

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE APPLICATION )  
OF PUBLIC SERVICE COMPANY OF NEW )  
MEXICO FOR APPROVAL TO ABANDON )  
SAN JUAN GENERATING STATION UNITS )  
2 AND 3, ISSUANCE OF CERTIFICATES )  
OF PUBLIC CONVENIENCE AND )  
NECESSITY FOR REPLACEMENT POWER )  
RESOURCES, ISSUANCE OF ACCOUNTING )  
ORDERS AND DETERMINATION OF )  
RELATED RATEMAKING PRINCIPLES AND )  
TREATMENT, )  
 )  
PUBLIC SERVICE COMPANY OF NEW )  
MEXICO, )  
 )  
Applicant )  
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Case No. 13-00390-UT

**MOTION OF PUBLIC SERVICE COMPANY OF NEW MEXICO  
FOR LIMITED RECONSIDERATION, OR IN THE ALTERNATIVE, TO PERMIT  
INTERLOCUTORY APPEAL TO THE COMMISSION, OF ORDER PARTIALLY  
GRANTING AND PARTIALLY DENYING PNM MOTION FOR  
PROTECTIVE ORDER TO PROHIBIT DEPOSITIONS**

Public Service Company of New Mexico (“PNM”), requests limited reconsideration of the Hearing Examiner’s *Order Partially Granting and Denying PNM Motion for Protective Order to Prohibit Depositions* (“Deposition Order”) issued August 19, 2015. In the alternative, PNM requests an order pursuant to 1.2.2.31 NMAC allowing an interlocutory appeal of certain portions of the Deposition Order to the New Mexico Public Regulation Commission (“Commission”).

The Deposition Order permits New Energy Economy (“NEE”) to proceed with the depositions of Patricia Vincent-Collawn (“Ms. Vincent-Collawn”), the Chairman, Chief Executive Officer, and President of PNM, and Charles Eldred (“Mr. Eldred”), the Executive

Vice President and Chief Financial Officer of PNM, on certain specified topics.<sup>1</sup> The request in this Motion is limited in that PNM does not seek reconsideration or appeal of the Deposition Order to the extent it permits the depositions to proceed on the topic of PNM's contacts and communications with individual Commissioners and their Executive Assistants (Vincent-Collawn Topics 4 and 5 and Eldred Topics 4, 5, 6 and 7). PNM seeks reconsideration or appeal of the Deposition Order only to the extent the Deposition Order permits deposition discovery of the Senior Officers on other topics.

## I. INTRODUCTION AND BACKGROUND

The relevant background underlying this Motion is that NEE first noticed the depositions of the Senior Officers in July 2015, after more than a year of discovery that included the depositions of several PNM officers and executives, the completion of a sixteen-day hearing on the merits, extensive post-hearing briefing, and the issuance of a *Certification of Stipulation* on April 8, 2015. Despite PNM's immediate attempts to elicit from NEE the need for or topics to be covered at the Senior Officer depositions, NEE largely refused to provide the requested information, although NEE did initially indicate that alleged ex parte contacts with Commissioners was a possible deposition topic.

PNM filed its *Notice of Non-Appearance for Depositions and Motion and Brief in Support of Protective Order to Prohibit the Depositions of Patricia Vincent-Collawn and Charles Eldred* ("Motion for Protective Order") on July 27, 2015. The Motion for Protective Order sought to prohibit the depositions of the Senior Officers on the grounds of annoyance, oppression and undue burden, and because those depositions were noticed by NEE for purposes other than the discovery of admissible evidence in this proceeding. PNM also raised the well-recognized and widely applied Apex Doctrine as a basis to foreclose the depositions of the

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<sup>1</sup> Ms. Vincent-Collawn and Mr. Eldred are sometimes collectively referred to as the "Senior Officers".

Senior Officers. Significantly, neither of the Senior Officers is a witness in the case, and no witness or discovery response in this proceeding has identified either of the Senior Officers as having unique knowledge concerning the matters at issue in this proceeding.

