

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION)	
OF PUBLIC SERVICE COMPANY OF)	
NEW MEXICO FOR APPROVAL OF)	Case No. 12-00007-UT
RENEWABLE ENERGY RIDER NO. 36)	
PURSUANT TO ADVICE NOTICE NO. 439)	
AND FOR VARIANCES FROM CERTAIN)	
FILING REQUIREMENTS)	
)	
PUBLIC SERVICE COMPANY OF)	
NEW MEXICO,)	
Applicant.)	
_____)	

**PUBLIC SERVICE COMPANY OF NEW MEXICO'S
RESPONSE TO COALITION FOR CLEAN AFFORDABLE ENERGY'S
MOTION TO COMPEL**

Public Service Company of New Mexico ("PNM"), by and through its attorneys, hereby responds to the Coalition for Clean Affordable Energy's ("CCAЕ") Motion to Compel ("Motion") as follows:

Interrogatory CCAE 1-1

PNM recognizes that the Commission favors prompt and complete disclosure and exchange of information. But discovery is not without its limitations. Discovery is allowable for information "which is relevant to the subject matter involved in the pending action." Rule 1-026(B) NMRA. Thus, the information sought must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it otherwise would be. It must naturally and logically tend to establish a fact in issue. *See, McNeill v. Burlington Resources Oil & Gas Company*, 2008-NMSC-022, ¶ 14, 143 N.M. 740, 182 P.3d 121. In this case PNM seeks approval of a

Renewable Energy Rider which it alleges in its Application conforms to the “terms, conditions and annual cost recovery limitations prescribed in the Amended Stipulation.” Application for Approval of Renewable Energy Rider No. 36 and for Variances from Certain Filing Requirements, ¶ 3 at 2. The Amended Stipulation itself states that the “Amended Stipulation contains the full intent and understanding and the entire agreement of the Signatories and no implication should be drawn in respect to any matter not addressed in the Amended Stipulation.” Amended Stipulation, ¶ 43 at 19. The “terms, conditions and annual cost recovery limitations” are contained in paragraphs 20(e)(ii), 20(f) and 22. To the extent that there is an issue regarding the conformance of the proposed Renewable Energy Rider to the terms, conditions and annual cost recovery limitations contained in the Amended Stipulation, the relevant information is that which is contained in the Amended Stipulation itself and not the confidential settlement discussions leading up to the agreements contained in the Amended Stipulation. And the information that may or may not have been provided to the Signatories that may or may not help CCAE understand why the Signatories agreed to the renewable energy provisions in the Amended Stipulation is simply not relevant to the consideration of whether or not the Rider should be approved. The motivations of the parties regarding what positions to take in a proceeding are generally not relevant to whether the Commission should grant the relief requested. *Cf., Attorney General v. New Mexico Public Service Commission*, 111 N.M. 636, 641, 808 P.2d 606 (1991) (it made no difference to the result whether Attorney General was representing ratepayers or the State). This is not a case where judicial estoppel is at issue. *See, Guzman v. Laguna Development Corporation*, 2009-NMCA-116, ¶ 12, 147 N.M. 244, 219 P.3d 12, *cert. denied*, 2009-NMCERT-009, 147 N.M. 421, 224 P.3d 648.

CCAIE does not explain how the motivations of the Signatories regarding the renewable energy provisions of the Amended Stipulation are at all relevant to the issue of whether the Rider should be approved or not. If CCAIE perceives problems with the proposed Rider, they should frame their discovery requests to elicit information regarding those perceived problems. In that regard, PNM disputes CCAIE's unsupported gratuitous comment about "the motivation for agreeing to something that is clearly not in the ratepayer interest". Motion at 3-4. CCAIE has provided absolutely no evidence rebutting PNM's prima facie case that approval of the Renewable Energy Rider is very much in the best interests of customers. *E.g.*, Direct Testimony of Gerard T. Ortiz at 14 (Rider lowers overall costs to customers, allows deployment of more renewable energy by creating more headroom under the reasonable cost threshold, provides better matching of costs and benefits, ensures that customers pay only actual cost of renewable portfolio standard in any year, customers will receive benefit of declining costs more timely). Further, PNM should not be forced to speculate as to why the Signatories did not object to the Amended Stipulation and agreed to the language regarding the Renewable Energy Rider and why the Signatories may disagree with CCAIE as to what is in the best interests of customers.

CCAIE contends that, under the Commission's Rules of Procedure, confidentiality extends to settlement discussions only when the discussions are part of formal settlement conferences, citing to 1.2.2.16(D) NMAC. Motion at 4. CCAIE overlooks 1.2.2.20(C) NMAC which extends the protection to statements, admissions, or offers of settlement made during the course of negotiations of settlements generally.

