

**STATE OF NEW MEXICO**  
**ENVIRONMENTAL IMPROVEMENT BOARD**

IN THE MATTER OF PROPOSED REVISIONS )  
TO THE STATE IMPLEMENTATION PLAN )  
FOR REGIONAL HAZE )

EIB No. 10-05 (R)

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**PUBLIC SERVICE COMPANY OF NEW MEXICO'S**  
**MOTION FOR CONTINUANCE OF HEARING**

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Public Service Company of New Mexico ("PNM" or "Company") files herewith its Motion for Continuance of Hearing. PNM seeks a continuance of the hearing, presently scheduled for October 4, 2010, to a date no earlier than January 10, 2011. As addressed below, such a continuance is warranted for a number of reasons, including: (i) to afford PNM sufficient time and opportunity to adequately address the issues and to present evidence at the hearing; (ii) to protect PNM's due process right to a fair hearing; and (iii) the absence of any countervailing considerations that would prejudice the State of New Mexico or the public.

**BACKGROUND**

The New Mexico Environment Department ("NMED") filed its Petition for Regulatory Change on June 21, 2010 ("Petition"), asking the Environmental Improvement Board ("EIB") to revise New Mexico's State Implementation Plan for Regional Haze ("SIP"). In its Petition, the NMED asked the EIB to schedule a hearing in October 2010.

On July 1, 2010, PNM filed its Response to the Petition ("Response"). In its Response, PNM argued that an October 2010 hearing date would not give the Company adequate time to prepare for the hearing and requested that the hearing not be scheduled prior to December 2010.

The EIB denied PNM's request for a December 2010 hearing and, instead, scheduled the hearing for October 4, 2010. The EIB did so based on representations by the NMED that: (i) NMED would provide PNM prompt responses to PNM's public records requests which are necessary for PNM to properly prepare for the hearing; and (ii) the state would be subject to having a Federal Implementation Plan ("FIP") imposed by the Environmental Protection Agency ("EPA") if the EIB did not conduct a hearing and issue a SIP by November 10, 2010. The NMED indicated that the imposition of a FIP could mean a loss of funding from the EPA, although the NMED could not provide any quantification of the asserted loss of EPA funding.

Since the time the EIB set the October 4, 2010 hearing date, several events have taken place to warrant the granting of a continuance of the hearing until January 10, 2011. First, the NMED has not been prompt in producing all of the documents requested by PNM. The documents requested by PNM were still being produced as recently as this week. Second, PNM has ascertained that the November 10, 2010 date is not critical in terms of the issuance of a SIP. The EIB can adopt a SIP after November 10, 2010, and before May 10, 2011, without risking EPA imposition of a final FIP.

#### **GROUND FOR CONTINUANCE**

The SIP revisions proposed in the NMED's Petition are intended to address the federal regional haze rule, 40 CFR §§ 51-308 and 51-309, which requires states to address regional haze visibility impairment in "Class I" areas. Attached to the Petition was the NMED's BART determination with respect to Units 1 through 4 of the San Juan Generating Station ("San Juan"), of which PNM is a co-owner and the operating agent. BART is the acronym for "best available retrofit technology" and refers to retrofitting certain pollution controls on existing facilities.

The NMED's BART determination would require San Juan to install and implement selective catalytic reduction, plus injection ("SCR-Plus") on all four units at San Juan. The impacts of requiring the installation of SCR-Plus at San Juan can hardly be overstated. The estimated cost for the installation of SCR-Plus at San Juan is a staggering \$750 million to \$1 billion. Investments on this scale will have drastic impacts on San Juan and will ultimately lead to higher electric rates for customers in New Mexico and in other western states that take power from San Juan. It is estimated that if San Juan is required to install SCR-Plus, it will cost the average PNM residential customer approximately \$90 per year for twenty years.

