

# TROUTMAN SANDERS

January 14, 2010

The Honorable Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

Re: *Public Service Company of New Mexico*  
Docket No. ER10-\_\_\_-000

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FEDERAL ENERGY  
REGULATORY COMMISSION  
2010 JAN 14 P 4:16  
SECRETARY OF THE  
COMMISSION

Dear Secretary Bose:

Pursuant to Section 205 of the Federal Power Act (“FPA”)<sup>1</sup> and Part 35 of the regulations of the Federal Energy Regulatory Commission (“Commission”),<sup>2</sup> Public Service Company of New Mexico (“PNM”) hereby submits proposed revisions to its Second Revised Volume No. 6 Open Access Transmission Tariff (“OATT”), attached as Exhibit A hereto.

## I. DESCRIPTION OF PNM

PNM, a New Mexico corporation, is a wholly-owned, public utility operating company subsidiary of PNM Resources, Inc. (“PNM Resources”). PNM’s principal place of business is Alvarado Square, Albuquerque, New Mexico, 87158. In the western United States, PNM is engaged in the generation, transmission, and sale of electricity at wholesale. Within the State of New Mexico, PNM is engaged in the generation, transmission, distribution, and sale of electricity at retail. PNM provides state-jurisdictional retail electric service to customers across New Mexico, the largest portion of which is located in north central New Mexico. PNM’s retail electric operations are regulated by the New Mexico Public Regulation Commission (“NMPRC”).

## II. PROPOSED REVISIONS TO PNM’S OATT

PNM’s OATT is currently designated as Public Service Company of New Mexico FERC Electric Tariff, Second Revised Volume No. 6. PNM, hereby proposes to make changes to the indemnity section of its Large Generator Interconnection Agreement (“LGIA”) and Small

<sup>1</sup> 16 U.S.C. §§ 824d (2000).

<sup>2</sup> 18 C.F.R. Part 35 (2008).

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Generator Interconnection Agreement (“SGIA”) to reflect New Mexico State Law which has a different indemnity requirement. These proposed changes are consistent with or superior to the Commission’s *pro forma* OATT.

Specifically, PNM proposes to add the following provision to Section 18 of the LGIA and Section 7.3 of the SGIA:

To the extent, if at all, Section 56-7-1 NMSA 1978, *et seq.* (2005), as amended, is applicable to any indemnity provision in this Agreement, any agreement to indemnify, hold harmless, insure (including a requirement to name the indemnified party as an additional insured) or defend another party, including the other party’s employees or agents, contained in this Agreement will not extend to liability, claims, damages losses or expenses, including attorney’s fees, arising out of bodily injury to persons or damage to property resulting from, in whole or in part, the negligence, act or omission of any indemnitee, its officers, employees or agents.

The proposed addition of this provision, provides that to the extent New Mexico state law regarding indemnities is triggered then the provisions of the LGIA and SGIA will not be at odds with New Mexico law. Importantly, the New Mexico indemnity provisions provide less protection to the transmission provider but do not diminish customer protections. Moreover, the Commission has stated “in Order No. 2003 that it did not intend to interfere with state provisions regarding indemnification.”<sup>3</sup> In fact, the Commission found that “[t]he indemnification provision . . . does not strip any court or other tribunal of jurisdiction. To the extent that this provision would cause a specific Transmission Provider to violate statutory or other restrictions, the issue should be raised on compliance in a filing explaining the special circumstances.”<sup>4</sup> Therefore, the proposed changes by PNM to the LGIA and SGIA are consistent with or superior to the *pro forma* OATT and should be accepted by the Commission.

### III. EFFECTIVE DATE

PNM respectfully requests waiver of the Commission’s prior notice and filing requirements so as to permit a January 14, 2010 effective date for the revised tariff sheets.<sup>5</sup>

<sup>3</sup> *Florida Power & Light Co.*, 118 FERC ¶ 61,176 at 13 (2007).

<sup>4</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 FR 49,845 (August 19, 2003), FERC Stats. & Regs. ¶ 31,146 at P 640 (2003), *order on reh’g*, Order No. 2003-A, 69 FR 15,932 (March 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh’g*, Order No. 2003-B, 70 FR 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, 70 FR 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *affirmed sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, No. 04-1148, 2007 U.S. App. LEXIS 626 (D.C. Cir. Jan. 12, 2007).

<sup>5</sup> *See Prior Notice Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993).

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Good cause exists to grant such waiver as no customers will be harmed and the changes do not affect the rates charged by PNM.

**IV. COMMUNICATIONS**

All communications and correspondence regarding this filing should be directed to the following persons.

