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 AUTH. NAME AUTHOR AFFILIATION  
 GAD, R. K. Arizona Nuclear Power Project (formerly Arizona Public Serv  
 GAD, R. K. Ropes & Gray  
 RECIP. NAME RECIPIENT AFFILIATION  
 Planning & Program Analysis Staff (post 851125)

SUBJECT: Forward's response to Plains Electric Generation &  
 Transmission Cooperative, Inc comments on anti trust info,  
 request for finding of significant change, for antitrust  
 hearing & for imposition of license conditions.

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Net Income	1,234,567	987,654	765,432	543,210
Operating Expenses	876,543	654,321	432,109	210,987
Depreciation	150,000	140,000	130,000	120,000
Provision for Doubtful Accounts	20,000	15,000	10,000	5,000
Income Taxes	100,000	80,000	60,000	40,000
Dividends	50,000	40,000	30,000	20,000

Assets and Liabilities as of December 31, 1952

Assets: Cash, Accounts Receivable, Inventory, Property, Plant, and Equipment, Intangible Assets, Total Assets

Liabilities: Accounts Payable, Notes Payable, Long-Term Debt, Other Liabilities, Total Liabilities

Notes on Financial Statements: Description of accounting policies, changes in accounting principles, and other relevant information.

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March 27, 1987

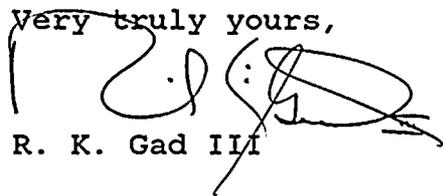
Mr. Jesse L. Funches, Director  
Planning and Program Analysis Staff  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Re: Arizona Public Service Company et al.  
Palo Verde Nuclear Generating Station, Unit 3  
Docket No. 50-530A

Dear Sir:

With reference to our earlier letter to you dated February 6, 1987, and to the "Reply" submitted by Plains to our responses transmitted thereby, we transmit herewith "Reply of El Paso Electric Company to 'Reply of Plains Electric Generation and Transmission Cooperative, Inc., to Response of El Paso Electric Company to Comments of Plains Electric Generation and Transmission Cooperative, Inc., on Antitrust Information Request for Finding of Significant Change, Request for Antitrust Hearing and Request for Imposition of License Conditions'."

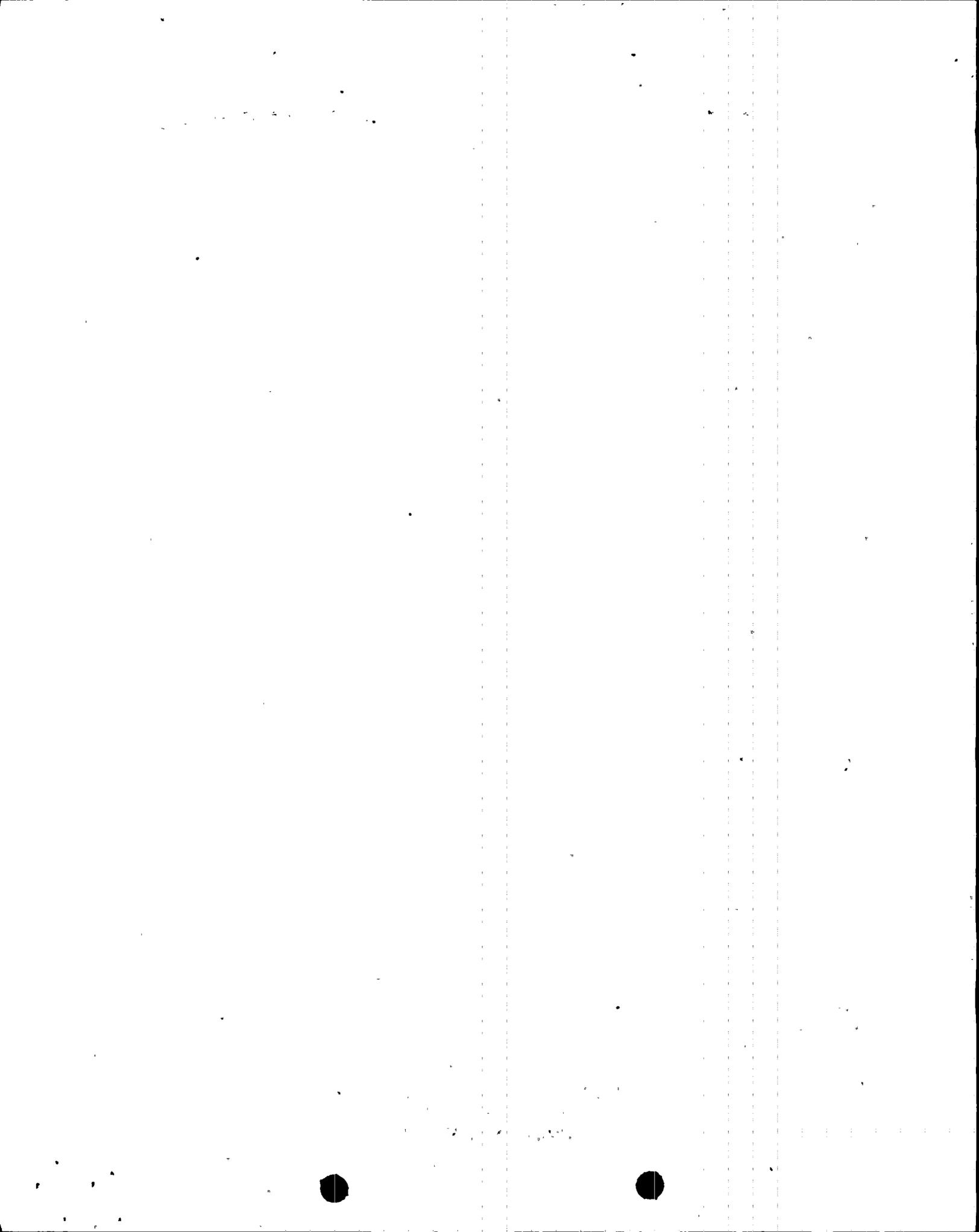
Very truly yours,

  
R. K. Gad III

RKG/ajp  
Enclosure

cc: Service List  
Secretary of the Commission  
Arthur C. Gehr, Esquire

2999  
/1



REPLY OF EL PASO ELECTRIC COMPANY  
TO  
"REPLY OF PLAINS ELECTRIC GENERATION AND  
TRANSMISSION COOPERATIVE, INC., TO RESPONSE  
OF EL PASO ELECTRIC COMPANY TO COMMENTS OF  
PLAINS ELECTRIC GENERATION AND TRANSMISSION  
COOPERATIVE, INC., ON ANTITRUST INFORMATION,  
REQUEST FOR FINDING OF SIGNIFICANT CHANGE,  
REQUEST FOR ANTITRUST HEARING AND REQUEST  
FOR IMPOSITION OF LICENSE CONDITIONS"

R. K. Gad III  
Randall W. Bodner  
Ropes & Gray  
225 Franklin Street  
Boston, Massachusetts 02110

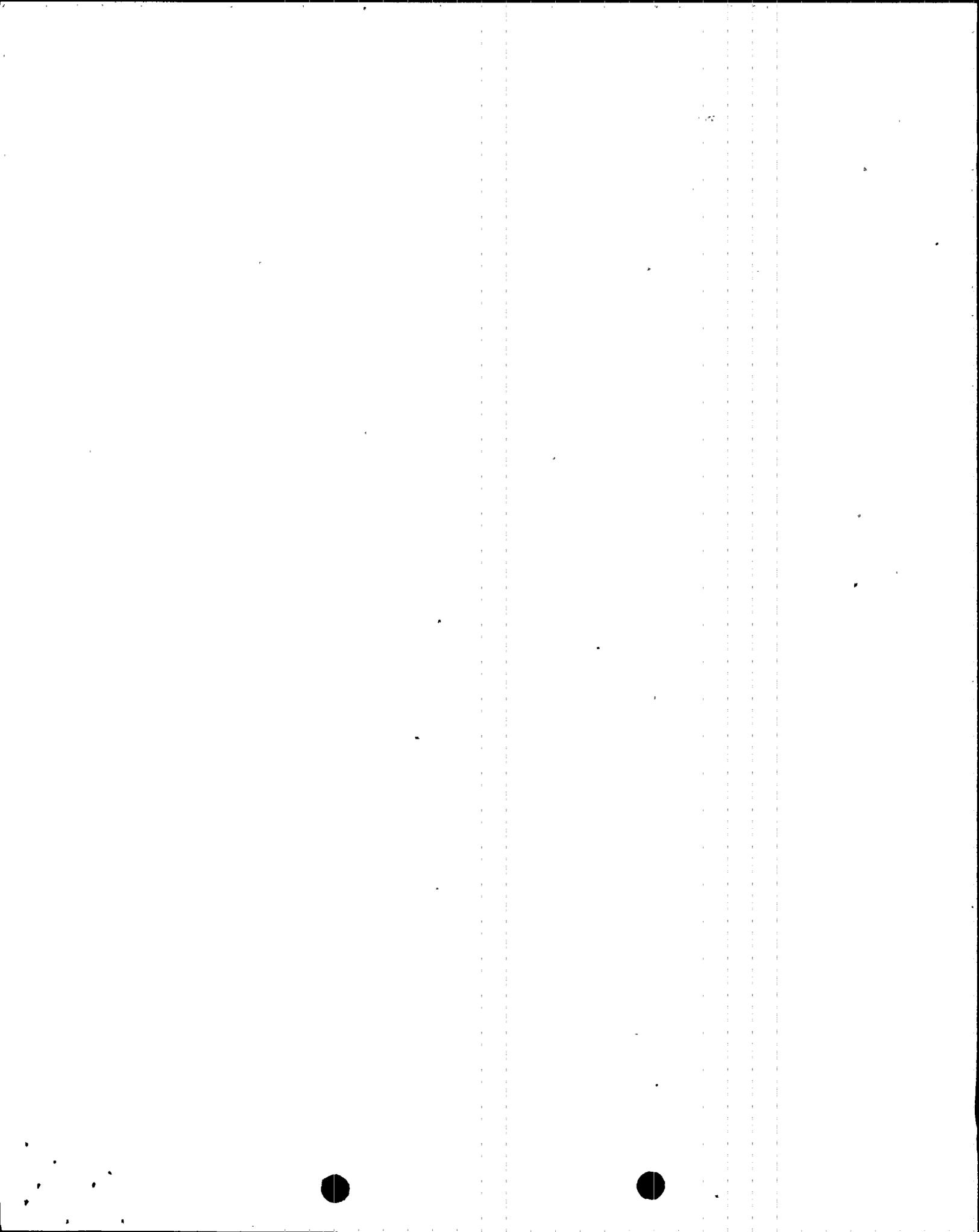
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El Paso Electric Company  
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*Attorneys for El Paso  
Electric Company*

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I.