As PNM explained in its Response, the SIP proposal will require extensive evaluation of numerous complex and technical issues and the preparation of expert technical testimony. *See* Response at 4-5. Under the EIB's rulemaking procedures, PNM is required to file a detailed notice of intent to present technical testimony fifteen days before the hearing, to include a summary or copy of the witness's testimony. *See* 20.1.1.302(A) NMAC. Thus, under the current procedural schedule, PNM will need to substantially complete its analysis and technical testimony by September 17, 2010. Such a truncated schedule leading to an October 4, 2010 hearing does not afford sufficient time to prepare for the hearing and would violate PNM's due process right to a fair hearing.

A. NMED Delays in Records Production. PNM has been diligent in its efforts to begin the evaluation process by requesting relevant documents from the NMED. On June 28, 2010, PNM served its request for public records falling into 26 specified categories. Follow up requests were sent to NMED on July 9, 2010 pertaining to the potential consequences of the Board failing to adopt a SIP by November 10, 2010. As of the date of this Motion for Continuance, PNM has received massive amounts of data in response to its data request. By

letter dated July 13, 2010, the NMED provided a partial response, stating that it would need until July 20, 2010 to complete its response to the remainder of the 26 categories. By letter dated July 20, 2010, the NMED made additional documents available, but stated that with respect to request number 26 the NMED would need additional time to respond, until July 27, 2010. On August 4, 2010, the NMED advised that it had located other document response to PNM's June 28 request. On August 9, 2010, the NMED was still producing documents in response to the PNM requests. Thus, the process of document production has been drawn out over a much greater period of time than as represented by NMED.

The NMED's lack of promptness in responding to PNM's public records request has hampered the ability of PNM and its consultants to do the necessary analysis of the data provided by NMED. At this time, with less than two months before the scheduled October 4, 2010 hearing, and just over a month before the 15-day notification of technical testimony, PNM and its consultants simply will not have adequate time and opportunity to fully analyze and address the Petition and the BART determination. Due process of law requires that a litigant in an administrative hearing process be afforded reasonable time to prepare its case. It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense. *Jones v. N.M. State Racing Comm'n*, 100 N.M. 434, 436, 671 P.2d 1145, 1147 (1983); *Albuquerque Bernalillo County Water Util. Authority v. N.M. Pub. Reg. Comm'n*, 2010-NMSC-013, ¶ 21, 229 P.3d 494, 505.

B. November 10, 2010 Not a Critical Date. Not only will PNM need additional preparation time, but such additional time will not prejudice the interests of the NMED, the EIB or the citizens of the State of New Mexico. As the result of inquiries initiated by PNM since the scheduling of the October 4, 2010 hearing, PNM has ascertained that November 10, 2010 is not a

critical date in terms of having a FIP imposed by the EPA. The November 10, 2010 date, which the NMED cited to the EIB, is the product of a Consent Decree entered earlier this year in *Wildearth Guardians v. Jackson*, United States District Court for the Northern District of California, Oakland Division, Case No. 4:09-CV-02453-CW. A copy of the Consent Decree is attached to this Motion for Continuance as Exhibit A.

The allegation in the *Jackson* case was that the Administrator of the EPA had failed to either approve a SIP or promulgate a FIP for several states, including New Mexico, to satisfy various requirements of the Clean Air Act. The Consent Decree resolved these allegations by providing a timeline by which the EPA Administrator was to sign a notice or notices approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP for several states, including New Mexico, to address visibility requirements. *See* Consent Decree ¶ 7. The NMED's evident interpretation of paragraph 7 of the Consent Decree is that by November 10, 2010, the EPA must promulgate a final FIP rule, with the state forfeiting the right to thereafter submit a SIP. Therefore, in what PNM understands to be the NMED's view, unless the EIB acts favorably on the Petition before the November 10, 2010 date, the EPA will proceed to issue a final FIP by that date.

PNM has an entirely different understanding of paragraph 7 of the Consent Decree, an understanding based on the specific language of the Consent Decree itself, supplemented by a telephone conversation that PNM's counsel had with counsel for the EPA in the *Jackson* case.

