

NEW MEXICO
Lawyer

October 2006 Volume 1, No. 3

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Energy Issues in the 21st Century



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The American Gas Crisis:

Raising the Stakes in Our Struggle for an Energy Policy

By Suedeen G. Kelly, Commissioner
Federal Energy Regulatory Commission

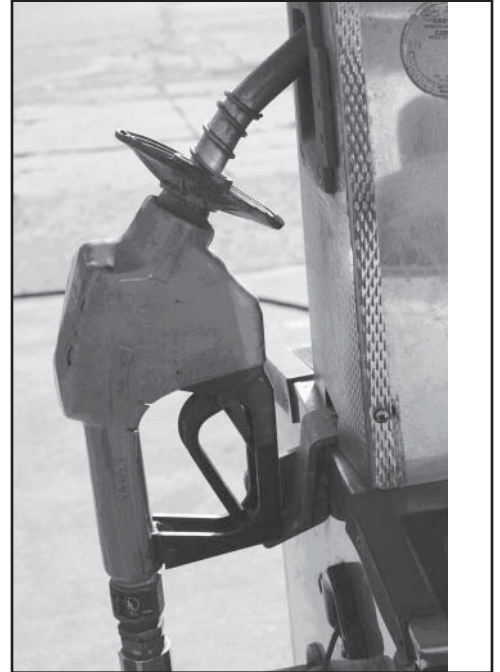
Thirty-three years ago, the Organization of Petroleum Exporting States embargoed oil destined for the United States, leaving us with insufficient oil at quadruple the price. Since then, America has struggled to enact an energy policy to ensure sufficient and secure energy supplies at reasonable and stable prices. We have also wanted the policy to include environmental and safety protections. We have made headway in this endeavor in fits and starts, usually after a smaller crisis prompts us to take another step. Today we find ourselves with insufficient natural gas at triple the price of just three years ago. This is not a small crisis. This is a disaster in the making that dramatically raises the stakes in the fight to guarantee ourselves a stable, secure, acceptable energy supply.

In 1978, Congress enacted a package of laws to deregulate and stimulate natural gas production, introduce competition into the generation of power and increase conservation and efficiency in electricity. It worked. In 1992, on the heels of the Gulf War, Congress enacted the Energy Policy Act, which, among other things, expanded competition in electricity and stimulated the transfer of energy technologies being developed in our national laboratories into the private sector. It improved things. Last year, not long after the East Coast blackout of 2003 and just before the devastation wrought by Katrina and Rita, Congress passed the Energy Policy Act of 2005. This law seeks to increase gas supplies to the United States and to increase the reliability of our national electric transmission grid. Congress hopes to stimulate the production of Arctic natural gas by encouraging the building of a trans-Alaska, trans-Canada pipeline to the United States. It hopes to encourage the importation of liquefied natural gas (LNG) by clarifying that the Federal Energy Regulatory Commission has jurisdiction over the siting of LNG terminals on all U.S. coast lines. It hopes to increase the reliability of our transmission system by mandating reliability standards for the grid. These will all be valuable advances, but we have yet to see and grapple with the full extent of our energy problem.

In our country we usually enact laws impacting our national economy only when we come to a national consensus on the problem and the solution. Achieving a consensus on energy policy is very difficult because of the many, many interests that have a real stake in the outcome. Because we have not faced a major energy crisis since 1973, we have not had the impetus to tackle the challenge of developing a comprehensive energy policy, but today we are facing another national energy crisis.

Not only is the price of our imported oil skyrocketing, but America is not producing enough gas to meet our demand. We have long been aware of our need for foreign oil, but most of us are not even aware that we have, almost silently, become dependent on foreign gas too. The story of America's gas supply is a bit like the story of Albuquerque's water supply. As little ago as 1998, we thought the United States sat over an ocean of natural gas. It was not long before that that we thought Albuquerque sat over an ocean of fresh water. Today we know that neither is the case.

The inadequacy of our gas supply to meet our demand has escalated the price of gas domestically as well as its volatility. As we turn to imported gas (LNG) to meet our demand, we must compete in the international market for gas, where the price is even higher. The international price reflects the costs of foreign production, liquefaction and trans-ocean transportation as well as the competition with Western Europe, India and China



for the supply. The high price of gas, in turn, has raised the cost of electricity in most parts of our country, where gas-fired electric generation sets the market price of electricity. In the electricity sector of our economy, generators are considering alternatives to gas-fired generation for new generation. Coal is abundant, but even the price of domestic coal is increasing as the international price of coal rises in meeting the demands of the large developing countries of India and China. Clean coal is expensive. New nuclear power is a possibility, but not an inexpensive one. Wind-powered generation can help the problem, but we need to build long transmission lines from the windy areas of the country, like New Mexico, to the consuming areas, like Phoenix, Las Vegas and California. Solar generation is expanding, but it is still expensive too.

