Senate Bill 489

"ENERGY TRANSITION ACT" in the 2018 Legislature.
Why many groups, legislators, and PRC Commissioners are opposed to this dangerous legislation.

Background & Context
PNM is closing the San Juan Generating Station ("San Juan"), one of the dirtiest coal plants in the United States, in 2022. This is a celebrated milestone. Coal is the single greatest driver of climate change and PNM's San Juan coal plant is the largest source of climate-altering carbon emissions in our state and an environmental hazard (coal waste leaching into groundwater, tens of Millions of dollars of externalized health care costs for asthma, heart disease and more, annually). PNM expected to collect $320 Million more dollars in cost recovery from San Juan from ratepayers until 2053; PNM has continued to invest in the San Juan and Four Corners coal plants despite legal challenges to those investments, the departure of other owners, and the availability of more cost-effective alternatives. Now PNM has acknowledged that San Juan is uneconomic and that it should be retired "early". PNM and its shareholders have an interest in recouping the future earnings it had on its balanced sheet even though it will produce nothing (NO electricity) for consumers. The current draft of SB489 allows them to do so but does so at the expense of consumer protections, legal standards, and PRC authority.

Before we get into specifics of the bill we need to lay out the context. PNM will be closing a quarter of all its energy production. This offers us a huge opportunity and responsibility: to create a model for the *HOW* of transition that builds upon and advances the long-standing tradition of environmental and economic justice struggles in our state. Our work to transition provides the opportunity to radically redesign our state's economy and our "democracy"– from an energy colony based on extraction and undue corporate influence to a regenerative economy, governed by and for the people – with justice and equity at the center.

The energy crossroads at which we stand is not just about fossil fuels or renewables but about who controls the process, who owns the resources, who benefits, and who bears the costs. We know that in the current model, the utility has been reaping the benefits – extracting enormous profit from the land and the people of New Mexico. The costs of extraction have been disproportionately borne by Diné people whose land has labeled a national "sacrifice zone" and whose health and lives have been sacrificed due to the high levels of heart disease, cancer, asthma, pneumonia, bronchitis, and other diseases brought on by exposure to the pollution of coal, gas, oil, and nuclear extraction as well as the stress

of intergenerational trauma. The costs are also disproportionately borne by the poorest households in New Mexican who have seen their rates rise by 63% over the last decade and who exist in a state of energy poverty – paying as much as 50.2% of household income on energy costs. New Mexicans in general have also paid a heavy price – in addition to the ever present threat of severe drought and catastrophic wildfires, our rivers are contaminated with mercury and arsenic, our state is home to the largest methane hotspot in the US– a 2,500 square-mile methane cloud that hovers over the communities in the four corners and we've paid hundreds of millions in public health costs. The San Juan mine is the second largest emitter of methane. But we've also paid in a different, more insidious way. New Mexico's relationship to our monopoly utilities and the extractive industries has corrupted our state's democracy. PNM is the most powerful corporation in the state and reigns supreme in the state legislature.

PNM is a regulated monopoly utility with a service territory of 512,000 New Mexicans who have no choice but to buy their power from PNM. Despite the fact that 84% of New Mexicans, across political, race, economic, and religious lines – support greater deployment of renewables, PNM's electricity mix is 50% coal, 30% nuclear, 10% natural gas, 10% renewables. PNM's fiduciary duty is to increase profits for its shareholders and shield its shareholders from risk. The regulated-monopoly structure is fundamentally biased toward cost recovery and return on equity generated from capital expenditures, increased earnings and shareholder dividends. PNM has been extremely successful growing its profits by more than 650% over the last decade. This wealth has been extracted from New Mexico and exported to shareholders on Wall Street.