Turning first to the language of the Consent Decree, the lead-in language of paragraph 7(a) says that the FIP relating to visibility protection will not be promulgated until May 10, 2011. Paragraph 7(a) makes no reference to the November 10, 2010 date. The November 10, 2010 date is referenced only in paragraph 7(b). Paragraph 7(b) says that if an identified state

(including New Mexico) has not by May 10, 2010 submitted a proposed SIP, then by November 10, 2010, the EPA Administrator shall sign a notice or notices “proposing” for each such state either the promulgation of a FIP, approval of a SIP (if one has been submitted in the interim), or partial promulgation of a FIP and partial approval of a SIP, to address the visibility requirement. In other words, under the terms of the Consent Decree, the only EPA action that will take place by November 10, 2010 is the promulgation of a *proposed* rule for states like New Mexico that did not submit a SIP by May 10, 2010 – not a final rule, as asserted by the NMED.

This interpretation of the Consent Decree is supported by the EPA’s own counsel in the *Jackson* case. As addressed in the attached Affidavit of Richard L. Alvidrez, the EPA’s interpretation of the Consent Decree is that the November 10, 2010 date found in paragraph 7(b) is for the EPA’s issuance of a *proposed* FIP, not a final FIP. As explained by the EPA counsel, it is only by May 10, 2011, that the EPA must finalize its proposed FIP, or if a covered state has filed a proposed SIP in the interim, the EPA must either approve the SIP or approve a partial SIP and issue a partial FIP. Affidavit ¶ 3. Under the Consent Decree, a state could thus submit a proposed SIP after November 10, 2010 and the EPA could consider the SIP before taking final action by May 10, 2011. Thus, based on a state’s SIP submitted after November 10, 2010, the EPA could, in effect, withdraw its proposed FIP and adopt the SIP, in whole or in part. *Id.* ¶ 4.

Therefore, there is no requirement, based on the Consent Decree, for the hearing to be held in October 2010, or for the EIB to act before November 10, 2010. Even if New Mexico has not submitted a SIP by November 10, 2010, the state will have until before May 10, 2011 to do so. A hearing in January of 2011 will in no sense prejudice the state in terms of its ability to submit a timely SIP. By contrast, an October 2010 hearing would severely prejudice PNM in

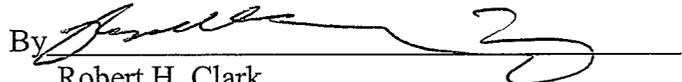
terms of its ability to review and analyze the massive relevant data in preparation for the hearing. The important issues implicated by the NMED's Petition should not be rushed to judgment.

### **REQUEST FOR RELIEF**

For these reasons, PNM moves for a continuance of the October 4, 2010 hearing until no earlier than January 10, 2011. PNM further requests that this motion be placed on the Board Agenda at its meeting scheduled for August 16, 2010 in Santa Fe.

Respectfully submitted,

MILLER STRATVERT P.A.

By 

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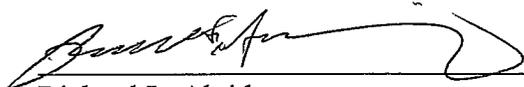
### **CERTIFICATE OF SERVICE**

This will certify Public Service Company of New Mexico's Motion for Continuance of Hearing was e-filed with the New Mexico Environmental Improvement Board this 10th day of August 2010, and that a true and correct copy of the foregoing was mailed and emailed on the same date to:

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Richard L. Alvidrez

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

WILDEARTH GUARDIANS,

Plaintiff

v.

LISA JACKSON, in her official capacity as  
Administrator of the Environmental Protection Agency

Defendant

CASE NO. 4:09-CV-02453-CW

**CONSENT DECREE**

WHEREAS, plaintiff WildEarth Guardians filed its complaint in this action in the United States District Court for the Northern District of California on June 3, 2009;

WHEREAS, plaintiff's complaint alleged that defendant Lisa Jackson, Administrator of the U.S. Environmental Protection Agency, ("EPA") has failed to perform a non-discretionary duty to either approve a State Implementation Plan ("SIP") or promulgate a Federal Implementation Plan ("FIP") for California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon to satisfy the requirements of Clean Air Act section 110(a)(2)(D)(i), 42 U.S.C. 7410(a)(2)(D)(i), with regard to the 1997 National Ambient Air Quality Standards ("NAAQS") for 8-hour ozone and fine particulate matter ("PM2.5");

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve this matter without protracted litigation;

WHEREAS, the Court finds and determines that the settlement represents a just, fair, adequate and equitable resolution of all claims raised in this action.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that:

1. This Court has subject matter jurisdiction over the claims set forth in the complaint and to order the relief contained in this consent decree.