As the National Petroleum Council has documented, traditional North American gas-producing areas will be unable to meet more than three-quarters of our projected demand. There are some growth areas in gas production, including in the unconventional sources of shale, coal bed methane and tight sands: the Opal area, the Powder River Basin, the Uinta/Piceance, the Dallas/Forth Worth (Barnett Shale) area, the Permian Basin and the deep Gulf of Mexico. However, production on the Gulf Coast, in the shallow Gulf and in the San Juan Basin is in decline. Overall, our total gas production is projected to remain relatively flat for the next 20 years. Only four per cent of the world's gas reserves reside in North America.

The high cost and volatility of gas, along with that of oil and electricity, has adversely affected the quality of life for most of us and has whipped our economy. Our many price-sensitive industries are suffering. In a recent report, *Energy in Flux: The 21st Century's Greatest Challenge*,

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A Comment From

Commissioner Jason Marks, Vice-Chairman,

New Mexico Public Regulation Commission

The growth in prosperity enjoyed by Western civilization over the last 150 years would not have been possible without fossil fuels. But today, our use of coal, oil and gas presents more risks than opportunities. Sharply higher prices at the gas pump and for home heating this past year pointed out emerging imbalances in worldwide supply and demand for petroleum products. Against this backdrop, do we really want to stake our prosperity and way of life on the bet that fossil fuel prices will stabilize at affordable levels over the next 20 or 30 years? Or on the gamble that almost all climate scientist are wrong about the adverse effects of carbon emissions?

Fortunately, at the same time that fossil fuels are posing significant economic and environmental concerns, renewable technologies are developing to the point where they are “ready for prime time.” Today, New Mexico benefits from 400 megawatts of installed wind energy capacity, enough to power 200,000 homes when wind conditions are optimum, and a recently inked contract could add 32 MW of biomass powered electricity by 2009. These sources of green power are attractively priced, with the wind farms coming in around three cents per kwh and the biomass at a little over six cents. Since wholesale power from natural gas fired plants has been running at six to eight cents and higher this past year, some New Mexico electric consumers have actually saved money because of the availability of wind power.

Solar power is still relatively expensive at 15 to 20 cents per kwh using thermal technologies (and even higher using photovoltaics), but its availability tracks peak electricity demand much better than wind. We have enough sun in New Mexico to supply the entire country’s electricity needs several times over without interfering with existing land use, and several companies are interested in building solar plants here using new, lower-cost technologies. If these companies are successful, we could see solar electricity in the 10 cent per kwh range, possibly with thermal storage to allow generation into the night. Over time, a renewable grid could even address our gasoline addiction. The cost to operate a battery-powered car that can reach highway speeds, when charged overnight at 10 cents per kwh, is equivalent to gasoline at less than \$1.50 per gallon.

The development of renewable energy has come about through a combination of private market forces and government regulation. The need for government intervention is driven by the failure of economic markets to account for the environmental and political costs associated with fossil fuel use. In addition, the short-term nature of much private decision-making and the incentives faced by current owners of energy resources to maximize their returns may, in a pure market-based approach, lead to outcomes that do not serve broader interests.

In the U.S., 23 states have renewable portfolio standard (RPS) laws that require a certain amount of retail electricity to come from renewable sources. Federal and state governments also provide some tax incentives. Portfolio standards have proven effective in stimulating deployment

of renewables and plans are afoot to increase the targets in several states, including New Mexico. The weakness of the RPS approach is that it is a fixed prescription that cannot optimize nor quickly react to changing circumstances. A regulatory tool known as Integrated Resource Planning (IRP) can address these deficiencies by allowing the consistent economic evaluation of a variety of energy resources, including conservation and efficiency, over a long horizon. In IRP, fuel cost risk can be quantified, and externalities such as environmental costs can be internalized. We can then determine the best mix of conventional, renewable and transitional technologies; e.g., coal gasification with carbon sequestration, to meet our energy needs.

Energy infrastructure has a long life cycle. The resources we commission today will be in service 30 years from now. We must invest now in a portfolio of alternatives or run the risk that fossil fuel dependence will visit economic and environmental crisis on our children’s generation.

About the Author:

Prior to being elected to the New Mexico Public Regulation Commission (PRC) in November 2004, Jason Marks had an extensive career in healthcare finance and rate setting. He represents the Albuquerque area on the PRC and serves as the commission’s vice-chair. Marks, a member of the State Bar of New Mexico, has a bachelor’s degree from Reed College and a J.D. from UNM.



Addressing Climate Change in a New Energy Era

By Jeff Sterba
Chairman, President and CEO, PNM Resources

The single greatest environmental challenge facing the world today is that of global climate change. The question of whether climate change is being caused by human activity—emissions of carbon dioxide (CO₂) and other so-called “greenhouse gasses”—has been debated for decades. In my opinion, it still has not been proven conclusively.