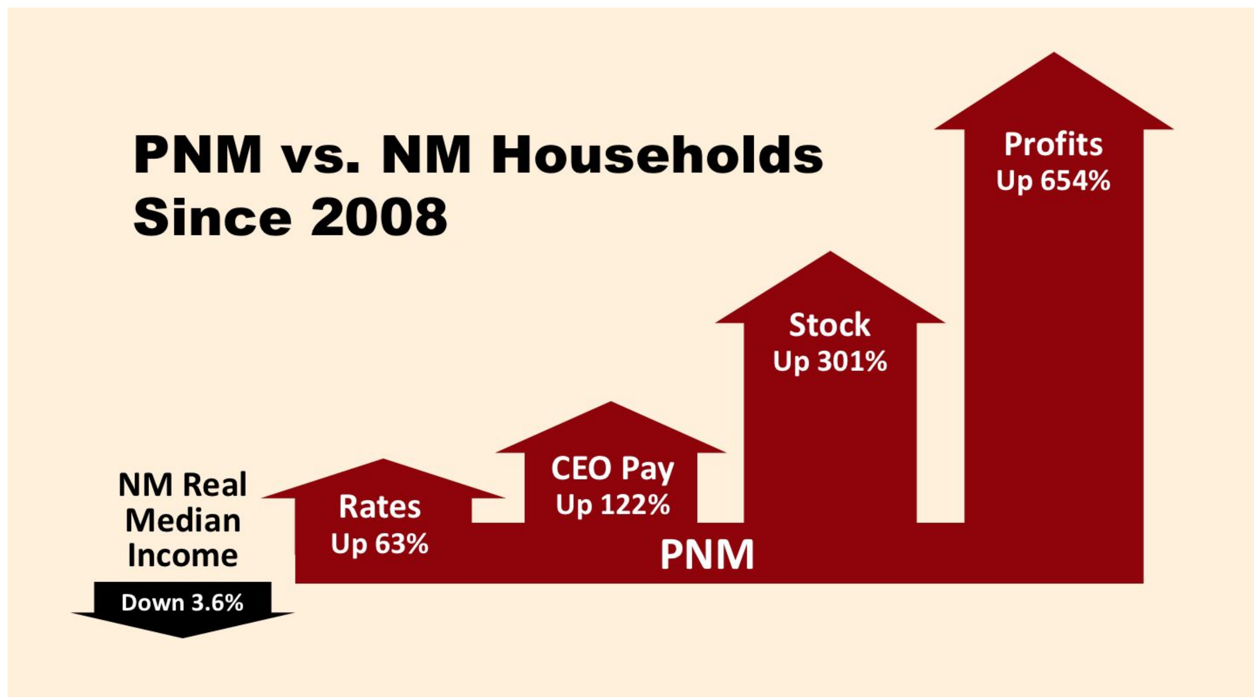
Substantive Issues in Current Draft of SB 489:

<u>PRC Authority Must Be Maintained to Review PNM's Request for Resources</u>

The Commission's oversight of "public utility facilities is the cornerstone of New Mexico's regulatory scheme. In return for monopoly market power in its industry, the utility must submit to Commission regulation." *In re Pub. Serv. Co.,* 815 P.2d 1169, 1176-1177, New Mexico Supreme Court, 1991.

- If the bill is enacted it would eviscerate the PRC's regulatory authority and discretion under existing law to approve resources only if they are the "most cost effective resource among feasible alternatives." (NMSA § 62-17-10)
- The current standard for the procurement of a new resource is that a utility must prove: 1) a net public benefit and 2) that the resource is the most cost effective among feasible alternatives. 16-00105-UT, Final Order, 5/24/2017, ¶10.
- By requiring the Commission to grant "all necessary approvals for replacement resources" it removes PRC authority to require PNM to prove that their proposed resources are a net benefit to the public and are the most cost-effective among feasible alternatives. It therefore creates an avenue for PNM to build the gas and purchase the nuclear in their integrated resource plan and undermines our ability to challenge those investments before the PRC.