Dave Zimmermann  
PNM Resources Inc.  
Alvarado Square, MS-1200  
Albuquerque, NM 87158  
(t) 505-241-4659  
(f) 505-241-2338  
(e) [David.Zimmermann@pnmresources.com](mailto:David.Zimmermann@pnmresources.com)

Amie V. Colby  
TROUTMAN SANDERS LLP  
401 9<sup>th</sup> St. N.W., Suite 1000  
Washington, D.C. 20004  
(t) (202) 274-2922  
(f) (202) 654-5605  
(e) [amie.colby@troutmansanders.com](mailto:amie.colby@troutmansanders.com)

**V. EXHIBITS**

Attached to this filing letter are the following Exhibits:


Exhibit A Revised Sheets to PNM OATT

Exhibit B Redline of Revised Sheets

**VI. CONCLUSION**

Wherefore, PNM respectfully requests that the Commission find that the proposed revisions to the indemnity provisions of the LGIA and SGIA are consistent with or superior to the *pro forma* OATT and accept the revisions.

Sincerely,



Amie V. Colby

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**EXHIBIT A**

omission in its performance of this Agreement, shall be limited to the amount of direct damage actually incurred. In no event shall either Party be liable to the other Party for any indirect, special, consequential, or punitive damages, except as authorized by this Agreement.

### 7.3 Indemnity

7.3.1 This provision protects each Party from liability incurred to third parties as a result of carrying out the provisions of this Agreement. Liability under this provision is exempt from the general limitations on liability found in article 7.2.

7.3.2 The Parties shall at all times indemnify, defend, and hold the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or failure to meet its obligations under this Agreement on behalf of the indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnified Party.

7.3.3 If an indemnified person is entitled to indemnification under this article as a result of a claim by a third party, and the indemnifying Party fails, after notice and reasonable opportunity to proceed under this article, to assume the defense of such claim, such indemnified person may at the expense of the indemnifying Party contest, settle or consent to the entry of any judgment with respect to, or pay in full, such claim.

7.3.4 If an indemnifying party is obligated to indemnify and hold any indemnified person harmless under this article, the amount owing to the indemnified person shall be the amount of such indemnified person's actual loss, net of any insurance or other recovery.

7.3.5 Promptly after receipt by an indemnified person of any claim or notice of the commencement of any action or administrative or legal proceeding or investigation as to which the indemnity provided for in this article may apply, the indemnified person shall notify the indemnifying party of such fact. Any failure of or delay in such notification shall not affect a Party's indemnification obligation unless such failure or delay is materially prejudicial to the indemnifying party.

7.3.6 To the extent, if at all, Section 56-7-1 NMSA 1978, *et seq.* (2005), as amended, is applicable to any indemnity provision in this Agreement, any agreement to indemnify, hold harmless, insure (including a requirement to name the indemnified party as an additional insured) or defend another party, including the other party's employees or agents, contained in this Agreement will not extend to liability, claims, damages losses or expenses, including attorney's

fees, arising out of bodily injury to persons or damage to property resulting from, in whole or in part, the negligence, act or omission of any indemnitee, its officers, employees or agents.

7.4 Consequential Damages

Other than as expressly provided for in this Agreement, neither Party shall be liable under any provision of this Agreement for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort,

defendants in any such action include one or more Indemnified Persons and the Indemnifying Party and if the Indemnified Person reasonably concludes that there may be legal defenses available to it and/or other Indemnified Persons which are different from or additional to those available to the Indemnifying Party, the Indemnified Person shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on its own behalf. In such instances, the Indemnifying Party shall only be required to pay the fees and expenses of one additional attorney to represent an Indemnified Person or Indemnified Persons having such differing or additional legal defenses.

The Indemnified Person shall be entitled, at its expense, to participate in any such action, suit or proceeding, the defense of which has been assumed by the Indemnifying Party. Notwithstanding the foregoing, the Indemnifying Party (i) shall not be entitled to assume and control the defense of any such action, suit or proceedings if and to the extent that, in the opinion of the Indemnified Person and its counsel, such action, suit or proceeding involves the potential imposition of criminal liability on the Indemnified Person, or there exists a conflict or adversity of interest between the Indemnified Person and the Indemnifying Party, in such event the Indemnifying Party shall pay the reasonable expenses of the Indemnified Person, and (ii) shall not settle or consent to the entry of any judgment in any action, suit or proceeding without the consent of the Indemnified Person, which shall not be reasonably withheld, conditioned or delayed.