NEE filed its *Response in Opposition to PNM's Notice of Non-Appearance for Depositions and Motion for Protective Order to Prohibit the Depositions of Patricia Vincent-Collawn and Charles Eldred* ("NEE Response") on August 3, 2015. On August 7, 2015, the Hearing Examiner issued his *Order Requiring Identification of Topics for Depositions* ("Topic Order"). The Topic Order required NEE to "identify the topics of the depositions noticed for Patricia Vincent-Collawn and Charles Eldred by August 11, 2015." Topic Order at 2. PNM was allowed to "file a pleading showing good cause why one or more named alternative witnesses would be more proper deponents" by August 13, 2015. *Id.*

Late in the afternoon (4:45 p.m.) of August 11, 2015, counsel for NEE sent a list of proposed topics ("Topics List") to counsel for PNM. On August 13, 2015, PNM timely filed its *Response and Objections to Topics Identified by New Energy Economy for Depositions of Patricia Vincent-Collawn and Charles Eldred* ("PNM Response"). PNM fully complied with the Topic Order by addressing each of the individual topics on NEE's Topics List of August 11, 2015. For each topic, the PNM Response (a) explained why a given topic was not relevant to these proceedings, (b) identified a less burdensome means of obtaining information on a given topic, (c) specifically identified one or more PNM individuals, other than the Senior Officers, with the most knowledge on a given topic, or (d) interposed a combination of the foregoing. In so responding, PNM demonstrated "good cause" as to why the depositions of the Senior Officers are not warranted.

On August 17, 2015, NEE submitted its *Filing Pursuant to the Hearing Examiner's Order of August 7, 2015* ("NEE Filing"). The NEE Filing utterly failed to address any of PNM's objections and responses to the specific topics on the Topic List as set forth in PNM's Response. Rather, the NEE Filing included only conclusory arguments that the Senior Officers have knowledge on the identified topics. NEE in no way disputed that there were other less burdensome means of obtaining discovery, and NEE in no way disputed that the other individuals identified by the PNM Response have more knowledge on the topics than the Senior Officers.

The Deposition Order should be reconsidered, or reversed, because it misapplies the Commission Procedural Rules, the New Mexico Rules of Civil Procedure, and the well-established Apex Doctrine, to the extent the Deposition Order permits the depositions to proceed with respect to matters other than communications with the individual Commissioners and their respective staff.

## **II. PNM DEMONSTRATED GOOD CAUSE FOR A PROTECTIVE ORDER AND RECONSIDERATION OF THE DEPOSITION ORDER SHOULD BE GRANTED**

In both its July 27, 2015 Motion for Protective Order and its August 13, 2015 Response, PNM detailed the reasons why the proposed depositions of the Senior Officers were improper. While it is true that there is a presumption in favor of discovery, *Reaves v. Bergsrud*, 1999-NMCA-075, ¶ 14, 127 N.M. 446, 449, 982 P.2d 497, this does not suggest that discovery is unlimited. To the contrary, Rule 1-026(C) NMRA provides that the Commission may enter "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense," including, but not limited to, (a) an order prohibiting the disclosure or discovery or (b) an order directing the method of discovery including a method different than the method selected by the party seeking discovery. *See* Rule 1-026(C), -(C)(1),

and -(C)(4). Similarly, 1.2.2.25(K) NMAC provides that “[t]he [C]ommission or presiding officer may issue such orders for the protection of staff, parties, or witnesses from annoyances, embarrassment, or oppression as may be just and proper under the circumstances.” When these rules are applied to the facts underlying this Motion, it is clear that the Senior Officers’ depositions should not proceed on any matters other than communications with the Commissioners and their Executive Assistants.

PNM asserted the Apex Doctrine as one of the bases for denial of NEE’s attempt to depose the Senior Officers. While the Apex Doctrine has not been addressed by the New Mexico appellate courts, the doctrine has been widely adopted among and applied by many other jurisdictions. *See e.g. Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1287, 13 Cal. Rptr. 2d 363, 365 (1992); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. 11-CV-01528-REB-KLM, 2011 WL 2535067, at \*1 (D. Colo. June 27, 2011); *Stone v. Morton International*, 170 F.R.D. 498 (D. Utah 1997). The Deposition Order notes that a principle underlying the Apex Doctrine is that “depositions of senior officers of large corporations may cause annoyance, embarrassment and undue burden or expense to the extent that the officers lack unique or superior knowledge of the facts in a case and other lower level employees may be better witnesses.” Deposition Order at 3. The Deposition Order further notes that as enumerated in the *Naylor Farms* case, a Court may protect a high level corporate executive from the burdens of a deposition when *any* of the following circumstances exist: “(1) the executive has no unique personal knowledge of the matter in dispute; (2) the information sought from the executive can be obtained from another witness; (3) the information sought from the executive can be obtained through an alternative discovery method; *or* (4) sitting for the deposition is a severe hardship for the executive in light

of his obligations to his company.” *Naylor Farms, Inc.*, No. 11-CV-01528-REB-KLM, 2011 WL 2535067, at \*1 (emphasis added).