- By providing a location mandate there is a near guarantee for PNM ownership of replacement resources especially when you add in the other requirements (§ 3B, D, ad F). SB 489 §§ 2, 3, and 25 of the bill are anti-competitive and likely to result in higher replacement power procurement costs to PNM's customers as compared to the “most cost-effective option among feasible alternatives” standard for procurement of such resources under existing PRC precedent, also embodied in the Legislature’s Efficient Use of Energy Act, CCN standard, and many PRC cases, including: 13-00390-UT; 15-00205-UT; 15-00312-UT, 16-00105-UT (“The Commission reiterates that PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives.” Final Order, 5/24/2017, ¶10.); 17-00129-UT, 18-00099-UT; *Re Public Service Company of New Mexico,* Case No. 2382, 166 P.U.R.4th 318, 337, 355-356 (1995).
- Further, by requiring a 100% location mandate for San Juan it eliminates the opportunity for replacement power to be located on Pueblo lands, near the load centers, or to be distributed throughout the state - despite the potential benefits to local communities and to the reliability of the system. The siting preference will result in the exclusion of wind energy, the most inexpensive form of energy in today’s market.



<u>PNM’s “cost-recovery”, collected through a non-bypassable charge on customers’ monthly bills for the next 25 years is set at 100% in this bill despite legal precedent setting consumer protection standards. Forcing ratepayers to pay for 100% of the losses associated with closure is unfair and disproportionately hurts low-income ratepayers</u>:

- PNM is requesting 100% recovery from ratepayers on those future earnings on its abandoned San Juan assets.

- This generous allocation is contrary to the Public Utility Act, specifically NMSA §62-3-1-B which declares the Legislature's policy: that the public interest requires the balance of interests between a utility's customers and investors.
- The New Mexico Supreme Court has held: To set a just and reasonable rate, the Commission must balance the investor's interest against the ratepayer's interest. As the New Mexico Supreme Court concluded in *In the Matter of the Rates and Charges of Mt. States Tel., v. Corporation Commission*, 653 P.2d 501, 507, (N.M. 1982), "The ratemaking process involves a balancing of investor and consumer interests. Neither is paramount. To argue that the consumer interest is best served by focusing solely on the investor interests ignores the Commission's duty to set rates."
- ***NO legal entitlement exists that allows PNM, or any utility, to get any amount of undepreciated assets (or any other associated costs) once the plant closes. This assumption is not based in law or precedent.***
- Everyone knows that the 4% return on equity promised by SB 489 is lower than PNM's current 9.575% return on equity. This is not disputed. What is disputed is the initial assumption, which has no basis in law or fact: PNM IS NOT ENTITLED TO THE FULL AMOUNT OF UNDEPRECIATED ASSETS OR ANY OTHER ASSOCIATED LIABILITY (LIKE DECOMMISSIONING AND RECLAMATION COSTS) WHEN A RESOURCE (Coal Plant) IS ABANDONED.
- Under current law, after the plant closes, PNM is not allowed to collect any amount of money from ratepayers for that plant or any associated liabilities ***until it shows the PRC that it is reasonable and prudent to do so.***

The New Mexico Public Regulation Commission has the duty to regulate the state's utilities and balance the interests of shareholders and ratepayers. In examples of securitization legislation across the country, the financing order has occurred *AFTER* there has been a hearing on the merits before a regulatory body. This is widely considered a best practice by securitization experts. As is outlined in the alternative securitization bill, SB 492, the tool of securitization can be created by the legislature but issues of substance should be vetted at the PRC through expert testimony and cross examination, evidence, discovery, and legal analysis.

- SB489 eviscerates Commission authority, oversight and discretion with regard to the securitization of financing in several areas in a manner that is atypical and contrary to ratepayer protections, including, most importantly:
    1) Limits the ability to decide on the amount of undepreciated investment recovery at San Juan and Four Corners Power Plant (not 1 of 64 securitization bills in the US has allowed a utility to determine the amount of cost recovery).
    2) Doesn't provide the Commission with an independent financial advisor to advise the Commission re: the detailed, complex, and specialized market information to discern whether securitization is *in fact* an economic benefit to ratepayers. This is especially important because this decision will be set in stone for 25 years.
    3) Imposes artificial statutory limits for costs of the Commission's independent counsel. SB 489 has a cap and that is unprecedented. There should be no cap for the financial advisor either.