As we watch events like the hurricanes that devastated the Gulf Coast last year, or even the unusually wet monsoon season New Mexico witnessed this summer, most of us are beginning to feel that the climate is indeed changing. Whether or not the cause-effect relationship between human activities and climate change has been proven beyond the shadow of any doubt, we know that as a society we have released an extraordinary amount of carbon into the atmosphere. Some estimate that there is 30 percent more carbon in the atmosphere today than there was before the Industrial Revolution. To me, the evidence that human activities are causing climate change is sufficiently compelling, and I feel strongly that we must address this very serious environmental issue.

While many associate greenhouse gas emissions as primarily an energy-sector issue, the fact is these emissions are distributed among all major economic sectors. According to the U.S. Department of Energy, of the estimated 5,789 million metric tons of CO₂ emitted by our nation in 2005:

- 39 percent came from electric generation;
- 32 percent came from transportation;
- 18 percent came from industrial processes;
- 7 percent came from residential consumption; and
- 4 percent came from commercial activities.

We share the responsibility of addressing climate change. By “we” I mean all of us—every country in the world, every sector of the economy, every supplier and every user of a product associated with the emission of greenhouse gasses. This is a global, economy-wide issue, and we all must take responsibility for finding solutions.

Here in the U.S., the best way to ensure that we are all a proportional part of the solution is through mandatory federal carbon regulations. I have advocated this approach already to the U.S. Senate Energy and Natural Resources Committee because I believe it is the fairest and quickest path for our nation to get to the business of slowing, stopping, then reducing the amount of carbon present in our atmosphere. Federal regulations that apply to all economic sectors would provide industries, including the energy industry, the regulatory certainty that we need in order to plan for what has been coined our “carbon-constrained” future.

For utilities like PNM in particular, we must know what to expect in terms of environmental compliance for the long term because energy resources such as power plants are capital intensive and require



decades of operation before a return on that investment is fully realized. In order to make sure the plants we build now will still be viable years from now, we need to know what regulatory constraints these plants will face. Regulatory certainty is vital to our ability to make prudent business decisions and contain the cost of electricity to our customers.

But simply regulating carbon emissions is not a solution unto itself. If we were all compelled to reduce our emissions tomorrow, we would find ourselves unable to comply because the technology to do

so on a commercially viable scale does not exist. That is why federal regulations for carbon must be coupled with a dedicated research and development program so that as a nation we can aggressively pursue technologies that will allow us to continue using coal—still the backbone of our generating capabilities and a key to containing energy costs—as well as other fossil fuel resources.

The energy industry needs to become more innovative and begin to transition into a new energy era that brings an array of challenges even beyond climate change issues. We must provide energy for an ever-expanding economy and an ever-increasing population. We are entering a building cycle in which we must upgrade our energy infrastructure at a time when the costs of vital materials such as steel and cement have spiked by 50 percent to more than 100 percent. And we must provide sustainable energy that is clean and environmentally friendly, which carries an inherently higher cost.

PNM has already begun preparing for the new energy era by pursuing a sustainable business model. We are investing in cleaner energy such as wind, biomass and solar resources and exploring energy efficiency and demand-side management as alternatives to building new generation. We recently made a major investment at our existing San Juan Generating Station, where we will spend an estimated \$270 million to further reduce air emissions, including mercury.

These initiatives represent just the beginning of the steps we will need to take as an energy company to help New Mexico prepare for the new energy era. As we move forward and begin to tackle climate change in earnest, we will all be tested in our ability to innovate and adapt to a carbon-constrained world. I am very optimistic that we will surmount this challenge as long as we are resolved as a community of stakeholders to do so.

About the Author:

Jeff Sterba is chairman, president and chief executive officer of PNM Resources, an energy holding company based in Albuquerque. He serves as second vice chair of Edison Electric Institute and vice chair of the Electric Power Research Institute. He is also on the board of directors for the U.S. Chamber of Commerce. Sterba graduated summa cum laude with a degree in economics from Washington University in St. Louis.

IN THE DARK

Over Rising Energy Rates

By Micah Rose

Each month the cost of utility service imposes a tremendous burden on the nation's poor. Studies have found that where the average middle class household devotes just around four percent of its income to the cost of energy, low income households spend upwards of twenty percent of their incomes on utility service.¹ Over 200,000 New Mexico households presently cannot afford their home energy bills and, incredibly, for 51,000 of our state's low-income families, maintaining utility service requires nearly 40% of the household's income.² As these services are necessary to keep households safe and healthy, large numbers of low income households are often forced to skip meals or medication in order to keep their homes warm in the winter and livable in the summer.³

For these sobering reasons, the non-profit association, Community Action New Mexico (CANM) became very concerned when, on May 30 of this year, the Public Service Company of New Mexico (PNM) requested a rate increase from the New Mexico Public Regulation Commission (PRC).⁴ Seeking to protect New Mexico's elderly and poor from the potentially devastating consequences that an increase in already unaffordable gas bills would cause, CANM, a group which works statewide to develop and implement high-impact strategies for ending poverty, intervened through its counsel at the Senior Citizens Law Office and Legal Aid of New Mexico in the regulatory proceeding.