A. In its *Reply*<sup>1</sup> Plains makes a number of necessary but crucial admissions. Plains admits the imperative that the New Mexico Power Pool transmission system be operated in a manner capable of withstanding the loss of the most critical transmission facility. *Reply* at 4. Plains admits that, given this imperative, the north-south transmission system cannot safely be operated above a level of 500-550 MW. *Reply* at 5. Plains admits that imports are presently at or near the 500-550 MW limit, such that no additional imports are presently possible. *Reply* at 5.

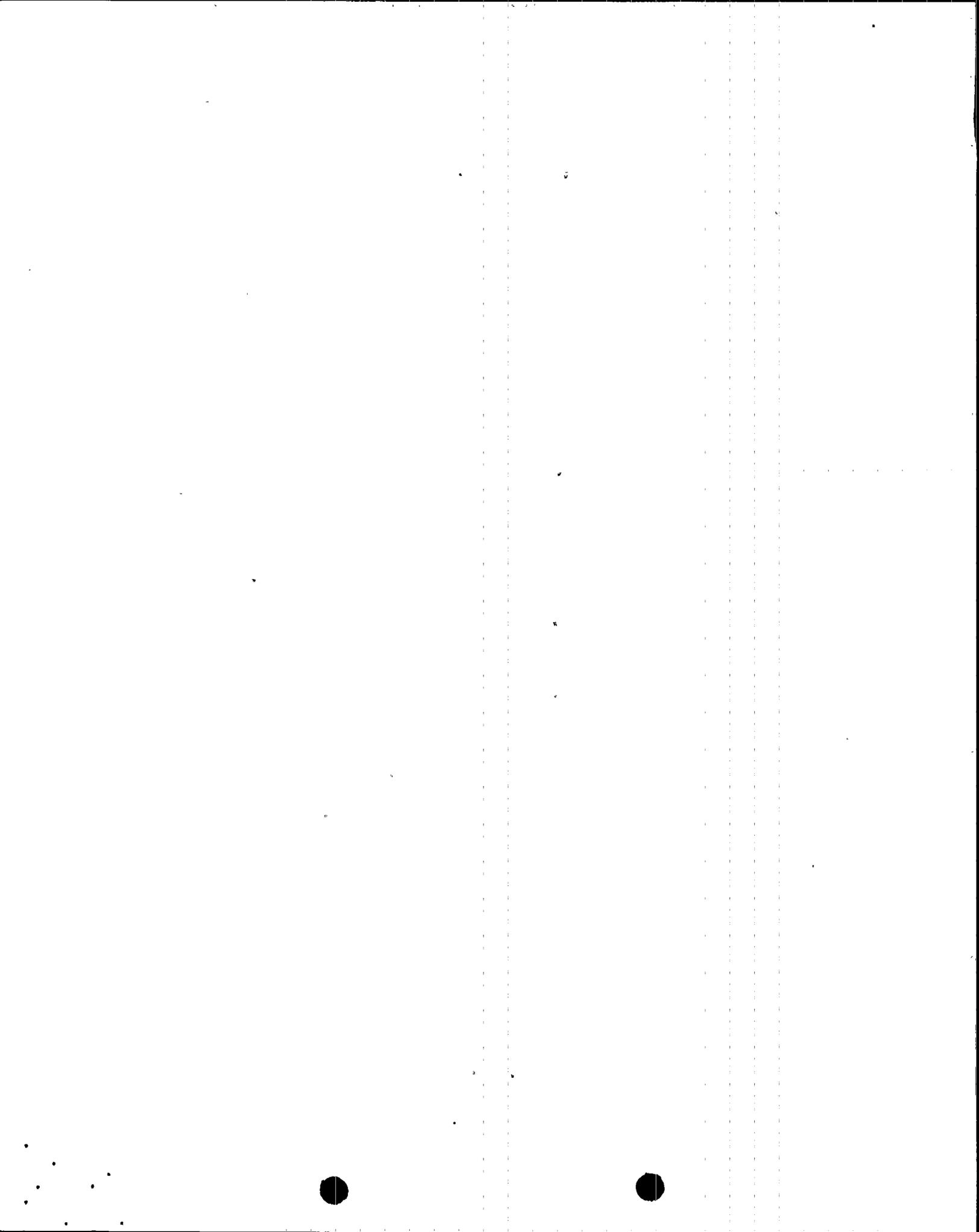
These necessary admissions are fatal to any claim -- within or without the ambit of the Commission's antitrust jurisdiction -- premised upon the "essential facilities" or "bottleneck boycott" theory, as the entirety of Plains' *Comments* is. The essential premise of this theory of liability is that the putative defendant has denied access to an *excess* facility: a facility or a capacity not needed by the putative defendant for its own business.<sup>2</sup> Given

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<sup>1</sup>*Reply of Plains Electric Generation and Transmission Cooperative, Inc., to Response of El Paso Electric Company to Comments of Plains Electric Generation and Transmission Cooperative, Inc., on Antitrust Information, Request for Finding of Significant Change, Request for Antitrust Hearing and Request for Imposition of License Conditions,* dated March 17, 1987. This document is hereinafter referred to simply as "*Reply*." "*Comments*" is used to refer to Plains' original Comments filed on November 28, 1986 and "*Response*" is used to refer to El Paso's Response filed on February 6, 1987.

<sup>2</sup>*Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 993 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Gamco, Inc. v. Providence Fruit and Produce Building, Inc.*, 194 F.2d 484, 487-88 & n.3 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952). See also *Seesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

One notes that Plains' *Reply* is singularly devoid of citation to authority on the substantive provisions of the antitrust laws upon which its *Comments* are premised. No cases are cited, and the only reference to agency precedent involves the scope of remedies once a violation has occurred. *Reply* at 11-13. Even that discussion is flawed, however, for Plains has overlooked the nexus distinction between the scope of a remedy



Plains' admission that its thrust with respect to north-south importation is to oust El Paso from El Paso's own use of its own line -- so that Plains may use that capacity for itself -- its antitrust claims are fatally flawed and cannot warrant a determination of "significant changes."