A primary ground stated in the Deposition Order for allowing the Senior Officer depositions to proceed is that PNM did not file an affidavit in support of either its Motion for Protective Order or the PNM Response showing that others had superior knowledge about issues in this case. Deposition Order at 3. However, NEE’s deposition notices for the Senior Officers did not identify any topics to be covered, and NEE had not been very forthcoming about the need for those depositions or the topics to be covered at such depositions. As a result, PNM was not fully informed of the scope of the depositions and could not respond to any specific issues when filing the Motion for Protective Order.

Once PNM was served with the Topics List, PNM provided (within the required two-day period from August 11 to August 13) a detailed response and objection to each of the topics first identified by NEE on August 11. In conformity with the Topic Order, PNM identified specific individuals at the company with the greatest amount of knowledge concerning the identified topics and who would be more proper deponents. *See* PNM Response at Vincent-Collawn Topics 1, 1.a, 1.b, 1.c, 1.d, 2.a, 2.b, and 6, and Eldred Topics 1, 2, 3 and 8. Nowhere in the Topic Order was there any notice or indication that PNM’s response was required to be augmented with an affidavit. By identifying “one or more named alternate witnesses” who are “more proper deponents” for each topic that NEE first identified on August 11, PNM fully complied with the express requirements of the Topic Order. Indeed, PNM’s Response went even further than the Topic Order required, as PNM explained in detail why certain of NEE’s identified topics were not germane and PNM identified less burdensome means of obtaining information for several of the specified topics.

Significantly, in the NEE Filing, NEE did not dispute a single instance where PNM identified a more knowledgeable individual on a given topic. Where, as here, the facts are not in dispute, there is no need for additional evidentiary support in the form of an affidavit.

Moreover, NEE failed to affirmatively establish the need to take the depositions of the Senior Officers. While NEE submitted the affidavit of Mariel Nanasi in support of the NEE Response, the primary focus of the affidavit was Ms. Nanasi's claim of ignorance that (a) she would potentially be entitled to a financial award in connection with her SEC Whistleblower Complaint and (b) the Senior Officer depositions were not being pursued in furtherance of Ms. Nanasi's complaint. *See* Nanasi Affidavit at ¶¶ 3 and 4. The balance of Ms. Nanasi's affidavit basically consists of non-specific references to public statements by the Senior Officers and Ms. Nanasi's utter speculation about the extent of knowledge on the part of the Senior Officers.

It is not unexpected that the Senior Officers have knowledge about the matters at issue in this proceeding and that they would make public statements about this proceeding. However, this does not establish that they are the most knowledgeable about the particulars of this case. There has been no indication by any witness to this proceeding, or by any response to discovery in this proceeding, that the Senior Officers possess the requisite knowledge to subject them to deposition regarding the matters at issue in this proceeding. Moreover, NEE's filings have made no factual showing that the Senior Officers possess "unique personal knowledge of the matter in dispute" as required under the Apex Doctrine.

Even if the public statements of the Senior Officers could be taken as evidence of relevant knowledge, many of the topics identified by NEE are entirely outside the scope of any of the cited public statements. No public statements have been attributed to Ms. Vincent-Collawn with respect to what PNM must establish to justify a decision in this case in PNM's

favor, which is a topic for legal argument (Vincent-Collawn Topic 1.a), or with respect to the productivity or performance of the San Juan Generating Station (“San Juan”) (Vincent-Collawn Topic 1.b) Likewise, there are no statements attributable to Ms. Vincent-Collawn concerning the recommended actions of the Edison Electric Institute on distributed generation.

With regard to Mr. Eldred, NEE did not cite any public statements by Mr. Eldred concerning the value of Unit 3 of the Palo Verde Nuclear Generating Station (Eldred Topic 3) or analyzing or tracking coal markets in the United States or the performance of coal companies (Eldred Topic 9). There are also no cited public statements by Mr. Eldred with respect to San Juan reclamation costs (Eldred Topic 11) or decommissioning costs (Eldred Topic 12). Nor are there any cited public statements by Mr. Eldred with respect to profits from solar assets (Topic 13) or the installation of SNCR at San Juan (Topic 14).