Since joining CANM two years ago, Energy Lead Jamie Porter-Lara has devoted great effort on behalf of New Mexico's poor to reduce the harmful impact of high energy costs. Among her efforts is CANM's intervention in a 2005 PRC regulatory proceeding to provide evidence and testimony about the unfair impact of PNM's proposed sale of a power plant from shareholders to ratepayers in order to supply additional peak electric capacity.⁵ In that case, Ms. Porter-Lara and CANM relied heavily on their expert consultant, Roger Colton, a leading national expert on low income utility issues.⁶ CANM, with the assistance of Roger Colton, argued that PNM's decision to transfer the power plant, something that was acknowledged would drive up electricity rates, was made without consideration for PNM's low income customers.⁷ This was evident, CANM argued, as PNM's own testimony asserted that its decision to transfer the power plant was based on a calculated projection of future demand and use of electricity for its customer classes; among which, PNM defined its entire residential class as being "relatively homogeneous."⁸ CANM

concluded that PNM, by failing to break down its residential customer class by income, was ignoring the serious consequences the transfer of the power plant would have on New Mexico's low-income residents.⁹

In the current gas rate case, CANM fears that PNM still lacks an understanding that its services are too expensive for New Mexico's poor. Stating its intention to seek higher rates for its gas service, PNM's CEO and President Jeff Sterba, announced, "I believe the era

of cheap energy is over."¹⁰ This declaration is out of sync with the reality faced by low-income New Mexican who can't afford current rates. During the first six months of 2006, PNM disconnected 11,699 electric accounts and 8,550 gas accounts for non-payment.

The proposed gas rate increase would raise residential gas delivery charges by almost 14%.¹¹ CANM argues that the result of the proposed increase will be that more PNM customers will fall behind on their gas bills, those already behind will fall further behind and a dramatically greater number of low- and

fixed-income customers will lose their service to disconnections for nonpayment.

All of this, CANM argues, is a consequence of rate increases to subsidize a growing gas distribution system that low-income households did not cause the need for and cannot benefit from, but will be charged for nonetheless. It is not CANM's intention in the present proceeding to dispute whether a legitimate need for a gas rate increase exists, but rather CANM is fighting for PNM to acknowledge that the proposed gas rate increases will place its services out of reach for many of New Mexico's poor and to take steps to effectively remedy this situation.

Utilities are a critical service which should not be treated as a mere convenience. As New Mexico's poor are already struggling to maintain their necessary utilities services, if the market does demand that PNM raise its gas rates, it should do so with consideration for those who will not be able to afford the new rates.

About the Author:

Micah Rose is a consumer attorney with the Senior Citizens Law Office in Albuquerque, a non-profit law firm which provides civil legal services to residents of Bernalillo County over sixty years of age in order to uphold their

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Renewable Energy Growing, but Challenges Remain

By Jeffery S. Dennis

With energy costs rising, consumers and policymakers are searching for alternatives to traditional sources of energy. Renewable energy as a source of electricity supply is one alternative receiving more attention both in New Mexico and nationally.

While still a small percentage of total electricity produced, renewable sources of electricity are making gains in New Mexico and nationwide. According to Energy Information Administration (EIA) statistics for 2004 (the most recent available), renewables (excluding hydroelectric generation) now represent 1.6 percent of the total installed electricity generation in New Mexico.¹ While a small percentage on the surface, it represents a significant gain since just 2000, when renewables represented only a very small fraction of total installed generation in New Mexico.² Much of that growth has occurred in the past few years; renewable electricity generation in New Mexico grew by 92.8 percent between 2005 and 2006, and now totals 441 megawatts.³ General Accountability Office (GAO) reports and EIA statistics note that one renewable resource, wind power, is the fastest growing new electricity generation technology in the United States on a percentage basis, growing 57.9 percent from 2005 to 2006.⁴ New Mexico is one of 10 states with 90 percent of all installed wind power in the country.⁵

The cost of electricity produced by renewable generators, while still higher than traditional coal and natural gas generators, has become more competitive, aiding the growth noted above. This is particularly true for wind power, which costs three to six cents per kilowatt hour to generate (as of 2004), down from costs as high as 30 cents per kilowatt hour in the 1980s.⁶ As prices for natural gas continue to rise, and if potential new greenhouse gas emissions regulations increase the cost of producing electricity from coal, renewable generation could become even more cost competitive.⁷