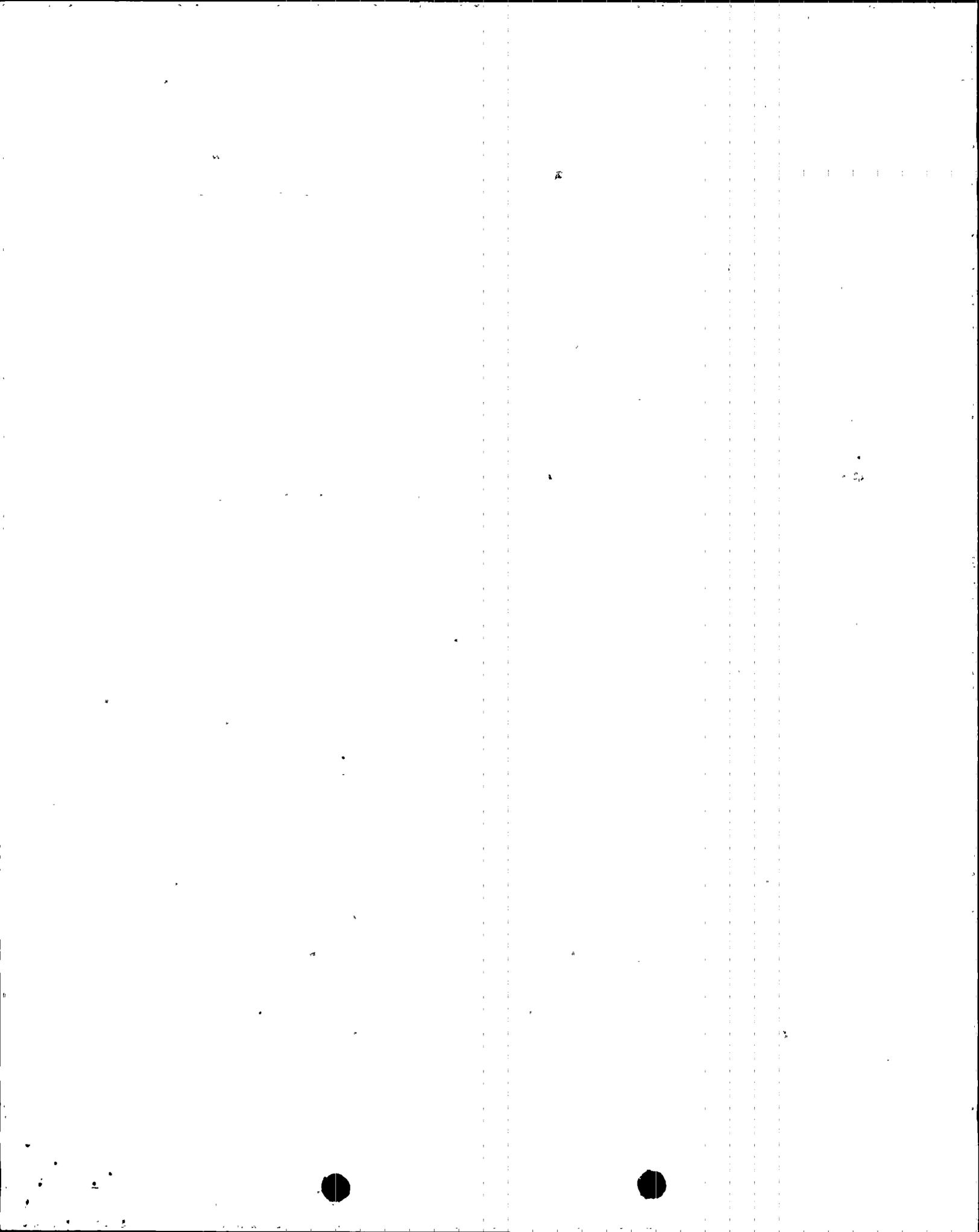
B. Bereft of a cognizable antitrust claim, Plains continues to rely upon an asserted contractual right to oust El Paso from El Paso's use of its own line. *Reply* at 14-16. As before, Plains continues to rely upon an interpretation of Contract 1605 grounded in selective ellipsis and a curious unilateral interpretation of a manifestly bilateral disclaimer clause. *Id.* at 15. *Compare Response* at 23-27. Wholly unaddressed by Plains, however, is how an asserted contractual right supplies the foundation for an antitrust claim, particularly in a forum with distinctly limited antitrust jurisdiction. *See, e.g., Florida Power & Light Co.* (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22 (1982). Nor, we respectfully submit, is it a matter of oversight that this essential point has been left unaddressed.

C. Though Plains devotes the lion's share of its *Reply* to its asserted rights of power importation over its north-south transmission line, it has become difficult to tell from the *Reply* precisely what Plains continues to contend with respect to its line. At pages 6-7 Plains' observes:

"[t]he [550] MW limitation on imports to southern New Mexico does not, in itself, cause any 'reliability curtailments' in north-south transmission. Reliability curtailments occur only if utilities

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given a liability finding and the nexus between assertedly violative conduct and the activities for which a license is sought. *Compare Florida Power & Light Co.* (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22 (1982) (no nexus thus no remedies as to transmission system), *with Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, 13 NRC 1027, 1108-09 (1981) (nexus established between access to nuclear facility and access to associated transmission facilities; remedies as to latter permissible under the circumstances), *aff'd on other grounds sub nom. Alabama Power Co. v. NRC*, 692 F.2d 1362 (11th Cir., 1982), *cert. denied*, 104 S. Ct. 72 (1983).



attempt to transmit more than [550] MW. In that event, Public Service Company of New Mexico ("PNM"), as control agent for the NMPP, will undertake corrective action. But this inability to transmit more than [550] MW of power does not affect Plains' base right to its 60 MW share--or any other utility's share--of the [550] MW available on the system. Those rights will be affected by curtailments undertaken by PNM."

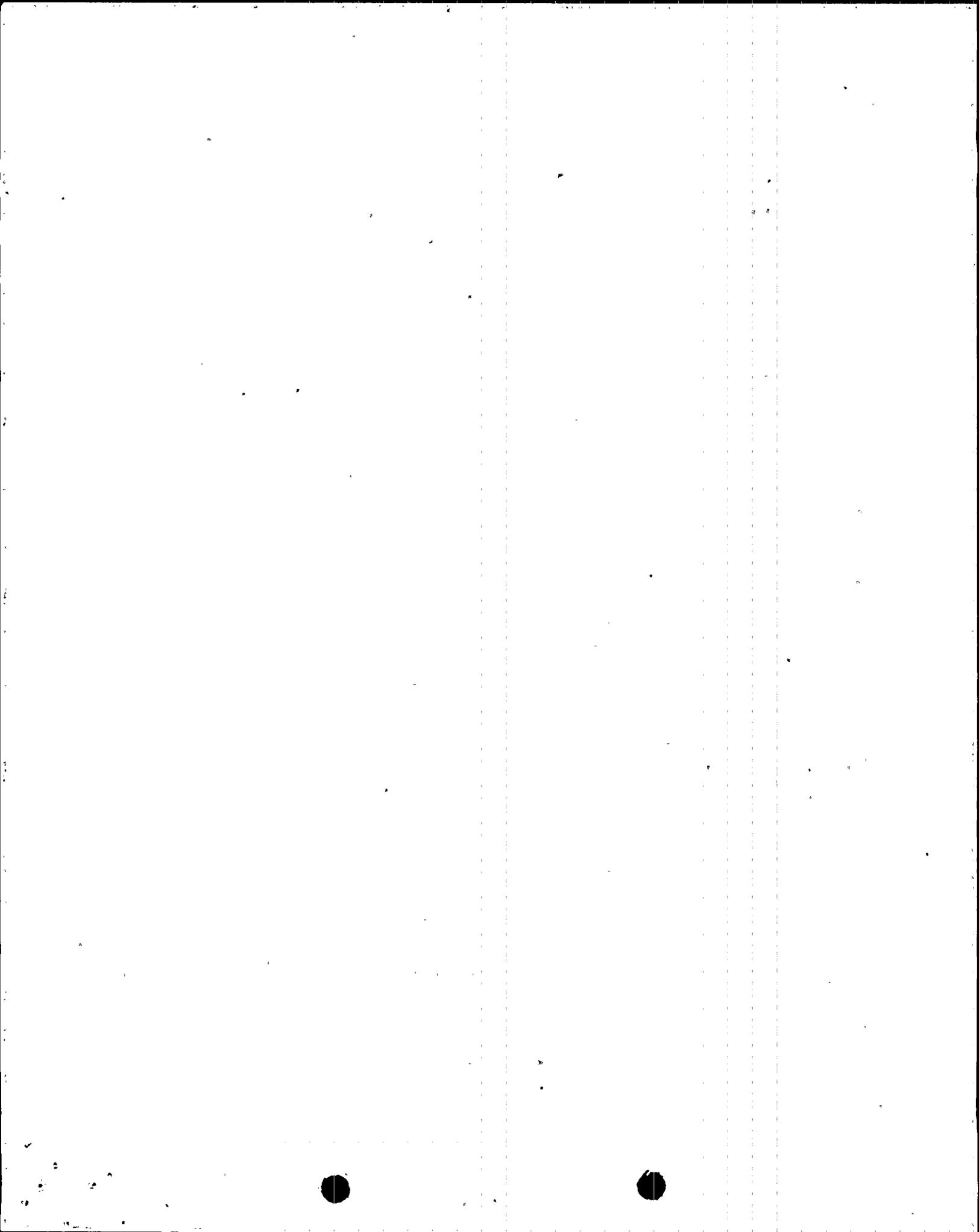
If Plains is now admitting an obligation to share in import curtailments when reliable system capacity has been reached, it has conceded all that El Paso contends is its obligation. If, on the other hand, Plains contends that it alone among the utilities on the system is relieved of any obligation to share in curtailments, then the inequity of its position has been made more stark by its own description of the governing constraints. The assertion that "[the] inability [of the system] to transmit more than [550] MW does not affect Plains' base right to its 60 MW share . . . of the [550] MW available on the system" is by itself a *non sequitur*.<sup>3</sup> Nor is interpretation aided by Plains' curious failure to annex a copy of the February 27th "contracts" with PNM to which it refers on page 7.<sup>4</sup>

## II.

Plains asserts that the recent emergence of the competing claims of the

<sup>3</sup>The very nature of the unchallenged N-Minus-1 reliability criterion prevents participating utilities from utilizing the full physical capacities of their respective transmission lines. Otherwise the transmission system would not be able to accommodate the loss of the most crucial facility. As Plains itself admits (*Reply* at 2, 5 & 10), north-south transmissions in New Mexico are at or near the maximum reliability limit. Consequently, no additional imports are currently possible even though the gross physical capacity of the transmission system into southern New Mexico could accommodate more power. Accordingly, El Paso and the other utilities (besides Plains?) recognize the need to utilize their lines at less than full physical capacity in order to sustain the admittedly crucial N-Minus-1 reliability.

<sup>4</sup>These "contracts," upon which Plains relies to neutralize the appearance of "shirking its responsibilities or otherwise getting a free ride," were apparently made three weeks after the filing of the *Response to Plains' Comments*.

