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SUBJECT: Informs that licensees wishes to address preliminarily
 certain misconceptions stated in EPE/CSW response to
 comments w/respect to nature & scope of significant changes
 review currently being undertaken by ofc.

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June 3, 1994

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Re: NRC Docket Nos. STN 50-528, STN 50-529 and
STN 50-530 --
Arizona Public Service Co., et al.

Dear Mr. Gody:

This letter is submitted on behalf of Plains Electric Generation and Transmission Cooperative, Inc. ("Plains") in response to the responsive comments filed on behalf of El Paso Electric Company ("EPE") and Central and South West Services, Inc. ("CSWS") in these dockets on May 17, 1994 (the "EPE/CSW Reply Comments"). Plains wishes to address preliminarily certain misconceptions stated in the EPE/CSW Reply Comments with respect to (1) the nature and scope of the "significant changes" review currently being undertaken by your office (EPE/CSW Reply Comments at pp. 19-24), and (2) the "watchful deference"^{1/} due to the FERC's pending proceedings on the EPE/CSW merger (EPE/CSW Reply Comments at 3-5, 24-26). Primarily, however, Plains wishes to address certain inaccurate factual assertions advanced in the EPE/CSW Reply Comments (at pp. 30-36) as a purported justification for EPE's failure to implement its June 1987 settlement agreement with Plains in these dockets. Plains has so limited this response solely because the remaining matters argued in the EPE/CSW Reply Comments were fully and adequately addressed in Plains' Petition for Leave to Intervene, filed April 1, 1994.

^{1/} The phrase "watchful deference" is borrowed from City of Holyoke Gas & Electric Department v. SEC, 973 F.2d 358, 363-364 (D.C. Cir. 1992); Wisconsin's Environmental Decade v. SEC, 882 F.2d 523, 527 (D.C. Cir. 1989).

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I. SIGNIFICANT CHANGES

The EPE/CSW Reply Comments argue (at pp. 19-24) that the "significant changes" review undertaken in connection with this Application is somehow limited in scope because the Application is merely one for transfer of control. Nothing cited in the EPE/CSW Reply Comments in fact supports such a limitation. In fact, the relevant requirements of Section 184 the Atomic Energy Act,^{2/} Section 50.80(b) of the Commission's Rules and Regulations and Commission precedent all require a contrary conclusion. In particular, the EPE/CSW Reply Comments overlook the Commission's indication in Ohio Edison Company (Perry Nuclear Power Plant Unit 1), CLI-92-11, 36 NRC 47, 59 & n. 39 (1992) that applicants for post-issuance license amendment may, by the fact of their application, subject themselves to additional antitrust scrutiny. For the reasons stated in Plains' Petition for Leave to Intervene, such scrutiny should be undertaken in connection with this Application.

II. "WATCHFUL DEFERENCE"

The EPE/CSW Reply Comments also argue strenuously (at pp. 3-5, 24-26) that the Commission should follow a policy of "watchful deference" toward the FERC's pending review of the EPE/CSW merger. The Reply Comments' reliance on this policy in connection with the instant Application is misplaced for two reasons. First, while recent decisions of the FERC suggest -- contrary to the optimistic prognosis of the Reply Comments (at pp. 3-5) -- the some fairly rigorous review should await EPE/CSW's self-proclaimed "open access" transmission tariff,^{3/} the fundamental fact remains (as

^{2/} 42 U.S.C. § 2234, which provides in relevant part that "No license granted hereunder . . . shall be transferred . . . directly or indirectly . . . unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing" (emphasis added).

^{3/} See, e.g., Kansas City Power & Light Co., 67 FERC ¶ 61,183 (May 13, 1994); American Electric Power Service Corp., 67 FERC ¶ 61,168, slip op. at 9 (May 11, 1994) ("[a]n open access tariff that is not unduly discriminatory or anticompetitive should offer third

(continued...)

stated at p. 25-26 of Plain's Petition for Leave to Intervene) that this Commission is required to fulfill its distinct antitrust mandate through a hearing. Second, and more importantly from Plains' perspective, EPE's failure over the past seven years to implement its June 1987 settlement agreement with Plains raises substantial issues with respect to this Commission's licensing jurisdiction and settlement processes, which are plainly cognizable in this proceeding and as to which "watchful deference" to the FERC would serve no useful or appropriate purpose.

III. THE REPLY COMMENTS' FACTUAL CONTENTIONS

Finally, the EPE/CSW Reply Comments (at pp. 30-36) embark on an unverified factual recitation with respect to EPE's asserted justification for its failure to implement the June 1987 settlement agreement. The essence of this recitation is that an adverse decision in EPE's 1990 arbitration with Public Service Company of New Mexico ("PNM") "significantly complicated EPEC's negotiations with Plains because, contrary to the mutual expectation of Plains and EPEC when they signed the LOU, the planned construction of the AIP enhancements would not, as a practical matter, provide the transfer capability to import 1000 MW from the north into southern New Mexico" (Reply Comments at 33).