The increase in renewable energy development in New Mexico has occurred with a set of state statutes that encourage and manage the development of renewable resources. Most notable is the Renewable Energy Act, NMSA 1978, § 62-16-1 et seq., enacted in 2004. Significantly, that act codified a Renewable Portfolio Standard (RPS), which requires electric utilities in New Mexico to obtain a certain percentage of their electricity supply from renewable resources. NMSA 1978, § 62-16-4. Previously, the New Mexico Public Regulation Commission (PRC) (charged with regulating electric utilities in New Mexico) had enacted an RPS through its regulations. The RPS now codified in the statutes required that each public utility, by January 1, 2006, include renewable energy in its supply portfolio (defined by the statute to include electric energy generated by zero-emissions technology, solar, wind, hydropower, geothermal and biomass resources, or fuel cells that are not fossil fueled) at a level comprising at least five percent of its retail sales. This percentage increases by one

percent per year until 2011, when the RPS will reach 10 percent. The statute requires that utilities diversify the renewable resources they use to satisfy the RPS, and also includes provisions directing the PRC to establish a “reasonable cost threshold,” above which an electric utility is not required to add renewable energy supply to meet the RPS. According to recent news reports, New Mexico utilities have had strong success soliciting bids to supply renewable energy to meet the RPS.⁸

Additionally, the Renewable Energy Act addresses the recovery by utilities in their electricity rates of the costs of procuring renewable energy, which is important since, as noted above, it is likely to be more expensive than traditional coal and natural gas sources. Specifically, NMSA 1978, § 62-16-6, explicitly states that utilities may recover the reasonable costs of complying with the RPS mandate, and that costs approved by the PRC as part of a renewable energy procurement plan shall be deemed reasonable.

The Renewable Energy Act also addresses the ownership of Renewable Energy Certificates, which establish compliance with RPS requirements. Specifically, NMSA 1978, § 62-16-5, provides that the certificates are owned in the first instance by the generator of the renewable energy unless transferred to the energy purchaser, or unless other conditions are present. This can be vitally important to the financing and development of a new renewable energy generation project. New Mexico is unique in that it is the only state in the country that has addressed this ownership issue by statute, as opposed to in agency regulations or through litigation.⁹

New Mexico also mandates by statute that its electric utilities engage in “integrated resource planning,” which requires that they file plans with the PRC to identify the most cost effective portfolio of resources to supply the energy needs of their customers. See NMSA 1978, § 62-17-10. The statute notes that integrated resource plans filed with the PRC must evaluate renewable energy, along with energy efficiency, demand-side management and other measures, and traditional generating technologies (coal or natural gas), on a “consistent and comparable basis,” taking into account price volatility and the costs of anticipated environmental regulations.

One of the first statutes dealing with renewable energy in New Mexico is the Solar Rights Act, NMSA 1978, § 47-3-1 et seq. This set of statutes governs access to the solar resource; rays of sunlight. In general, the Solar Rights Act establishes the method for the owner of a property with a solar collector to claim and record a solar right. This property right is considered an easement appurtenant, and is enforceable against any person constructing or planning to construct a structure that would obstruct the line-of-sight path from the solar collector to the sun.

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New Mexico also offers several tax exemptions to spur the development of renewable energy. These include: (a) a general renewable energy production tax credit, available for qualified renewable energy generators of at least 10 megawatts in capacity (NMSA 1978, § 7-2A-19); (b) a tax credit for the sale of wind generation equipment to state and federal agencies (NMSA 1978, § 7-9-54.3); and (c) a recently-enacted tax credit for the purchase and installation of solar generation systems in a residence, business or agricultural enterprise (2006 N.M. Laws 93).

The federal Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, 119 Stat. 594 (2005), also includes provisions intended to promote renewable energy. Most importantly, this legislation extended the federal production tax credit for electricity produced from renewable resources to January 1, 2008. *Id.* at § 1301, 119 Stat. at 986-87. Extension of this credit was widely considered vital to the continued growth of wind power in the United States. EPAct 2005 contains other provisions concerning renewables that are too numerous to mention here, including production incentives, a federal purchase requirement, and amendments to the laws governing geothermal development on federal lands. *Id.* at §§ 202-203, 221 et seq., 119 Stat. at 651-52, 660 et seq.