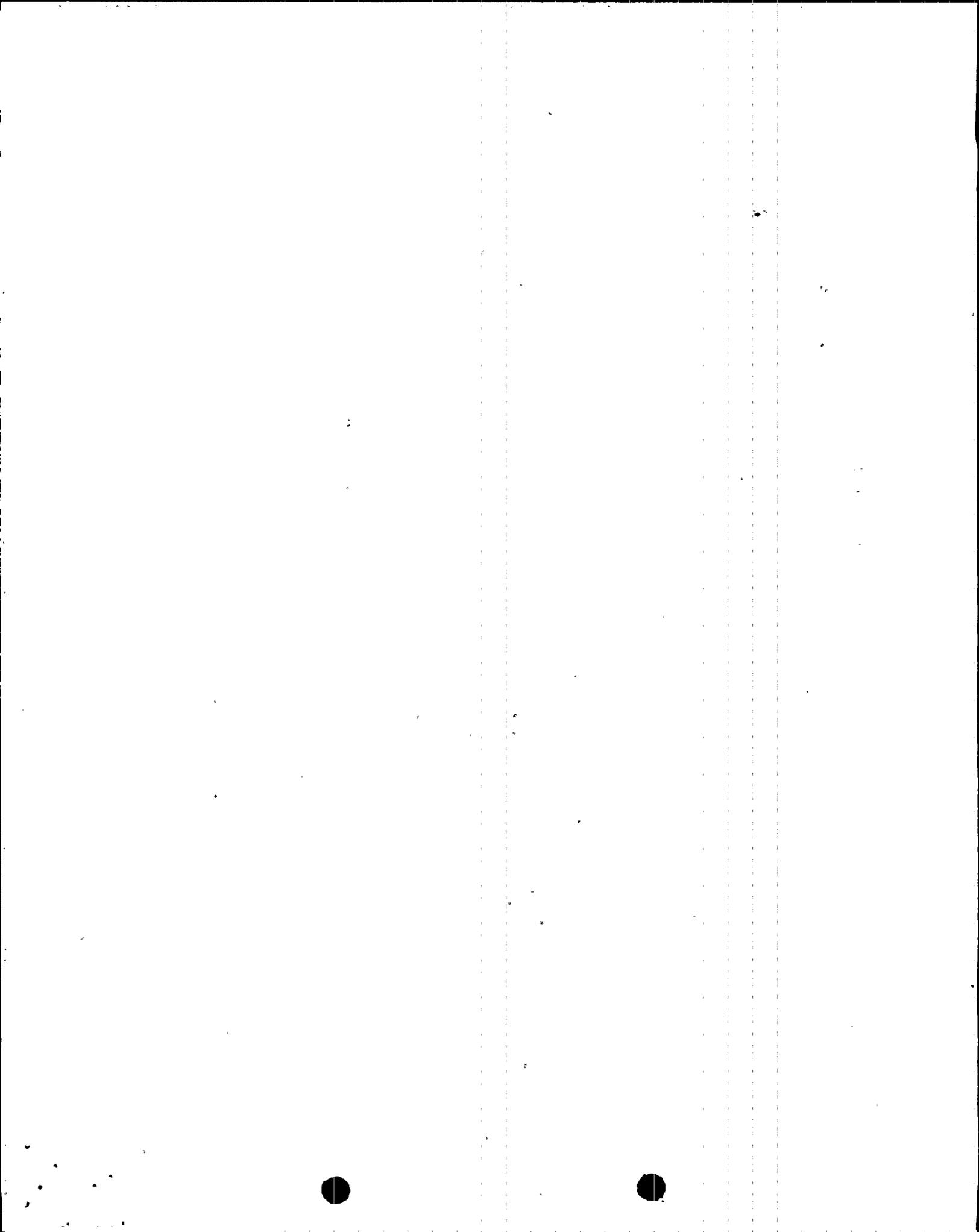


parties to use of the parallel lines demonstrates the existence of a "change." *Reply* at 8-9. This is so, it is argued, because the system import limitations have existed for some time, yet only recently has El Paso insisted that Plains stay in its own corner. What Plains has left out of the equation is that only recently have imports grown to the point where the limitation is controlling. What has been demonstrated is not a "recent change" but only that, for as long as tolerating Plains' use of El Paso's line did not result in precluding El Paso from capacity on its own line needed by it for its own purposes, El Paso was willing to tolerate such use. This establishes rather conclusively that El Paso's present motives are not based upon exclusion of a competitor but rather only on the need to employ its own capacity for itself. *Compare Reply* at 1-2.

### III.

The most telling aspect of Plains' treatment of the requirement of nexus between the putative antitrust situation and the activities to be licensed is what Plains does not say. Plains makes no attempt to address or distinguish *Florida Power & Light Co.* (St. Lucie Plant, Unit No.2), ALAB-665, 15 NRC 22 (1982), a case which is directly on point and upon which El Paso relies heavily in its *Response*. ALAB-665 is neither addressed nor mentioned because the decision is simply not distinguishable from this case. See El Paso's *Response* at 3-4 and 16-22.

Furthermore, the only case cited by Plains, *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559 (1975), is quoted out of context and does not support Plains' contention of nexus. In fact, as El Paso noted in its *Response*, ALAB-279 and a subsequent and related decision, *Kansas Gas & Electric Co.* (Wolf Creek Generating Station,



Unit No. 1), ALAB-299, 2 NRC 740 (1975), far from supporting Plains, actually reveal by their analysis the lack of nexus in the instant case. See *Response* at 19-21.<sup>5</sup>

#### IV.

Insofar as its claims are based upon access to any excess capacity that may be available in the proposed Springerville-Luna 345 kV transmission line

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<sup>5</sup>Plains' own description of the situation of which it complains confirms the patent absence of the required nexus. As Plains concedes:

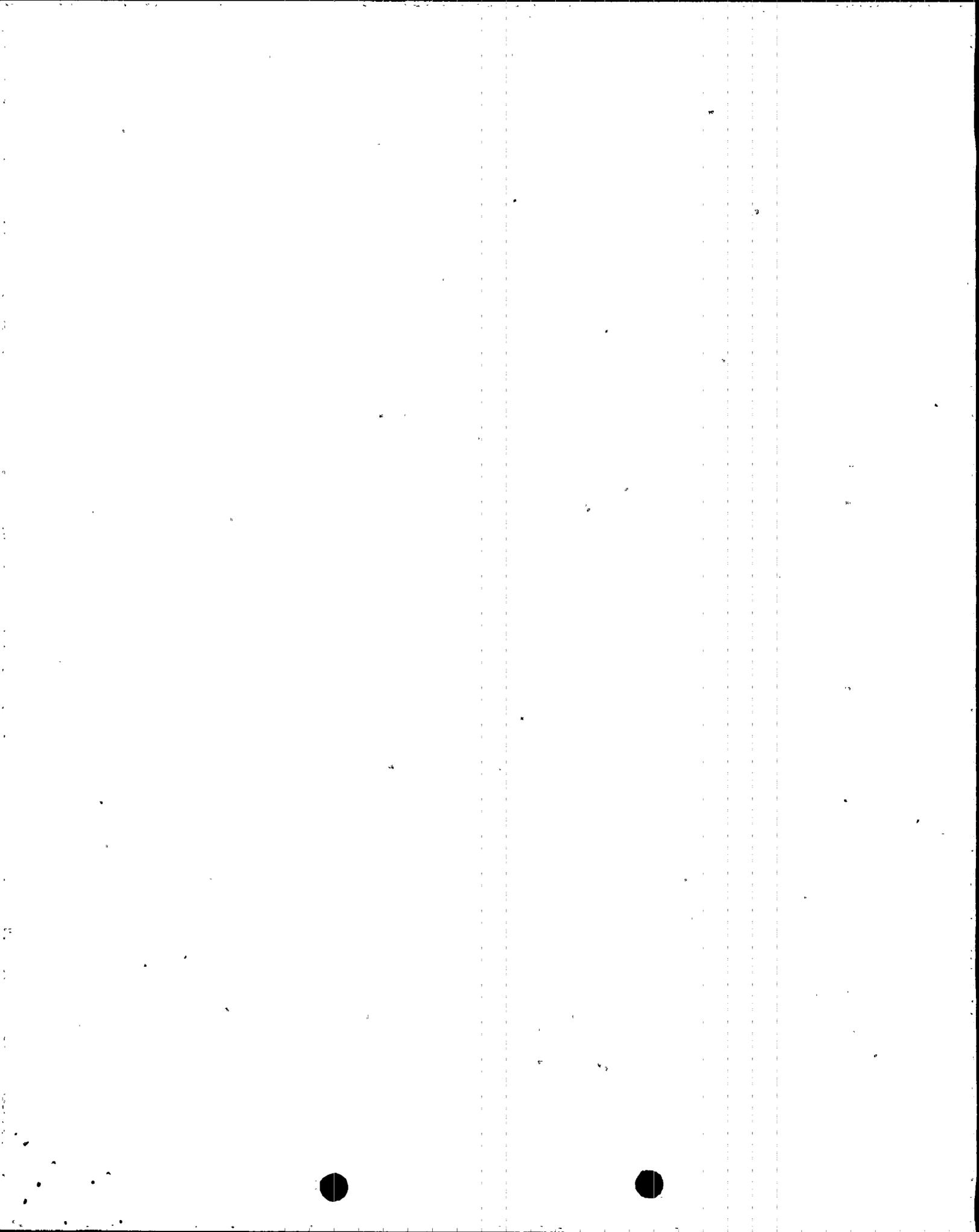
"the underlying dispute between El Paso and Plains is caused by a transmission shortage from northern to southern New Mexico. Simply put, utilities wish to transport more than [550] MW to southern New Mexico, but are prevented from doing so by the [N-Minus-1] operating limitations on the system."

*Reply* at 10. This underlying dispute does not involve access to PVNGS-3, as the cases require, but rather involves (1) access to El Paso's already fully utilized transmission system, (2) an equitable distribution of limited system-wide transmission capacity, and (3) the proper interpretation of Contract 1605. Whatever forum ultimately decides these issues, it is clear that they do not belong before the NRC.