In addition, many of the identified topics are quite technical in nature and even if the Senior Officers referred to them in public statements, it is unreasonable to assume that the Senior Officers possess the requisite unique personal knowledge to be deposed on such technical issues. Examples of the technical topics identified by NEE with respect to Ms. Vincent-Collawn include load forecasting (Vincent-Collawn Topic 1.c) and the EPA’s Clean Power Plan (Vincent-Collawn Topic 2.a). Technical topics identified by NEE for the deposition of Mr. Eldred include the valuation of Palo Verde Unit 3 (Eldred Topic 3), coal markets (Eldred Topic 9), San Juan reclamation costs (Eldred Topic 11), and San Juan decommissioning costs (Eldred Topic 12). PNM has identified in its Response one or more competent technical witnesses to address each of these topics, and there has been no showing by NEE that the Senior Officers possess unique personal knowledge of such topics or are better suited to testify at a deposition about such technical matters.

As noted above, PNM is not seeking reconsideration or review of the Deposition Order to the extent it allows NEE to proceed to depose the Senior Officer on matters relating to communications with Commissioners and each Commissioner's Executive Assistant. As reflected in the Deposition Order, the Hearing Examiner previously ruled that discovery on this issue is permitted, and PNM will not use the present Motion to reargue this issue.

As demonstrated by the foregoing, NEE has not established that the Senior Officers have unique knowledge concerning any of the topics first listed by NEE on August 11, 2015. PNM has timely demonstrated good cause to preclude the depositions on all matters other than alleged ex parte communications because there are less burdensome methods of obtaining the requested information and other witnesses with greater knowledge and expertise to address the other topic permitted under the Deposition Order.

**III. IN THE ALTERNATIVE, PNM REQUESTS LEAVE TO PURSUE AN INTERLOCUTORY APPEAL OF THE DEPOSITION ORDER TO THE COMMISSION**

As alternative relief to PNM's request for reconsideration, PNM requests that it be permitted to appeal the above-referenced portions of the Deposition Order to the Commission pursuant to 1.2.2.31 NMAC. The grounds for appeal are the same arguments as set forth above.

In addition, a party seeking appeal must demonstrate that "the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal to the commission from the ruling may materially advance the ultimate disposition of the proceeding." 1.2.2.31(B)(1)(a) NMAC. In addition to the controlling New Mexico Rules of Civil Procedure and Commission rules, this case involves the application of the Apex Doctrine in the context of a proposed deposition of a high-ranking company executive who is not a party to or witness in a proceeding. As reflected in the

Deposition Order, “[t]he Apex Doctrine does not appear to have been addressed in New Mexico, and its details vary among the states in which it has been adopted.” Deposition Order at 3. Thus, the requisite demonstration has been made to allow an interlocutory appeal of the Deposition Order.

Even apart from the Apex Doctrine, an interlocutory appeal is also warranted to obtain Commission review of the application of Rules 1-026 and 1-030 to NEE’s attempt to depose the Senior Officers. Rule 1-026(A) states that depositions are among the recognized “methods of discovery Rule 1-026(B) defines and limits the scope of discoverable information; and Rule 1-026(C) authorizes the Commission to enter a protective order “directing the method of discovery including a method different than the party seeking discovery selected.” For each of the topics (identified on NEE’s Topics List of August 11, 2013) for which PNM presently opposes NEE’s attempt to depose the Senior Officers, PNM’s Response shows that to the extent such topics are within the scope of Rule 1-026(B), NEE may still discover such information through (a) the deposition of other designated PNM representatives or (b) the use of other discovery methods directed at PNM.

Meanwhile, as the United States District Court for the District of Utah recognized in evaluating the application of Federal Rule of Civil Procedure 30(b)(1) to a similar situation, the ability of a party to depose “any person” pursuant to Rule 30(b)(1) does not “obligate[] a corporation to produce an officer, not a party to the litigation, at a deposition.” *Stone v. Morton Int’l, Inc.*, 170 F.R.D. 489, 500 (D. Utah 1997). The underlying issue, perhaps of first impression in the Commission, is whether one party’s use of the “method” of deposition entitles that party to designate and depose particular high-ranking corporate officials of an adverse party, even where the information purportedly sought remains available and discoverable from the

corporation itself pursuant to Rule 1-030(B)(6) depositions or other discovery directed to the corporation.