Under these and other statutes, and with rising fossil fuel costs, renewable energy appears poised for continued growth; EIA statistics forecast 11.3 and 15.5 percent growth rates for renewables nationally during 2005-2006 and 2006-2007, respectively.¹⁰ But challenges to its development remain. The most significant challenge may well be access to high-voltage transmission lines to get renewable energy to wholesale markets and ultimately consumers. While many generating resources face the problem of a lack of access to transmission lines or fully-subscribed transmission lines, renewable resources can be particularly vulnerable to this problem because they are often located in remote areas far from existing transmission systems.¹¹

A related challenge for renewables is the ability for such resources, and related transmission infrastructure, to obtain "siting" approval. While considered "green" energy, renewable electricity generators nonetheless may encounter resistance or legal obstacles with regard to their potential environmental impact and other location concerns. This is particularly true for federal lands like those prominent in New Mexico, where lengthy National Environmental Policy Act (NEPA) and other statutory reviews are generally required. Wind energy projects can face siting opposition from local communities who fear the tall turbines will be unsightly. The Federal Aviation Administration and military have slowed wind power developments over concerns that the turbines will interfere with radar.¹²

EPAct 2005 took some steps to address transmission congestion and siting. Most notably, that legislation directed the Federal Energy Regulatory Commission (FERC) to develop incentives for utilities to construct new transmission lines, and also gave FERC certain limited authority to approve the location of high-voltage transmission lines. See Pub. L. No. 109-58, §§ 1221 and 1241, 119 Stat. at 946 and 961. During the last session of the New Mexico Legislature, lawmakers attempted to take a significant step to address the need for transmission infrastructure by establishing a state Renewable Energy Transmission Authority, similar to the Mortgage Finance Authority, to aid in the financing of new transmission lines that would allow for further development of renewable resources. See Senate Bill 317, 47th Leg., Second Regular Session (N.M. 2006) (failed in the House).

Finally, while the cost of electricity generated by renewable resources has become more competitive with traditional fossil fuel generators,

the higher costs remain a potential barrier to more widespread development. While further advances in technology should help lower renewable energy production costs, extension of the production tax credit and other incentives will likely to be necessary for the pace of growth of renewables to continue increasing. Prior to the extension of the tax credit in EPAct 2005, EIA projected a severe drop in the growth of wind power should the credit expire.¹³ At least one potential wind energy project recently cited uncertainty over the future availability of the production tax credit as a reason for shelving its plans.¹⁴

About the Author:
Jeffery S. Dennis is an attorney-advisor at the Federal Energy Regulatory Commission. He is a graduate of the UNM School of Law and a member of the State Bar of New Mexico. The views expressed here are solely those of the author and do not necessarily represent the views of the Federal Energy Regulatory Commission or the United States.



Endnotes

¹See Energy Information Administration (EIA), New Mexico Electricity Profile, 2004 Edition, Table 5, available at http://www.eia.doe.gov/cneaf/electricity/st_profiles/new_mexico.html (last visited Aug. 28, 2006); EIA, Renewable Energy Annual 2004 at 39 (June 2006).

²See New Mexico Electricity Profile, *supra* note 1.

³See EIA, Electric Power Monthly: August 2006 at table 1.14.B, available at http://www.eia.doe.gov/cneaf/electricity/epm/table1_14_b.html (last visited Aug. 20, 2006).

⁴See GAO, Wind Power: Impacts on Wildlife and Government Responsibilities for Regulating Development and Protecting Wildlife, No. GAO-05-906 at 7 (Sept. 2005); Electric Power Monthly: August 2006, *supra* note 3, at table ES1.B.

⁵See Wind Power, *supra* note 4, at 9.

⁶GAO, Renewable Energy: Wind Power's Contribution to Electric Power Generation and Impact on Farms and Rural Communities, No. GAO-04-756 at 20 (Sept. 2004).

⁷The CEO of Public Service Company of New Mexico, the state's largest electric utility, recently proclaimed that more stringent greenhouse gas emissions standards and rising fuel costs would mean the end of "the era of cheap energy." Rosalie Rayburn, "Power Rising," *Albuquerque Journal*, June 18, 2006, at C1.

⁸See Rosalie Rayburn, "Proposals Are Coming in For Renewable Energy," *Albuquerque Journal*, June 26, 2006 at Bus. Outlook pg. 5.

⁹See Edward A. Holt, "Who Owns Renewable Energy Certificates: An Exploration of Policy Options and Practice," Presentation to American Bar Association Teleconference "Renewables Litigation: Past, Present and Future" (June 21, 2006).

¹⁰EIA, Short-Term Energy Outlook: July 2006 at 22, Table 11.

¹¹See, e.g., GAO, Renewable Energy: Increased Geothermal Development Will Depend on Overcoming Many Challenges, Testimony of Jim Wells Before U.S. Senate Committee on Energy and Natural Resources, No. GAO-06-930T at 7 (July 11, 2006).

¹²See, e.g., Thomas Content, "Wind Energy Projects Might Move Forward," *Milwaukee Journal Sentinel*, June 23, 2006.

¹³GAO, Renewable Energy: Wind Power's Contribution, *supra* note 6, at 31-32.

¹⁴American Wind Energy Association, "40-MW Community Wind Project Get Put on Hold in Wind-Rich Nebraska," *Wind Energy Weekly* (Aug. 25, 2006).