Furthermore, the very argument that Plains uses to attempt to establish nexus reveals an unavoidable and terminal inconsistency in its overall case. The argument Plains makes to establish nexus directly contradicts the argument it must make later in the antitrust context.

In arguing for nexus, Plains asserts that bringing PVNGS-3 on line would further tax what Plains concedes is an already overtaxed transmission system, which is currently operating at the maximum reliability limit. See *Reply* at 10. Even assuming that such an indirect connection meets the nexus requirement (and ALAB-665 is to the contrary), Plains' assertion forecloses any case on the merits, for Plains is not able to claim without contradicting itself that there is transmission capacity in excess of El Paso's own legitimate needs (to which excess Plains might assert a right of access). As noted above (with authorities), it is fundamental to the antitrust doctrine of "essential facilities," upon which doctrine Plains bases its case, that the owner of the alleged essential facility is *not* required to curtail his own use in order to make the facility available to others.

This tension is dispositive -- Plains must fail either on the nexus issue or on the antitrust merits. Consistency precludes Plains from prevailing on both.



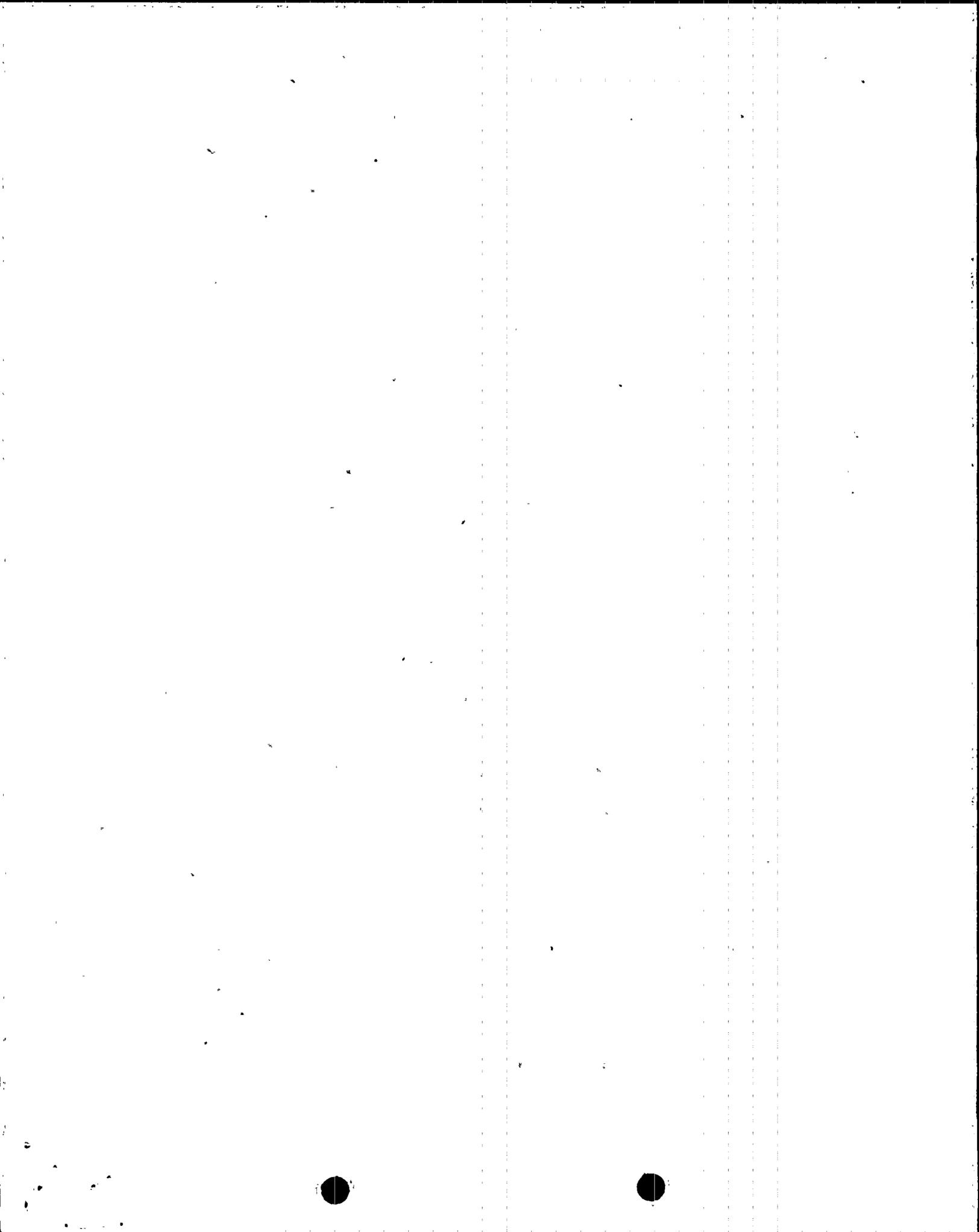
under construction<sup>6</sup> by El Paso, Plains relies upon something of a shell game. The additional line will have two different effects once it becomes available. *First*, it will provide added importation capacity in and of itself. *Second*, with the addition of the line on the system, the aggregate system importation limits consistent with reliability constraints will be increased, thus freeing up capacity presently existing but not usable on existing lines. The assertion of inconsistency between El Paso's uncertainty about the prospective existence of excess capacity on *Springerville-Luna* and the prospective enhancement of *system capacity* available to ease Plains' present limitations over its own north-south line is fallacious.

To meet its burden of a substantial demonstration of even a *prima facie* antitrust case in respect of *Springerville-Luna*, Plains must demonstrate that there is capacity in the line, that the capacity is not needed for El Paso's own use, and that El Paso has denied access to this excess capacity. Plains has not and cannot carry this burden. In the first instance, *Springerville-Luna* is not presently in existence and therefore it provides capacity to no one.<sup>7</sup> Second, Plains has not even attempted to demonstrate that there is (or will be) excess capacity in *Springerville-Luna*.<sup>8</sup> Third, Plains has not

<sup>6</sup>The line is not under physical construction at this time; as was pointed out in El Paso's *Response*, the line is subject to regulatory approvals. Plains has the capacity to aide in the obtaining of those regulatory approvals but to date has made no effort to do so.

<sup>7</sup>Note that any assertion by Plains to the effect that El Paso is presently obligated to provide or to commit to provide Plains with capacity in the future line is tantamount to the assertion of a duty on El Paso's part to build the line at all. This assertion, mercifully allowed to remain only implicit, bears no rational connection to the antitrust doctrines upon which Plains professes reliance.

<sup>8</sup>Excess means, at the minimum, over and above the capacity needed to permit importation of El Paso's owned, remote generation (PVNGS-1 and -2 and Four Corners 1 and 2, plus, when on line, PVNGS-3). In addition,



even attempted to demonstrate a refusal of access to excess capacity.<sup>9</sup>

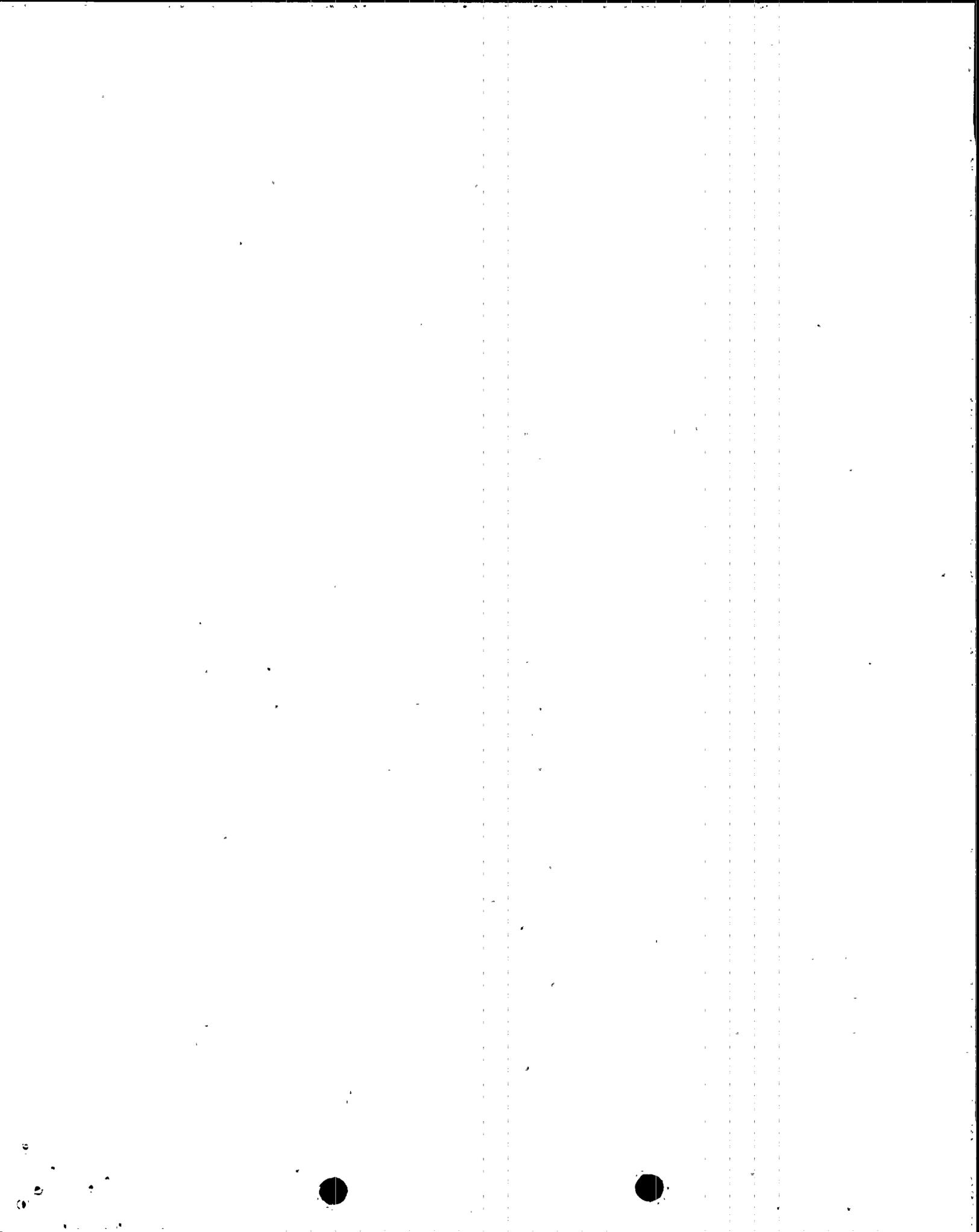
Invocation of any NRC antitrust jurisdiction at this stage of the PVNGS-3 facility is dependent upon Plains carrying a substantial burden. The burden has not been carried and the jurisdiction may not be invoked.