Another critical issue of first impression in New Mexico is the question of which party bears the initial burden in connection with proposed depositions of high-level corporate officials. For example, although the Texas Supreme Court's adoption of the Apex Doctrine requires a motion for protective order to be accompanied by affidavits denying knowledge of relevant facts (*see Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995), discussed at p. 13, n.1 of PNM's Motion for Protective Order), the Apex Doctrine as more recently applied in Colorado requires the deposition-requesting party to "bear [the] initial burden of making some showing that the executive has 'unique personal knowledge' of some relevant issues[.]" and only then does the burden shift to the executive to demonstrate that he or she "has no unique personal knowledge or that there exists one of the other three circumstances" rendering the requested deposition inappropriate. *See Naylor Farms*, 2011 WL 2535067, at \*2.

The absence of clear guidance by the Commission or New Mexico courts on this issue makes it inappropriate for the Commission to find that PNM's Motion for Protective Order or August 13, 2015 Response were in any way deficient for lack of accompanying affidavits. The differing versions of the Apex Doctrine as adopted in Texas, Colorado, California, and elsewhere show that the burden allocation as between NEE and PNM is inherently "a controlling question of law or policy as to which there is substantial ground for difference of opinion" (*see* 1.2.2.31(B)(1)(a) NMAC). Furthermore, because the Commission and New Mexico courts have not previously made clear the allocation of this burden in Commission proceedings or New Mexico courts, there exist sufficient "circumstances which make prompt [C]ommission review of the contested ruling necessary to prevent irreparable harm to any person (*see* 1.2.2.31(B)(1)(b)

NMAC). For illustration, if the Commission recognizes the Apex Doctrine in the manner described by the United States District Court for the District of Colorado in *Naylor Farms*, then the Deposition Order would be erroneous for the simple reason (among others) that NEE failed to satisfy *its* initial burden to show “unique personal knowledge” on the part of any Senior Officer. Interlocutory appeal of the Deposition Order (regarding the topics that remain challenged by PNM) is necessary to prevent irreparable harm to PNM and to its Senior Officers.

For these reasons, in the event the Hearing Examiner does not grant PNM’s request for reconsideration, PNM should be allowed to pursue an interlocutory appeal before the Commission. *See also, e.g., Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1287, 13 Cal. Rptr. 2d 363, 365 (1992) (granting requested writ “to review questions of first impression to provide guidance to the bench and bar”).

#### **IV. COMPLIANCE WITH 1.2.2.12(E)(3) NMAC**

Pursuant to 1.2.2.12(E)(3) NMAC, PNM states that NEE opposes this Motion. PNM has not sought concurrence of Staff and parties other than NEE because no other party took a position on the Motion for Protective Order. Further, because of the short time required for filing this Motion in order to obtain timely relief from the Deposition Order issued on August 19, 2015, PNM was unable to prepare this Motion and provide adequate time for other parties to state positions. In addition, the Hearing Examiner is not required to consider any responses in ruling on alternative interlocutory appeal motion. 1.2.2.31(B)(3) NMAC.

#### **V. CONCLUSION**

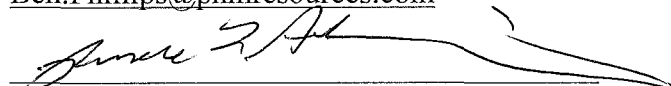
NEE failed to demonstrate proper or adequate grounds to proceed with depositions of PNM’s Senior Officers. NEE has not shown that the Senior Officers have the requisite unique knowledge to be subject to deposition in this case. By contrast, PNM has identified competent

and knowledgeable alternative witnesses who can address the permitted topics at deposition. Accordingly, the Deposition Order should be reconsidered and the depositions of the Senior Officers should be allowed to proceed only on the topic of PNM contacts and communications with Commissioners and their respective staff. Alternatively, PNM should be permitted to pursue an interlocutory appeal of the Deposition Order before the Commission.

Respectfully submitted this 20<sup>th</sup> day of August 2015,

**PUBLIC SERVICE COMPANY OF NEW MEXICO**

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PUBLIC SERVICE COMPANY OF NEW )  
MEXICO, )

Applicant )

**CERTIFICATE OF SERVICE**

I hereby certify that the **Motion of Public Service Company of New Mexico for Limited Reconsideration, or in the Alternative, to Permit Interlocutory Appeal to the Commission, of Order Partially Granting and Partially Denying PNM Motion for Protective Order to Prohibit Depositions** was mailed first-class, postage-paid, or emailed to those persons at the email addresses and hand-delivered on August 20, 2015 as shown below:

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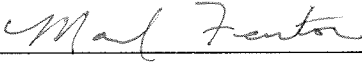
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