Energy Development on Indian Lands:

The Basics

By Lynn H. Slade and Walter E. Stern

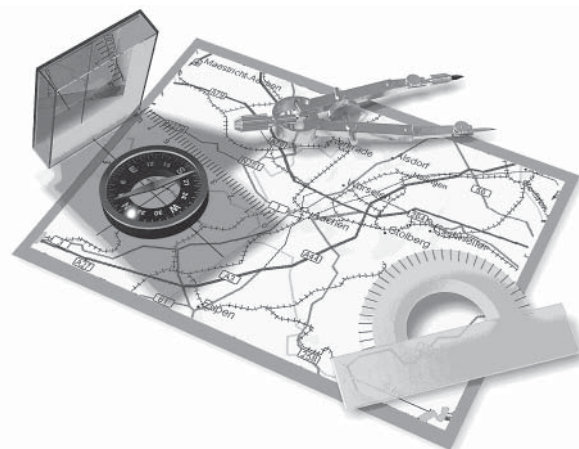
Many Indian Tribes across the United States are pursuing energy development projects on their lands. Close to home, for example, the Navajo Nation is working with energy developers to develop a coal-fired electric generating station on the New Mexico portion of the Navajo Reservation. Other Indian tribes, Pueblos and Native American groups (collectively, “tribes”) may be looking at development of renewable resources, such as wind and solar power, natural gas, coal and other energy sources. While understanding only the basics of energy development on Indian lands can be, as the saying goes, a bit dangerous, we will embark on that mission in this article.

Successful energy or resource development on Indian lands hinges in large measure on the use of federal legislation authorizing leases, rights-of-way and other agreements with tribes. Any lease, right-of-way, or agreement with a tribe or individual Indian owner must be approved by the secretary of the interior or his designate (“secretary”) to be valid and enforceable. The Indian Mineral Development Act (IMDA)¹ authorizes tribes to enter into a range of agreements for the development of minerals, including leases, operating or development agreements, or joint ventures. The IMDA and its implementing regulations provide flexibility to tribes to enter into more than conventional leases, in which tribes occupied essentially the role of a passive lessor, receiving compensation in the form of mineral royalty payments. Under the Indian Mineral Leasing Act², the Indian Business Leasing Act³ and similar older federal statutes, tribes had been limited to the role of a lessor only. With the enactment of the IMDA, tribes can be active risk-bearing and reward-sharing participants in the energy development should the parties so desire. Under these statutes, the involved tribe and other business “partners” negotiate the terms of the agreement, with the possible input and advice from the secretary, acting through the Bureau of Indian Affairs (BIA). Once the terms are negotiated and drafted, the agreement is presented to the secretary for the required approval.

In contrast, under the General Right-of-Way Act of 1948,⁴ rights-of-way necessary for energy development, whether for facilities crossing tribal lands, to bring employees and equipment to the energy project, or to transport energy resources to market, are sought by application from the BIA after obtaining the consent of the tribe. Tribal consent is required not only for the original grant, but also for any renewal or expansion of the right-of-way. This tribal consent requirement has been controversial of late as some tribes have been viewed as seeking to extract unreasonable compensation or other conditions to consent to rights-of-way and renewals. Section 1813 of the Energy Policy Act of 2005 (EPAAct 2005) authorized a study of this issue.

The grant of rights-of-way and the approval of leases or IMDA agreements are subject to the requirements of the National Environmental Policy Act (NEPA) and related statutes such as Section 106 of the National Historic Preservation Act (NHPA). Tribes and project proponents should be mindful that anything less than thoughtful compliance with NEPA, NHPA and related statutes could render a project vulnerable to challenge or cancellation.

EPAAct 2005 also enacted provisions giving tribes opportunities for federal support and broader participation in energy developments on tribal lands. Title V of EPAAct 2005, the Indian Energy Title of the Act,⁵ authorizes the secretary to provide development grants, low interest loans, technical assistance and training and support research projects



to assist participating tribal governments to develop energy resources and promote “integration of energy resources” on Indian land. EPAAct 2005 also enables tribes to enter into tribal energy resource agreements (TERAs), pursuant to which a tribe demonstrating a qualifying program to the secretary’s satisfaction may take over the environmental and cultural resource review functions under NEPA and NHPA and enter into its own leases, development agreements and rights-of-way without review or approval by the secretary. Proposed regulations to implement Title V of EPAAct 2005 were published August 21, 2006.⁶

Development of energy resources in Indian country also must take into account the possible effects of tribal sovereignty. Sovereignty effects include the immunity from suit of tribal governments in the absence of a valid waiver, the possibility for tribal regulation and taxation, tribal court dispute resolution, and the potential for conflict between state, tribal and federal regulation and land use planning. Careful analysis is necessary to predict the applicable law and the forums in which it will be applied.

Now you know enough to be dangerous. As the Sergeant in *Hill Street Blues* used to say, “Let’s be careful out there.”