V.

To El Paso's letter to Public Service Company of New Mexico of January 28, 1987, Plains attaches the colorful sobriquet of "late blooming." The letter in question, of course, was merely the most recent manifestation of the historical willingness of El Paso to engage in coordinated planning with other electric utilities that the Staff has previously recognized. Arizona Public Service Co. et al., 48 Fed. Reg. 6,060 (1983). Plains' rhetoric

because of the availability of "economy interchange" energy the importation of which saves the El Paso ratepayers substantial amounts of money, excess must also mean over and above the capacity that could be utilized (taking into account the availability of "economy interchange" energy and the amount of load on the El Paso system) to capture these economies for the benefit of the El Paso ratepayers.

<sup>9</sup>Plains' vague references to "statements made by El Paso management personnel," *Reply* at 2, are inadequate. In the first place, such vague allegations, wholly unsupported, fail to carry the burden imposed upon one seeking a determination of "significant changes;" this is particularly so given the Staff's prior findings regarding the exemplary record of El Paso Electric Company concerning cooperation with other utilities. *Arizona Public Service Co. et al.*, 48 Fed. Reg. 6,060 (1983) ("El Paso [has] continued to offer and provide to small utilities wholesale power service, wheeling service and various other coordinated services on a scale comparable to, and perhaps even larger than, that undertaken prior to the construction permit stage."). Second, Plains' apparent doubts about the reliability of representations made by El Paso through counsel seem to overlook Commission precedent on the obligations of counsel appearing before the Commission and its boards, of which, we assure the Staff, we remain cognizant. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 533 (1973). Third, even as described by Plains, the asserted "statements" go only to predictions about the availability of excess capacity on Springerville-Luna, not to whether El Paso would make excess capacity (if any) available to other utilities. El Paso has never taken the position that it would hoard available capacity in order to deny it to other utilities, competitors or not.



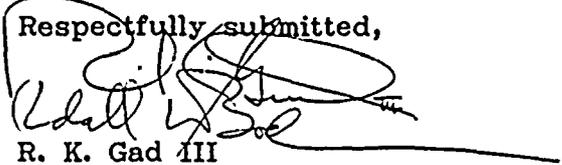
displays more flair than substance.

"Late blooming" or not, however, the overture by El Paso seems to be bearing flower, as is demonstrated by the attached letters from PNM dated February 19, 1987, and from Plains dated February 17, 1987. Putting aside *Plains'* own rather unflattering desire to cut other utilities out of the process, the planning process has been demonstrated to be functioning no less well than the Staff previously determined it to function.

Conclusion

For the foregoing reasons together with those set forth in the El Paso *Response*, the Staff should determine that no significant changes in El Paso's activities or proposed activities have occurred and that no operating license antitrust review is advisable.

Respectfully submitted,

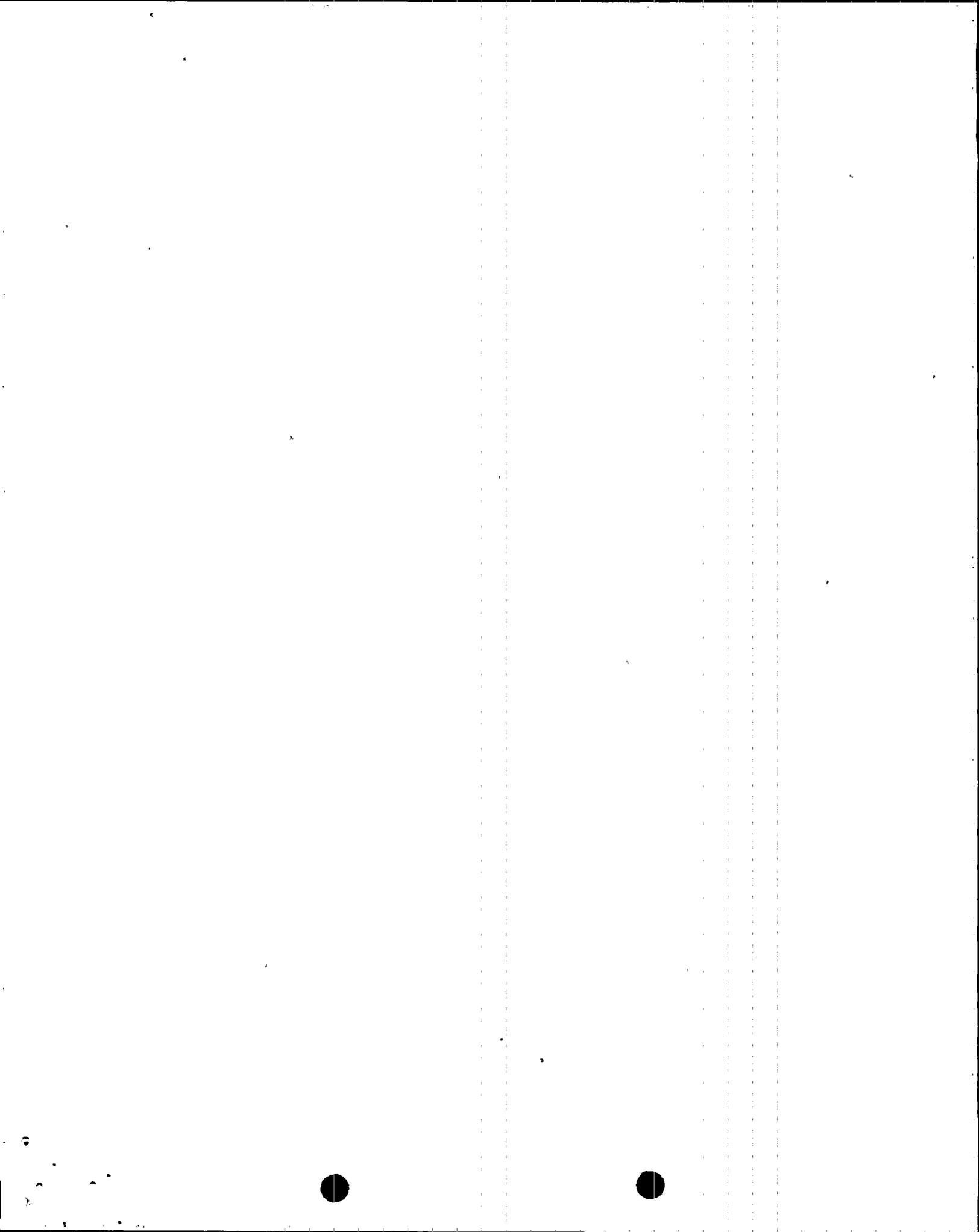
  
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El Paso, Texas 79901

*Attorneys for El Paso  
Electric Company*



Certificate of Service

I, Robert K. Gad III, being one of the attorneys for El Paso Electric Company, do hereby certify that on this 27th day of March, 1987, I served the within "Reply of El Paso Electric Company to 'Reply of Plains Electric Generation and Transmission Cooperative, Inc., To Response of El Paso Electric Company to Comments of Plains Electric Generation and Transmission Cooperative, Inc., On Antitrust Information, Request for Finding of Significant Change, Request for Antitrust Hearing and Request for Imposition of License Conditions'" by mailing copies thereof, first class mail, postage prepaid, as follows:

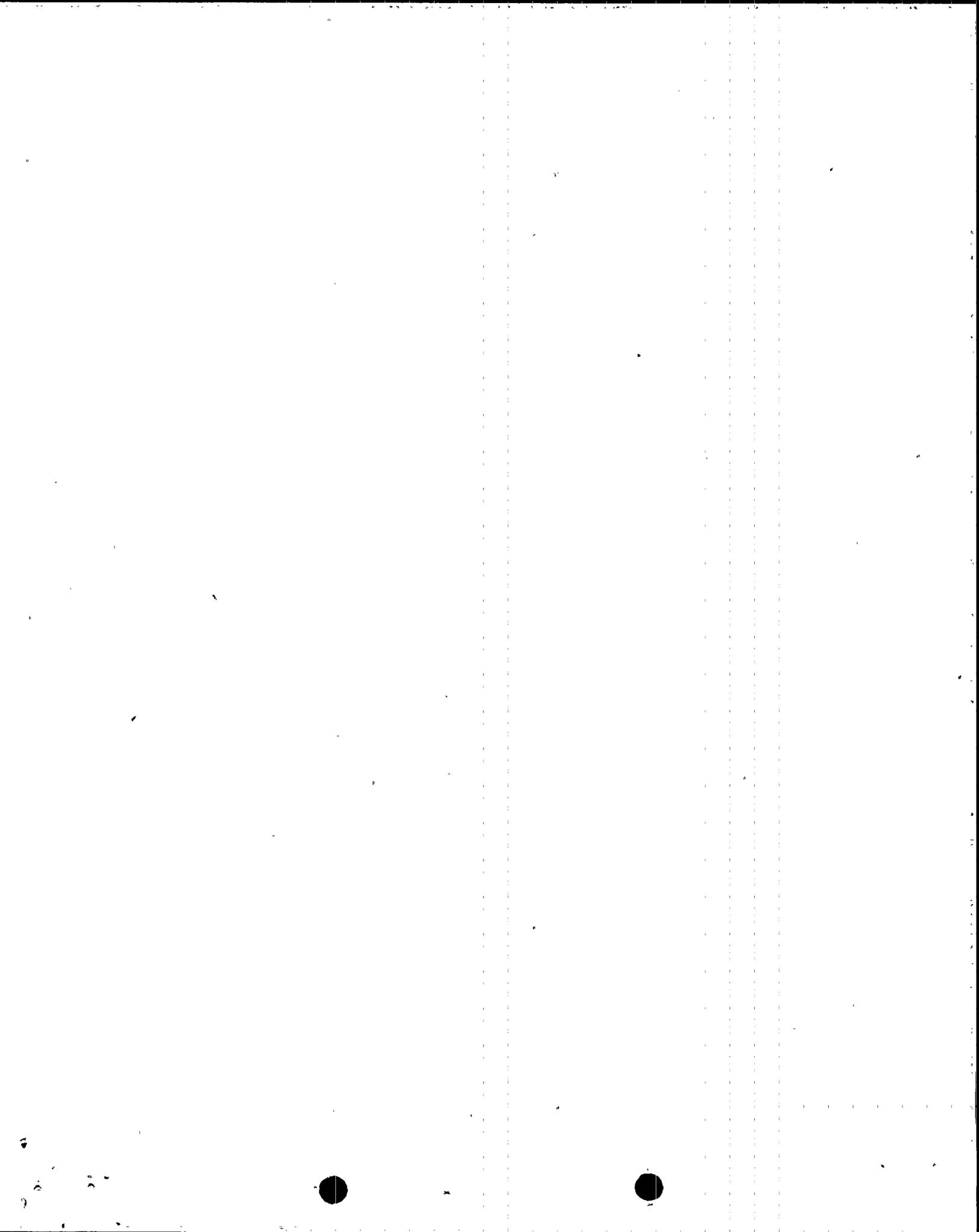
Frederick L. Miller, Jr., Esquire  
Duncan, Weinberg & Miller, P.C.  
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Washington, D.C. 20036

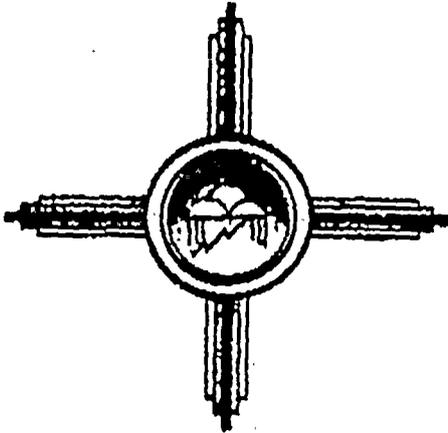
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Janet R. Urban, Esquire  
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555 4th Street, N.W.  
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Washington, D.C. 20001



R. K. Gad III





**PLAINS ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC.**

Albuquerque Headquarters  
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Albuquerque, New Mexico 87197  
Phone (505) 884-1881

Escalante Generating Station  
P.O. Box 577  
Prewitt, New Mexico 87045  
Phone (505) 876-2271

February 17, 1987



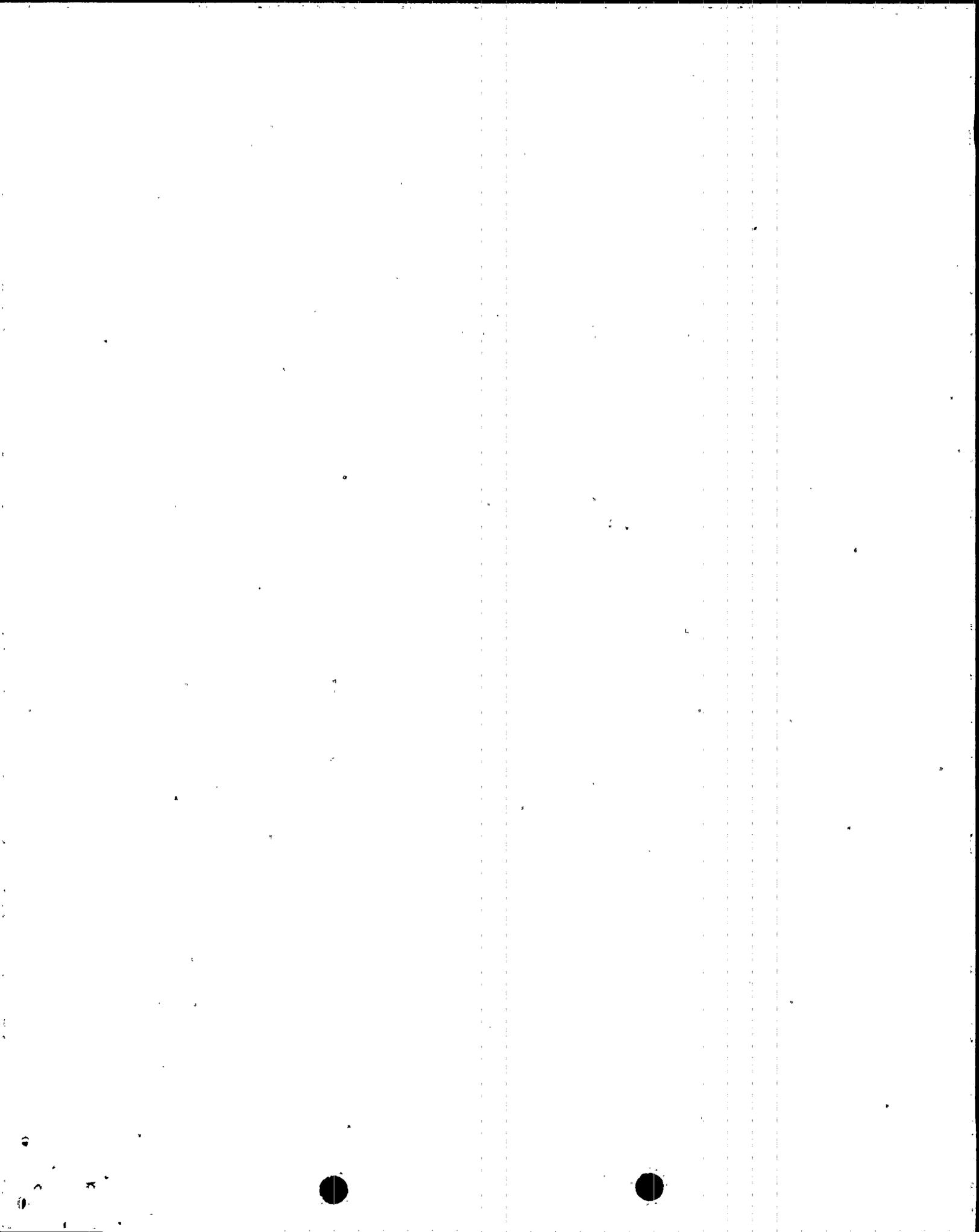
Mr. Allan B. Davis, Chairman  
Planning Engineering Committee  
New Mexico Power Pool  
Texas-New Mexico Power Company  
4188 International Plaza  
Fort Worth, Texas 76189

Dear Allan:

We are in receipt of the copy of EPE's, J.P. Maloney's letter to you of 1/28/87. We are encouraged to see that EPE is suggesting that the AIP project be studied by all of the New Mexico Utilities which will be affected by this currently proposed project, and EPE's suggestion that this study encompass all other major 345 KV projects in New Mexico, i.e., OLE. This approach is consistent with the proposal that Plains made to EPE in August of 1986.

While we feel that a joint study by the New Mexico Power Pool (NMPP) is appropriate, we question the need to include others outside the NMPP. It is our suggestion that the NMPP do the work in order to determine what is best for those of us operating in New Mexico. Completing this, it would then be possible for those organizations obtain benefits from the new facilities to share in the cost of said facilities. This is consistent with the philosophy that we have stated which is to ensure that what is being built is absolutely necessary and obtains the maximum amount of benefit for all parties affected. With this shared benefit and cost responsibilities, those organizations obtaining benefits from the project and who have shared in the cost could then make whatever other contractual arrangements with other NMPP members or non-members which may be appropriate using the rights that they have obtained.

We are concerned that the more participants we have in this study, the longer the study will take to resolve all the critical issues. This is obvious when one realizes that each of us has different criteria, different standards and different load demographics which must be considered. Since it is clearly recognized by all the NMPP members that the import capability of New Mexico and, in particular, southern New Mexico, are currently operating near their



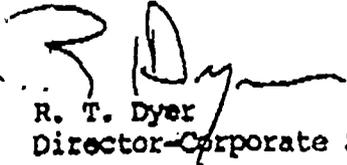
Mr. Allan B. Davis  
February 17, 1987  
Page 2

limits, it is important that we concentrate as quickly as possible on the resolution of New Mexico problems. Therefore, we should take whatever action is needed to expeditiously solve our problems and we feel that the addition of non-NMPP members will not contribute to the resolution of New Mexico problems as they will not have the same needs and time constraints as NMPP members. However, it is important to consider the effects on our neighboring systems. Therefore, we would suggest that input be solicited from any systems that are not members of NMPP who have interest during the course of the study and allow them to comment on the draft report. We feel the study should be developed by NMPP members.