Contrary to the Reply Comments' suggestion, there was in fact no "mutual expectation of Plains and EPEC" with respect to implementation of the June 1987 settlement agreement that was in any way affected by EPE's arbitration with PNM. None is evident on the face of the settlement agreement, and none appears from a close scrutiny of the surrounding "facts" alleged in the EPE/CSW Reply Comments. Indeed, Plains believes that full evidentiary scrutiny of the sort of temporizing that EPE undertook in connection with the June 1987 settlement agreement, purportedly based on EPE's contractual obligations toward PNM as delineated by the 1990 arbitration, will likely reveal it to be of a piece with the anticompetitive conduct that the settlement agreement was

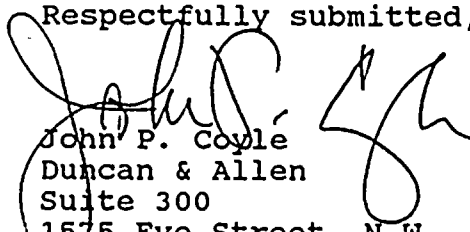
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parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's use of its own system; New England Power Pool, 67 FERC ¶ 61,042 (1994).

supposed to remedy.^{4/} Thus, contrary to the characterization advanced in the EPE/CSW Reply Comments (at p. 35 & n. 45), the matters alleged by Plains in connection with EPE's failure to implement the settlement agreement are, in Plains' view, more than a mere "contractual dispute."

That said, Plains acknowledges that negotiations with EPE have proceeded in a satisfactory and business-like manner since the filing of Plains' Petition for Leave to Intervene in this matter. To the extent that those negotiations are successfully concluded -- as Plains fondly hopes, after waiting a full seven years to date for implementation of the settlement agreement -- Plains will appropriately advise the Commission's staff. In the meantime, however, the settlement agreement has yet to be implemented and the concerns raised in Plains' Petition for Leave to Intervene remain for the Commission's consideration.

Respectfully submitted,

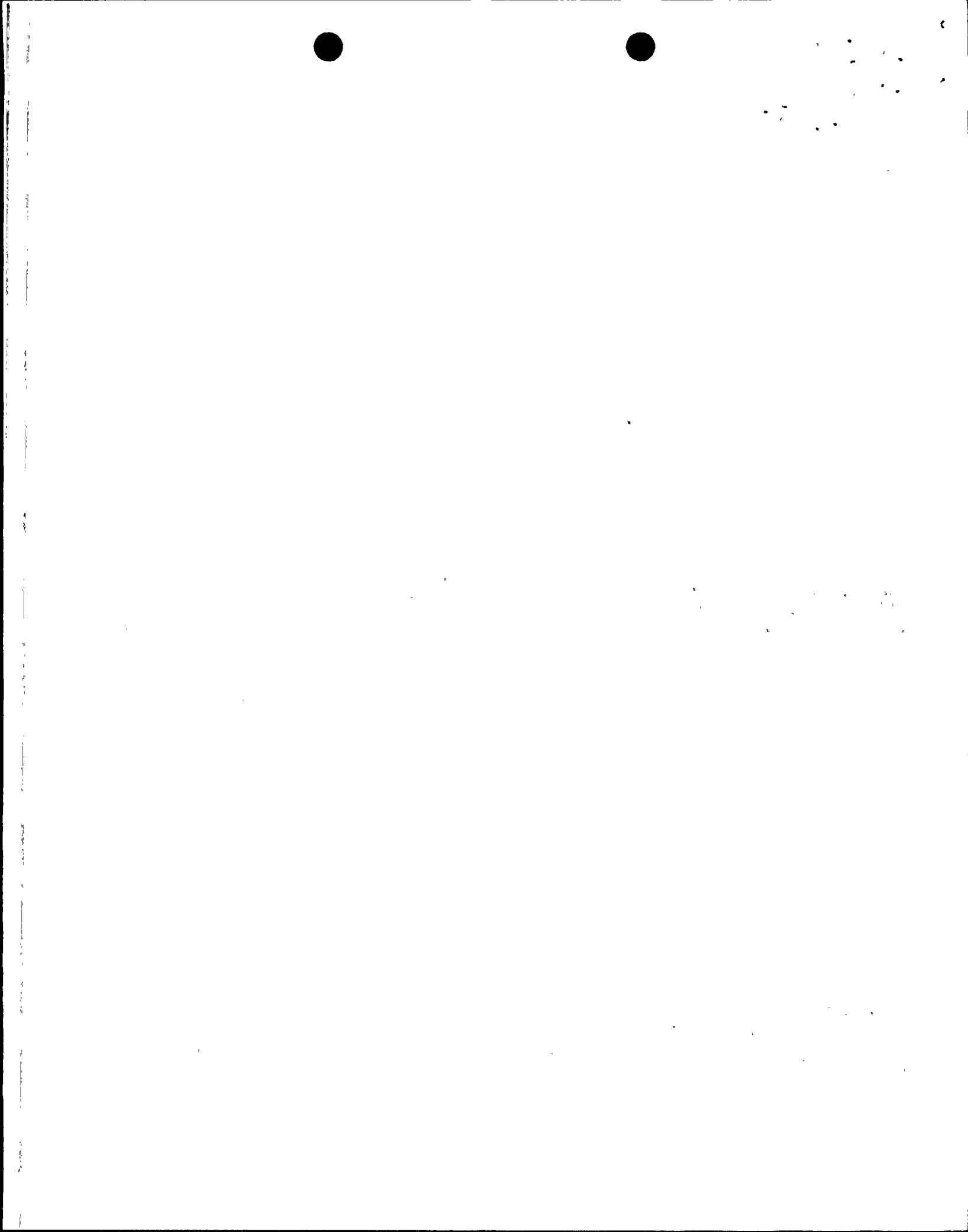


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^{4/} Cf. Otter Tail Power Co. v. United States, 410 U.S. 366, 378 (1973).



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