and operators of covered sources, each allowance being authorization to emit one metric ton of carbon dioxide equivalent. 20.2.350.7(B) NMAC. These allowances may then be traded within a regional trading market, yet to be defined by NMED, through approval of individual trading partners. Testimony linked the NMED proposal to a loose framework developed by the

Western Climate Initiative (“WCI”), which was initially established as a collaboration of seven western states and four Canadian provinces. NMED will reduce the emission allowances granted to each source by 1.5 percent in 2013 and two percent per year from 2014 to 2020. 20.2.350.11 NMAC.

The Regulation’s rationale, as well as its specific terms and provisions, were and are the subject of great controversy. The NMED argued, and the EIB found in adopting the Regulation, that climate change is real and continuing and that it is caused by anthropogenic emissions of GHG. Statement of Reasons at ¶ 1. According to this view, climate change is causing adverse impacts on public health and it is necessary, in the public interest, to prevent and abate this climate change by adopting regulations that reduce GHG emissions. *Id.* at ¶ 5-6, 9, 11-13. The Regulation, said the EIB, will have a small but significant effect on climate change. *Id.* at ¶ 14. The EIB found that the Regulation was practicable from a technical standpoint, *Id.* at ¶ 15-29, and economically reasonable. *Id.* at ¶ 30-38.

By contrast, PNM (supported by testimony presented by other parties opposed to the NMED proposal) argued and presented detailed supporting evidence that the NMED proposal was neither supported by substantial evidence nor sustained by applicable legal principles. For example, PNM noted the essentially undisputed evidence that the NMED proposal would have no discernible impact on GHG emissions in New Mexico. PNM/SPS brief at 6-10.

PNM also pointed out that five out of the seven states that were original WCI participants had dropped out of the regional trading program, *Id.* at 1-2, 5, 21, 25, thereby greatly reducing the potential number of trading partners. PNM also analyzed in detail why the NMED had failed to demonstrate the technical practicability or economic reasonableness of the proposed rule. *Id.* at 10-14, 24-30. Not only would the NMED rule have no effect on GHG emissions in New Mexico, the evidence showed that the costs of the proposal would vastly outweigh any possible benefits. These costs include lost jobs, reduced gross state product, lower tax revenues and increased utility rates. *Id.* at 30-36.

PNM also addressed the legal impediments to the EIB's adoption of the NMED proposal. These included the EIB's lack of legislative authorization to promulgate a climate change rule. *Id.* at 50-54, 55-57. Moreover, the proposed rule would violate the stringency limitations under the Air Act and would conflict with federal Prevention of Significant Deterioration ("PSD") rules. *Id.* at 54-55. Further, the truncated schedule employed by the EIB in its consideration of the NMED Petition resulted in a denial of due process of law. *Id.* at 57-61.

IV. ISSUES PRESENTED

As reflected in the above description of the proceedings in this case, the following issues are presented on appeal.

- A. Is the Regulation unlawful because: (i) the EIB does not have legislative authority to regulate the emission of GHG by promulgating a climate

change rule, including a trading program; (ii) it conflicts with other initiatives for GHG reduction, including, for example, the stringency limitations in the Air Act, the federal PSD regulations, New Mexico Public Regulation Commission regulations and provisions of the New Mexico Renewable Energy Act and the Efficient Use of Energy Act?

- B. Did the EIB abuse its discretion in adopting a regulation: (i) that will not result in the abatement of air pollution in New Mexico; (ii) before the EIB had established an ambient standard for GHG?
- C. Does the Regulation violate due process of law: (i) because it is unduly vague and lacks necessary details and definitions; (ii) where the stakeholder process that preceded the Petition was unduly abbreviated and PNM and other parties were afforded insufficient preparation time for the hearing?
- D. Is the Regulation supported by substantial evidence in the whole record even though: (i) the Regulation would have no discernable impact on climate change or its effects in New Mexico; (ii) the NMED failed to demonstrate the technical practicability or economic reasonableness of the Regulation; (iii) the Regulation creates a complex regulatory structure for which insufficient implementation time is allowed; (iv) the costs of the Regulation vastly outweigh any benefits; (v) the NMED's economic analysis supporting the Regulation is flawed; and (vi) the Regulation would have significant adverse consequences for the New Mexico economy, such as lost jobs and reduced gross state product, lower tax revenues and increased utility rates?

V. PRESERVATION OF ISSUES

All of the issues presented in this appeal were raised in the proceedings before the EIB, including in PNM's written testimony and exhibits, in cross-examination of witnesses at the EIB hearing and in PNM's post-hearing brief filed with the EIB on October 26, 2010.

VI. STANDARD OF REVIEW

Under NMSA 1978, § 74-1-9(J) and NMSA 1978, § 74-2-9(C), the Court of Appeals will set aside an EIB regulation if it is arbitrary, capricious or an abuse of discretion; not supported by substantial evidence in the transcript; or otherwise not in accordance with law.

The standard of judicial review for administrative appeals depends generally upon whether the decision presents a question of law, a question of fact, or some combination of the two and if the matter is within the specialized field of expertise of the administrative agency. Questions of law and statutory construction are not within an agency's expertise and little, if any, deference is given to agencies. *See e.g., N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 11, 141 N.M. 41 (court not bound by agency's interpretation of statute since it is a matter of law that is reviewed de novo); *Rodeo, Inc. v. Columbia Casualty Co.*, 2007-NMCA-013, ¶ 11, 141 N.M. 32 (interpreting contracts is an issue of law which is reviewed de novo); *N.M. Indus. Energy Consumers v. N.M. Pub. Reg. Comm'n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533 (recognizing statutory construction is not a matter within a commission's expertise).