CCAIE recognizes that discovery of privileged information is not allowed and that the Commission has established in its Rules of Procedure that settlement discussions are

privileged. CCAE then erroneously argues, without citation to authority, that it is not clear that the Commission can declare settlement discussions to be privileged if the Supreme Court has not. Motion at 4. The Court has determined that the Legislature may not create new privileges applicable to judicial proceedings because that power is reserved to the Court. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 311-312, 551 P.2d 1354 (1976). But the Commission is not precluded from recognizing additional reasonable privileges for purposes of its own proceedings. The Commission is authorized to adopt its own reasonable procedural rules necessary or appropriate to carry out its duties. NMSA 1978, § 8-8-4(B)(10) (1998); *El Paso Electric Company v. New Mexico Public Service Commission*, 103 N.M. 300, 304, 706 P.2d 511 (1985); *see*, 1.2.2.25(C), 1.2.2.35(A)(2) NMAC. Further, CCAE's argument is a challenge to the Commission's Rules of Procedure which is time-barred. *Community Public Service Company v. New Mexico Public Service Commission*, 99 N.M. 493, 496, 660 P.2d 583 (1983).

Providing settlement discussions the status of "privilege" for purposes of protecting their confidentiality in Commission proceedings even from discovery is consistent with the strong public policy of the State and the Commission favoring settlement of disputes. *See, Attorney General*, 111 N.M. at 640; *New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission*, 104 N.M. 565, 725 P.2d 244 (1986). It is clear that discovery rules favoring "full disclosure" must sometimes take a back seat when they interfere with other important public policies. *Nebraska ex rel. Acme Rug Cleaner, Inc. v. Likes*, 588 N.W.2d 783,789-790 (Neb. 1999) (burdensome discovery not allowed when it frustrates right of party to choose own expert); *accord, Primm v. Isaac*, 127 S.W.3d 630, 636 (Ky. 2004); *see also*, Rule 1-026 NMRA (limiting discovery to information that is not

privileged, prescribing other limitations on discovery, providing for protective orders against discovery); *Pincheira v. Allstate Insurance Company*, 2008-NMSC-049, ¶¶ 22, 24, 144 N.M. 601, 190 P.3d 322 (discovery of privileged information is not allowed because it would destroy the privacy right inherent in every privilege, making the evidentiary privilege useless; rules provide for protection of parties from discovery that causes “annoyance, embarrassment, oppression or undue burden or expense”). In this case, forcing disclosure in discovery of confidential settlement discussions would undermine the very purpose for providing confidential status, destroying the expectation of privacy that the parties had, thus undermining the public policy favoring settlement of disputes. *Cf.*, Rule 11-408 NMRA (statements made in compromise negotiations inadmissible). CCAE’s attempts to show the relevance of the information sought completely fails to demonstrate any materiality of the information for purposes of Commission decision sufficient to outweigh the important public policy considerations in favor of settlements. *See*, Motion at 3-4.

In addition the Signatories have a common interest in fulfilling the terms of the Amended Stipulation in litigation before the Commission. The common interest rule protects the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. The rule applies whenever more than one client share a common interest about a legal matter. *Santa Fe Pacific Gold Corporation v. United Nuclear Corporation*, 2007-NMCA-133, ¶¶ 16, 18, 143 N.M. 215, 175 P.3d 309. Communications among the Signatories in furtherance of fulfilling the terms of the Amended Stipulation are protected from disclosure by the common interest rule. *See also*, Rule 11-503(B)(3) NMRA.

Interrogatory CCAE 1-10

CCAIE seeks to force PNM to do a special study to segregate the costs of various forms of generation in a manner that is not typically used to perform a cost of service study. The exercise would only result in an estimate that may or may not be reasonable because it requires the use of a number of assumptions and new allocation methodologies that have not been examined, agreed to or approved by the Commission, Staff or any Intervenors. Affidavit of Shauna Lovorn-Marriage, ¶ 6. PNM believes that CCAIE has an expert available to it who is familiar with ratemaking. It would be just as easy for CCAIE's expert to take the illustrative cost of service filed in the last rate case and make whatever adjustments and assumptions he believes are reasonable to provide a relevant comparison to the Renewable Energy Rider for other classes of generation.

CCAIE's representation that PNM is seeking to segregate the costs of a particular class of generation and that the information sought would provide a comparison for other classes of generation is misleading. Motion at 6. PNM has clearly stated that the Renewable Energy Rider is not designed to recover costs of renewable energy currently in rate base. It is designed to recover incremental costs that are not currently in rate base. Direct Testimony of Gerard T. Ortiz at 4. Thus the information sought is not relevant. The benefit of such a speculative exercise that does not provide information that is at all comparable to what PNM is seeking in the Renewable Energy Rider is clearly outweighed by the burden of performing the special study requested. Therefore, PNM should not be required to respond to CCAIE's Interrogatory. *See*, Rule 1-026(B)(2)(c) NMRA.