2:09-cv-02453-CW CONSENT DECREE

EXHIBIT "A"

TO PNM'S MOTION FOR CONTINUANCE OF HEARING

2. Venue lies in the Northern District of California.

3. Plaintiff and EPA shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Upon entry, no party shall challenge the terms of this Consent Decree. This Consent Decree constitutes a final resolution of all claims raised in the complaint.

4. No later than May 10, 2010, the Administrator shall sign a notice or notices:

(a) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for (i) New Mexico and North Dakota to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for 8-hour ozone and PM<sub>2.5</sub>, and (ii) Colorado to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for 8-hour ozone; and

(b) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP for North Dakota to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to prevention of significant deterioration of air quality.

5. No later than November 10, 2010, the Administrator shall sign a notice or notices:

(a) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for Idaho to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for 8-hour ozone and PM<sub>2.5</sub>;

(b) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for (i) Idaho, New Mexico, and North Dakota to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for 8-hour ozone and PM<sub>2.5</sub>, and (ii) Colorado to

meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for 8-hour ozone; and

(c) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for Idaho, New Mexico, and Oklahoma to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to prevention of significant deterioration of air quality.

6. No later than May 10, 2011, the Administrator shall sign a notice or notices:

(a) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for (i) California, Oklahoma, and Oregon to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for 8-hour ozone and PM<sub>2.5</sub>, and (ii) Colorado to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for PM<sub>2.5</sub>;

(b) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for (i) California, Oklahoma, and Oregon to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for 8-hour ozone and PM<sub>2.5</sub>, and (ii) Colorado to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for PM<sub>2.5</sub>; and

(c) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for California, Colorado, and Oregon to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to prevention of significant deterioration of air quality.

7. (a) No later than May 10, 2011, the Administrator shall sign a notice or notices either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon

to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to protection of visibility;

(b) If any of the States identified in paragraph 7(a) has not submitted an administratively complete proposed SIP to address the visibility requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) by May 10, 2010, then by November 10, 2010, the Administrator shall sign a notice or notices proposing for each such State either promulgation of a FIP, approval of a SIP (if one has been submitted in the interim), or partial promulgation of a FIP and partial approval of a SIP; to address the visibility requirement.

8. Within 15 business days following signature of such action required by paragraphs 4 - 7, EPA shall deliver notice of such action to the Office of the Federal Register for prompt publication. Following such delivery to the Office of the Federal Register, EPA shall not take any step (other than as necessary to correct within 10 business days after submittal any typographical or other errors in form) to delay or otherwise interfere with publication of such notice in the Federal Register.

9. The deadlines in paragraphs 4 through 7 may be extended for a period of 60 days or less by written stipulation executed by counsel for WildEarth Guardians and EPA and filed with the Court. Any other extension to the decree deadlines may be approved by the Court upon motion by any party to this Consent Decree and upon consideration of any response by the non-moving party.

10. Plaintiff alleges that it is the "prevailing party" in this action and that, as such, it is entitled to reasonable attorney's fees and costs pursuant to section 304 of the CAA, 42 U.S.C. § 7604. The parties hereby agree to settle all of Plaintiff's claims for attorney's fees and costs in this action, without further litigation or any final determination regarding entitlement to or reasonableness of attorney's fees and costs, for a total of \$ 22,420.00. Payment shall be made by electronic funds transfer to the account specified by Plaintiff's counsel Robert Ukeiley. Plaintiff agrees to provide counsel for Defendant all necessary

information for processing the electronic funds transfer within five (5) business days of receipt of the Court's order entering this Consent Decree. In the event that the payment required by this Paragraph is not made within 90 days of entry of this Order, interest on the unpaid balance shall be paid at the rate established pursuant to section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the effective date of this Order and accruing through the date of the payment.