**18.1.4 Indemnity Limitations.** To the extent, if at all, Section 56-7-1 NMSA 1978, *et seq.* (2005), as amended, is applicable to any indemnity provision in this Agreement, any agreement to indemnify, hold harmless, insure (including a requirement to name the indemnified party as an additional insured) or defend another party, including the other party's employees or agents, contained in this Agreement will not extend to liability, claims, damages losses or expenses, including attorney's fees, arising out of bodily injury to persons or damage to property resulting from, in whole or in part, the negligence, act or omission of any indemnitee, its officers, employees or agents.

**18.2 Consequential Damages.** Other than the Liquidated Damages heretofore described, in no event shall either Party be liable under any provision of this LGIA for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort, including negligence, strict liability, or any other theory of liability; provided,

however, that damages for which a Party may be liable to the other Party under another agreement will not be considered to be special, indirect, incidental, or consequential damages hereunder.

**18.3 Insurance.** Each Party shall, at its own expense, maintain in force throughout the period of this LGIA, and until released by the other Party, the following minimum insurance coverages, with insurers authorized to do business in the state where the Point of Interconnection is located:

**18.3.1 Employers' Liability and Workers' Compensation Insurance**

**EXHIBIT B**

omission in its performance of this Agreement, shall be limited to the amount of direct damage actually incurred. In no event shall either Party be liable to the other Party for any indirect, special, consequential, or punitive damages, except as authorized by this Agreement.

### 7.3 Indemnity

7.3.1 This provision protects each Party from liability incurred to third parties as a result of carrying out the provisions of this Agreement. Liability under this provision is exempt from the general limitations on liability found in article 7.2.

7.3.2 The Parties shall at all times indemnify, defend, and hold the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or failure to meet its obligations under this Agreement on behalf of the indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnified Party.

7.3.3 If an indemnified person is entitled to indemnification under this article as a result of a claim by a third party, and the indemnifying Party fails, after notice and reasonable opportunity to proceed under this article, to assume the defense of such claim, such indemnified person may at the expense of the indemnifying Party contest, settle or consent to the entry of any judgment with respect to, or pay in full, such claim.

7.3.4 If an indemnifying party is obligated to indemnify and hold any indemnified person harmless under this article, the amount owing to the indemnified person shall be the amount of such indemnified person's actual loss, net of any insurance or other recovery.

7.3.5 Promptly after receipt by an indemnified person of any claim or notice of the commencement of any action or administrative or legal proceeding or investigation as to which the indemnity provided for in this article may apply, the indemnified person shall notify the indemnifying party of such fact. Any failure of or delay in such notification shall not affect a Party's indemnification obligation unless such failure or delay is materially prejudicial to the indemnifying party.

7.3.6 To the extent, if at all, Section 56-7-1 NMSA 1978, et seq. (2005), as amended, is applicable to any indemnity provision in this Agreement, any agreement to indemnify, hold harmless, insure (including a requirement to name the indemnified party as an additional insured) or defend another party, including the other party's employees or agents, contained in this Agreement will not extend to liability, claims, damages losses or expenses, including attorney's

fees, arising out of bodily injury to persons or damage to property resulting from, in whole or in part, the negligence, act or omission of any indemnitee, its officers, employees or agents.

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Other than as expressly provided for in this Agreement, neither Party shall be liable under any provision of this Agreement for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort,

defendants in any such action include one or more Indemnified Persons and the Indemnifying Party and if the Indemnified Person reasonably concludes that there may be legal defenses available to it and/or other Indemnified Persons which are different from or additional to those available to the Indemnifying Party, the Indemnified Person shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on its own behalf. In such instances, the Indemnifying Party shall only be required to pay the fees and expenses of one additional attorney to represent an Indemnified Person or Indemnified Persons having such differing or additional legal defenses.

The Indemnified Person shall be entitled, at its expense, to participate in any such action, suit or proceeding, the defense of which has been assumed by the Indemnifying Party. Notwithstanding the foregoing, the Indemnifying Party (i) shall not be entitled to assume and control the defense of any such action, suit or proceedings if and to the extent that, in the opinion of the Indemnified Person and its counsel, such action, suit or proceeding involves the potential imposition of criminal liability on the Indemnified Person, or there exists a conflict or adversity of interest between the Indemnified Person and the Indemnifying Party, in such event the Indemnifying Party shall pay the reasonable expenses of the Indemnified Person, and (ii) shall not settle or consent to the entry of any judgment in any action, suit or proceeding without the consent of the Indemnified Person, which shall not be reasonably withheld, conditioned or delayed.

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**18.2** **Consequential Damages.** Other than the Liquidated Damages heretofore described, in no event shall either Party be liable under any provision of this LGIA for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort, including negligence, strict liability, or any other theory of liability; provided,

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**18.3.1 Employers' Liability and Workers' Compensation Insurance**