Substantial evidence issues are reviewed under the "whole record" standard of review. *Dona Ana Mutual Domestic Water Consumers Assoc. v. N.M. Pub. Reg. Comm'n*, 2006-NMSC-032, ¶ 11, 140 N.M. 6. Segments of the record will

not be ignored. *Duke City Lumber Co. v. N.M. Env'tl. Improvement Bd.*, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984).

VII. LIST OF AUTHORITIES

A. Supporting Authorities

- (i) *Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 112 N.M. 379, 384, 815 P.2d 1169, 1174 (1991) (burden of proof is on moving party)
- (ii) *El Paso Elec. Co. v. N.M. Pub. Serv. Comm'n*, 103 N.M. 300, 304, 706 P.2d 511, 515 (1985) (regulations must be capable of being construed using known, accepted rules of construction)
- (iii) *PNM Elec. Servs. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-017, ¶ 10, 125 N.M. 302 (“Statutes create administrative agencies and agencies are limited to the power and authority expressly granted and necessarily implied by statute.”)
- (iv) Environmental Improvement Act, NMSA 1978, § 74-1-2 (1997) (purpose of EIA is to protect “health, safety, comfort and economic and social well-being [of the state’s] inhabitants”)
- (v) Air Quality Control Act, NMSA 1978, § 74-2-5 (EIB functions to prevent or abate air pollution)
- (vi) *Pub. Serv. Co. of N.M. v. N.M. Env'tl. Improvement Bd.*, 89 N.M. 223, 227, 549 P.2d 638, 642 (Ct. App. 1976) (EIB’s authority to promulgate regulations must derive from its authority to prevent or abate air pollution)
- (vii) *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd.*, 80 N.M. 633, 645, 459 P.2d 159, 171 (Ct. App. 1969) (emissions standards adopted by board must be reasonably related to prevention or abatement of air pollution)

- (viii) *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 104 N.M. 565, 568, 725 P.2d 244, 247 (1986) (essence of due process is the right to be heard at a meaningful time and in a meaningful manner)
- (ix) *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 20, 146 N.M. 473 (a regulation is unconstitutional if it is so vague that persons of common intelligence must guess at its meaning and would differ in its application)
- (x) *State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (when a statute is clear and unambiguous, it should be interpreted as written)
- (xi) *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.”)
- (xii) *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 10, 140 N.M. 464 (agency’s action will be found to be arbitrary and capricious when facts found are not rationally connected to the decision made)
- (xiii) *Kennecott Copper Corp. v. N.M. Env'tl. Improvement Bd.*, 94 N.M. 610, 613, 614 P.2d 22, 25 (Ct. App. 1980) (supporting proposition that the EIB’s authority to prevent or abate air pollution must be premised on a previously established standard of what constitutes air pollution)

B. Contrary Authorities

- (i) *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶¶ 11, 26, 141 N.M. 41 (regulations that have been enacted by an agency are presumptively valid and will be upheld if consistent with authorizing statutes)
- (ii) *Regents of University of California v. N.M. Water Quality Control Comm'n*, 2005-NMCA-073, ¶ 35, 136 N.M. 45 (even if

a different conclusion might have been reached from the facts, the choice made is not arbitrary or capricious if exercised honestly and upon due consideration)

(iii) *Massachusetts v. EPA*, 549 U.S. 497, 527-28, 127 S. Ct. 1438, 1460 (2007) (broadly construing federal Clean Air Act's definition of "air pollutant")

VIII. TRANSCRIPTION OF PROCEEDINGS

The hearing before the EIB was transcribed by a court reporter. Copies of the hearing transcript have been prepared and provided to interested parties.

IX. PRIOR OR RELATED APPEALS

There are several related appeals. In addition to PNM, six other parties have filed notices of appeal to the Court of Appeals from the promulgation of the Regulation: City of Farmington and its Farmington Electric Utility System ("Farmington") (Docket No. 30,897); New Mexico Oil and Gas Association ("NMOGA") (Docket No. 30,898); Tri-State Generation and Transmission Association, Inc. ("Tri-State") (Docket No. 30,899); Southwestern Public Service Company ("SPS") (Docket No. 30,901); Independent Petroleum Association of New Mexico ("IPANM") (Docket No. 30,907); and El Paso Electric Company ("EPE") (Docket No. 30,908).

Additionally, these same appellants have filed appeals to the Court of Appeals from the EIB's promulgation of a different, but related, GHG regulation. This other regulation, found in 20.2.100 NMAC, is entitled "Greenhouse Gas

Reduction Program.” These appeals are the following: Farmington (Docket No. 31,015); IPANM (Docket No. 31,016); NMOGA (Docket No. 31,017); EPE (Docket No. 31,018); Tri-State (Docket No. 31,019); PNM (Docket No. 31,020); SPS (Docket No. 31,021). The Docketing Statements are due in the appeals from the Greenhouse Gas Reduction Program on May 25, 2011.

Further, there are several pending appeals from the EIB’s promulgation of a GHG reporting rule. The GHG reporting rule appeals are: NMOGA (Docket No. 30,952); Tri-State (Docket No. 30,953); and IPANM (Docket No. 30, 954). PNM is not an appellant in these cases.

Finally, it should be noted that there are two reported cases involving various administrative issues raised in relation to the EIB’s proceedings to address GHG issues: *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, 243 P.3d 746 and *New Energy Economy, Inc. v. Martinez*, 2011-NMSC-006, ___ P.3d ___.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW
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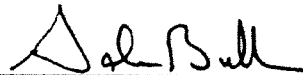
CERTIFICATE OF SERVICE

Appellant Public Service Company of New Mexico hereby certifies that it caused to be mailed by U.S. mail, postage prepaid, a copy of the foregoing Docketing Statement to the following party on April 13, 2011:

NEW MEXICO ATTORNEY GENERAL'S OFFICE

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Galen M. Buller