11. Plaintiff agrees that receipt from Defendant of the payment described in Paragraph 10 shall operate as a release of Plaintiff's claims for attorneys' fees and costs in this matter through and including the date of this agreement. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this agreement arising from a need to enforce or defend against efforts to modify the schedule outlined herein, or for any other unforeseen continuation of this action.

12. By this agreement, Defendant does not waive any right to contest fees claimed by Plaintiff or Plaintiff's counsel, including the hourly rate, in any future litigation, or in any continuation of the present action. Further, this stipulation as to attorney's fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

13. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree. Upon EPA's demonstration that it has satisfied all of the obligations of this Consent Decree it may move to have this decree terminated. Plaintiff shall have twenty days in which to respond to such motion.

14. Except as provided herein, nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions which are the subject of this Consent Decree.

15. The parties agree and acknowledge that final approval and entry of this proposed Consent Decree are subject to the requirements of Clean Air Act § 113(g), 42 U.S.C. § 7413(g). That subsection provides that notice of this proposed Decree be given to the public, that the public shall have a reasonable opportunity to make any comments, and that the Administrator or

the Attorney General, as appropriate, must consider those comments in deciding whether to consent to this Consent Decree.

16. Nothing in the terms of this Consent Decree shall be construed to waive any remedies plaintiff may have under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

17. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing party shall contact the other party to confer and attempt to reach an agreement on the disputed issue. If the parties cannot reach an agreed-upon resolution, then either party may move the Court to resolve the dispute.

18. EPA's commitments in this Decree are subject to the availability of appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341 or any other applicable law or regulation.

19. The undersigned representatives of each party certify that he is fully authorized to consent to the Court's entry of the terms and conditions of this Consent Decree.

Dated: February 18, 2010

/S/ James J. Tuchtton (by permission)  
James J. Tuchtton (CA Bar No. 150908)  
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Counsel for Plaintiff

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Assistant Attorney General

Dated: February 18, 2010

/S/ Norman L. Rave, Jr.  
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Counsel for Defendant

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Claudia Wilken  
United States District Judge

**STATE OF NEW MEXICO**  
**ENVIRONMENTAL IMPROVEMENT BOARD**

IN THE MATTER OF PROPOSED REVISIONS )  
TO THE STATE IMPLEMENTATION PLAN ) EIB No. 10-05 (R)  
FOR REGIONAL HAZE )

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**AFFIDAVIT OF RICHARD L. ALVIDREZ**  
**IN SUPPORT OF PNM'S MOTION FOR CONTINUANCE OF HEARING**

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Richard L. Alvidrez, being first duly sworn under oath, states:

1. I am an attorney licensed to practice law in the State of New Mexico and am one of Public Service Company of New Mexico's ("PNM") counsel of record in this matter. This Affidavit is submitted in support of PNM's Motion for Continuance of Hearing.

2. I have spoken telephonically to Norman Rave, Esq., of the United States Department of Justice. Mr. Rave represented the United States Environmental Protection Agency ("EPA") in the negotiation of the Consent Decree in *Wildearth Guardians v. Jackson*, United States District Court for the Northern District of California, Oakland Division, Case No. 4:09-CV-02453-CW.

3. Mr. Rave confirmed that New Mexico did not file a revised SIP before the May 10, 2010 deadline found in paragraph 7(b) of the Consent Decree. He explained that the November 10, 2010 date contained in paragraph 7(b) of the Consent Decree is for the issuance of a *proposed* Federal Implementation Plan ("FIP"), not a final FIP. He explained that by May 10, 2011 the EPA must finalize its proposed FIP, or if a covered state has filed a proposed SIP in the interim, the EPA must either approve the SIP or approve a partial SIP and issue a partial FIP.

**EXHIBIT "B" TO PNM'S**  
**MOTION FOR CONTINUANCE FO HEARING**