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Endnotes

- 1 25 U.S.C. § 2101-2108.
- 2 25 U.S.C. § 396a-396g.
- 3 25 U.S.C. § 415.
- 4 25 U.S.C. § 323-328.
- 5 25 U.S.C. § 3501-3506.
- 6 71 Fed. Reg. 48626-48645.

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commissioned by Deloitte & Touche USA L.L.P., Dr. Joseph Stanislaw, co-author with Daniel Yergin, of *The Commanding Heights: The Battle for the World Economy*, explains that inadequate oil and gas supplies threaten more than our economy. They also jeopardize global political harmony, the environment, and the historical pre-eminence of U.S. expertise in energy technology and know-how.

The time has come to realize that the stakes in having a better plan for our energy future have been raised dramatically in the last few years. As we step back and look at the big picture, our traditional sources of energy—oil and gas—are not as secure, stable or affordably priced as we need them to be. Our derivative energy source—electricity—is suffering as well. Many in the gas industry, the larger energy industry, and the scientific community believe we can solve our energy problem with solutions on the supply side as well as the demand side. I believe we can too. America has long been successful with market-driven solutions to problems—solutions that lower costs, increase efficiency, and produce innovations. I believe that approach can work here too—in the development of energy resources and the infrastructure to deliver them, in the development of technology to improve efficiency, the development of technology to harness non-fossil fuels and clean up fossil fuels, and in the establishment of markets for carbon, renewables credits and demand response; but the public must support this, and

public policy must be developed to shape and support this. To succeed we will need the commitment of our leaders—local, state, federal, industry, environmental—and ourselves to forge an energy policy to sustain us for the future. The time to do this is now.

About the Author:

Suede G. Kelly is a commissioner at the Federal Energy Regulatory Commission, confirmed to a term that expires June 30, 2009. Previously she was a professor of law at the University of New Mexico School of Law, where she taught energy law, public utility regulation, administrative law and legislative process. She also worked with the law firm of Modrall, Sperling, Roehl, Harris & Sisk in Albuquerque from 2000 through 2003. In 2000, Kelly served as counsel to the California Independent System Operator. In 1999, she worked as a legislative aide to U.S. Senator Jeff Bingaman. Prior to joining the faculty of the law school, Kelly served as chair of the New Mexico Public Service Commission, which regulated New Mexico's electric, gas and water utilities. She had been a lawyer in the Office of the New Mexico Attorney General and with the New Mexico firm of Leubben, Hughes & Kelly. She also worked for two years in Washington, DC, upon her graduation from law school. Kelly earned her B.A. with Distinction in Chemistry from the University of Rochester and a J.D. cum laude from Cornell Law School. She is admitted to the bars of New Mexico and the District of Columbia.

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rights, maximize their autonomy and ensure that they receive the benefits to which they are entitled. Rose is one of the attorneys representing Community Action New Mexico in the present PNM proceeding before the PRC.

Endnotes

¹National Low Income Energy Consortium, National Energy Assistance Directors' Association, and National Fuel Funds Network, *The Cold Facts: The First Annual Report on the Effect of Home Energy Costs on Low-Income Americans, 2001-2002*, at <http://www.nliec.org/Projects/ColdFacts.pdf>

²Roger Colton, *the Home Energy Unaffordability Gap*, 2006. Fisher, Sheehan & Colton, at http://www.fsconline.com/work/heag/2005_Released_Apr06/States/New-Mexico.pdf

³The National Energy Assistance Directors' Association, *the National Energy Assistance Survey Report*, Final Report 2004, Executive Summary, at page ES-9. Survey reported that 22 percent of low income households which responded reported that due in part to their energy expenses they went without food for at least one day, 38 percent said they went without medical care, 30 percent said they didn't fill a prescription or took less than the full dose of a prescribed medicine.

⁴Before New Mexico Public Regulation Commission, *In the Matter of the Application of Public Service Company of New Mexico, et. al., Case No. 06-00210-UT*.

⁵Before New Mexico Public Regulation Commission. *In the Matter of the Application of Public Service Company of New Mexico, et. al., Case No. 05-00275-UT*,

⁶See Roger Colton's resume at <http://www.fsconline.com/downloads/R-COLTON.pdf>.

⁷See generally, direct testimony and exhibits of Roger D. Colton on Behalf of Community Action New Mexico, January 13, 2006, In the matter of Application of Public Service Company of New Mexico, Case No. 05-0275-UT.

⁸*Id.*, page 5, whereby Mr. Colton discusses the relevance of PNM's direct testimony in the same matter where it describes its own Residential customer class as being "large and relatively homogenous."

⁹*Id.* at 5-10.

¹⁰Rosalie Rayburn, *PNM To Seek Higher Rates*, Albuquerque Journal, May 17, 2006 at A1.

¹¹*Proposed Form Of Notice to Customers*, attached to PNM's Petition for a Revision to Retail Natural Gas Rates and Rule, and submitted to the PRC on May 30, 2006.

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