4) Prohibits Commission review of the financing order – there is no final audit procedure. Again, this limitation is unprecedented.
5) Prohibits Commission from including additional terms and conditions in the financing order for the benefit of ratepayers. This does not comport with best practices.
6) Prohibits Commission from ordering a utility to apply for a securitization financing order (once a utility has applied to the PRC for abandonment of a qualified utility facility).

Issues of Decommissioning & Reclamation Are Serious and a Comprehensive Evaluation of the Contamination Must be Vetted.

- The $30M for mine reclamation and plant decommissioning in SB 489 is an arbitrary and capricious amount and based on NO evidence. (SB 489 §2 H (2) (a)) The amount of PNM and ratepayer responsibility should be decided by the PRC after a hearing and proper vetting after discovery, with experts, cross-examination, etc. PNM told the Commission in July 2017 that it had $224M in projected liabilities for mine reclamation and plant decommissioning at San Juan. 16-00276-UT, 7/25/16, PNM Table 7-25 BR-22-26. This bill awards PNM with a ratepayer requirement of $30M for both reclamation and decommissioning without any prudence determination or Commission oversight. Even so, that means (at least) $175M of unidentified funding is needed to clean up SJGS. And what if there are many hundreds of millions of dollars associated with the clean up of coal ash leaking into the San Juan River? There has been no contemporaneous evaluation of the extent of mine reclamation and plant decommissioning liability and it seems to be irresponsible in the extreme to pick a number out of thin air to "address" (or greenwash) this situation.

Four Corners Power Plant should be omitted from SB 489.

- Four Corners Power Plant (FCPP) should not be included in this securitization bill. Depending on when PNM files to abandon FCPP the undepreciated assets and related costs associated with that plant, assets and liabilities for the plant could be as high as $725M (if closed in 2022). We are concerned about Four Corners for two reasons: 1) It is prudent to assess the impacts of this bill and its potential (un)intended consequences before we add the Four Corners Power plant to this securitization effort. 2) The PRC has already ruled (Case No. 16-00276-UT) that PNM's life extension of and investment in Four Corners power plant was "imprudent" due to the fact that it failed to do any contemporaneous financial evaluation before it reinvested in the plant. In the next rate case, in 2019, the PRC will determine the extent of cost disallowance. The law requires that only prudently incurred expenses should be recoverable.

<u>The Renewable Portfolio Standard (RPS) should not include nuclear. We support the Renewable Portfolio Standard in HB 275. Our concern is that the RPS, as defined in SB 489, carves out and protects utility investments and continued use of nuclear energy despite significant environmental justice, health, and waste issues. This is a line in the sand for our indigenous communities who have borne the devastating impacts of uranium mining and waste</u>.

- Through the "zero-carbon " exemption, SB 489 prevents renewables plus storage from ever reaching more than 70% of PNM's and EPE's energy portfolios - because it secures their reliance on nuclear energy.

- Claims that there will be 80% renewables by 2040 cannot be achieved under this bill and therefore are false. PNM's plan of records is to purchase 114MW of nuclear in 2022 and 2023. SB 489 incentivizes this purchase because PNM will be able to count this nuclear acquisition toward RPS compliance under the "zero carbon resource standard." (SB 489, §28, L) As stated more fully above, the combination of this nuclear "out" plus the circumvention of ratepayer protections by 1) forcing PRC approval for utility replacement resources (SB 489, §3 D); and 2) language that creates an undefined and lower procurement standard of what's "necessary", will make it harder for advocates to oppose PNM's purchase of the 114 MW of nuclear. In addition to presenting enormous environmental justice, health, and waste issues, nuclear is the most costly form of electricity on the market than any other available energy resource.

- The stand alone RPS bill, SB275/HB283, is far better for New Mexicans. The "trade" in SB489 is simply not worth it for New Mexicans.

Unfortunately, many people from impacted communities and stakeholders were excluded from the conversations during this bill's drafting. Now SB 489 is facing very serious opposition from many stakeholders. Consumer advocates, ratepayers, the PRC, Diné community members and others from the impacted communities were not consulted and the bill reflects that omission.

There are beneficial and even game-changing aspects to this bill and that can be realized if we can correct the fatal flaws and move forward together.

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