PNM notes that it sought a Capital Additions Rider in the last rate case which would have accomplished a similar result to the Renewable Energy Rider for incremental generation additions and improvements other than renewable energy resources, but it was rejected by the Commission. CCAE could look to the data regarding the Capital Additions Rider to derive costs more comparable to those involved in the Renewable Energy Rider. Key differences between the two riders, which justify approval of the Renewable Energy Rider despite rejection of the Capital Additions Rider, include that the Legislature has specifically mandated the addition of renewable energy resources to PNM's supply portfolio regardless of a demonstration of need under the public convenience and necessity provisions of the Public Utility Act and that PNM obtains prior approval of the resources for which costs are to be recovered under the Renewable Energy Rider pursuant to Commission approval of renewable energy plans. Despite those differences, and even though the comparison is irrelevant to the merits of the proposed Renewable Energy Rider, the data regarding the Capital Additions Rider provide a better basis for the comparison CCAE claims it wants to make than the overly burdensome special study it seeks. *See*, Rule 1-026(B)(2)(a) NMRA.

WHEREFORE, PNM prays the Hearing Examiner for an order denying CCAE's Motion to Compel, and for such further relief as the Hearing Examiner deems proper under the circumstances.

Respectfully submitted,

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5. PNM's current base rates are based on an illustrative cost of service that was filed by PNM in support of the Stipulation in Case No. 10-00086-UT. The illustrative cost of service, as adjusted by the Commission, is attached as PNM Exhibit SLM-1 (Affidavit). The illustrative cost of service provides a detailed breakdown of PNM's jurisdictional revenue requirement and contains 900 lines of detail. The illustrative cost of service identifies components of the revenue requirement by production, transmission, distribution, and general. PNM's base rates are based upon the total revenue requirement as calculated in the illustrative cost of service.

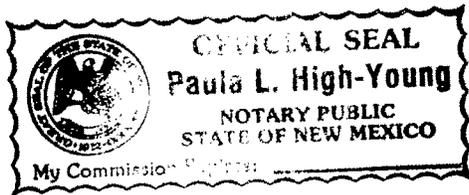
6. As reflected on PNM Exhibit SLM-1 (Affidavit), the illustrative cost of service contains enough detail to prepare a study segregating the revenue requirement for PNM North and PNM South by Coal, Natural Gas, Nuclear, Renewable, and Other. As stated in PNM's objection to CCAE's request in Interrogatory 1-10, PNM has not prepared the revenue requirement segregated in this manner. In order for PNM to calculate the revenue requirement by the requested components, a separate revenue requirement would have to be calculated for each of the requested components using the total PNM Retail column (column E of PNM Exhibit SLM-1 (Affidavit)). This would require creating a new cost of service study with separate columns for Coal, Natural Gas, Nuclear, Renewable, and Other with assignment or allocation for each component of the illustrative cost of service into one of those categories based on the description in the illustrative cost of service. Assumptions and additional allocation calculations would need to be developed in order to allocate general production related items, such as Shared Service allocated production related costs, other production, and general revenue credits since these components of the revenue requirement are not specific to the components requested in the Interrogatory. A traditional cost of service study does not calculate revenue requirements on the basis requested by the Interrogatory and so PNM has not performed such a study. The study

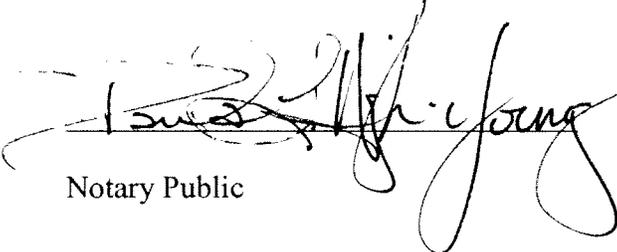
would only provide an estimate of the segregated revenue requirements, which may or may not be reasonable because it would be based on assumptions and new allocation methodologies not examined, agreed to or approved by the Commission, Staff or any Intervenors. The special study I have described is based on information which is equally available to CCAE and is more appropriately performed by CCAE so that they can determine what assumptions necessary for the study should be used.


SHAUNA LOVORN-MARRIAGE

SUBSCRIBED AND SWORN TO before me this 11th day of April, 2012, by

Shauna Lovorn-Marriage.




Notary Public

My commission expires:

May 27th, 2014

GCG # 514230

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE APPLICATION)
OF PUBLIC SERVICE COMPANY OF NEW)
MEXICO FOR APPROVAL OF RIDER NO. 36)
FOR RECOVERY OF RENEWABLE)
ENERGY COSTS)**

Case No. 12-000007-UT

**PUBLIC SERVICE COMPANY OF NEW)
MEXICO,)**

Applicant.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Public Service Company of New Mexico's Response to Coalition for Clean Affordable Energy's Motion to Compel** was mailed first-class, postage-paid, or hand-delivered on April 11, 2012 to the following persons whose mailing addresses are listed below and emailed to those persons at the email addresses shown below:

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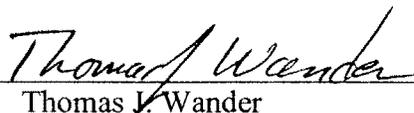
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Dated this 11th day of April, 2012.

By: 
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