Plains has been in the past, and will continue to be, ready to study the need for system improvements and when a need is identified, we are ready to invest in those projects as long as we receive equitable rights in the project or its surrounding system commensurate with that investment. This is a position that we have stated on a number of occasions to the various utilities that we work with.

Therefore, we welcome a meeting which has been recommended by Mr. Maloney to be scheduled sometime in February in El Paso. We do feel that prior to this meeting some resolution should be made with respect to the invitation to non-NMPP members for participation in this study. If you need any additional information or wish to discuss this matter in more detail, please do not hesitate to call.

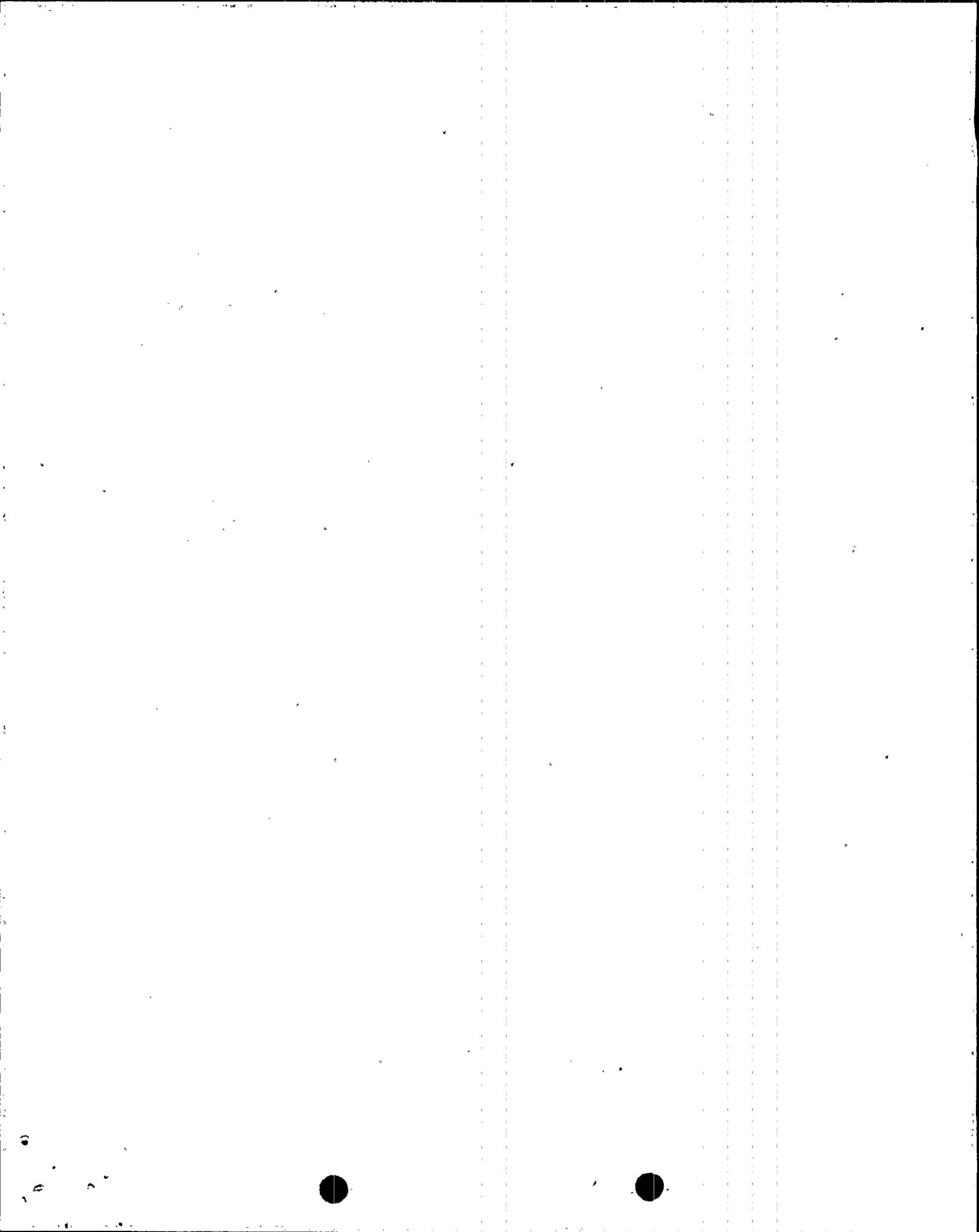
Sincerely,

  
R. T. Dyer  
Director - Corporate Services

RTD:Hav:326

cc: NMPP Executive Committee  
NMPP Planning Committee

cc: Dannie Malone - 3-3-87 - UPS



PNM

PUBLIC SERVICE COMPANY OF NEW MEXICO

ALVARADO SQUARE ALBUQUERQUE, NEW MEXICO 87158 \_ \_ \_

February 19, 1987

Mr. Jim Maloney  
Vice President  
El Paso Electric Company  
Post Office Box 982  
El Paso, TX 79960

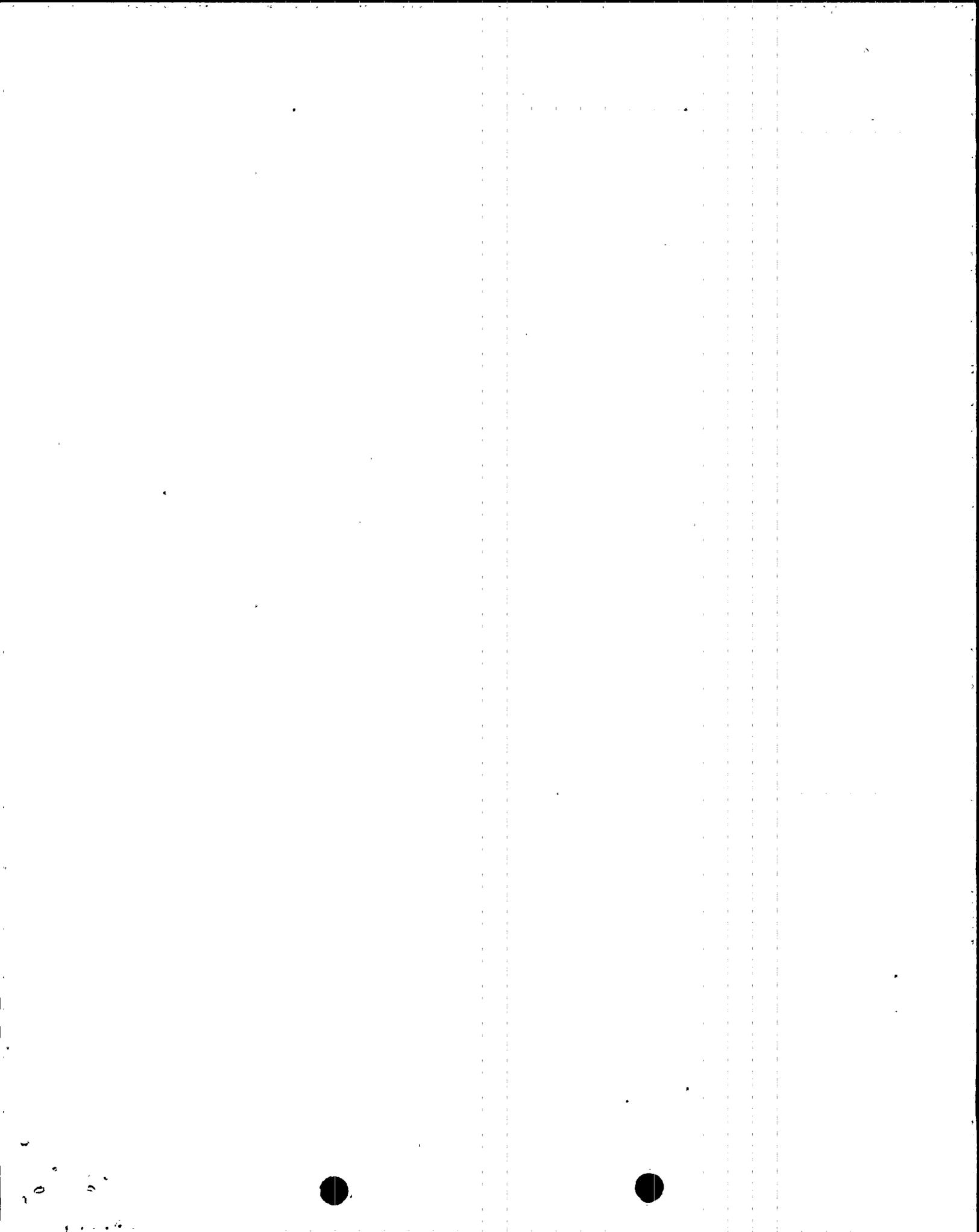
Dear Mr. <sup>Jim</sup> Maloney:

Subject: Proposed Transmission  
Studies

This is to acknowledge your letter of January 28, 1987 to Mr. Ailan Davis, Chairman of the New Mexico Power Pool (NMPP) Planning and Engineering Committee. As I read it, your letter proposes: 1) to place the study of the Springerville-Luna-Rio Grande 345 kV line under the direction of NMPP; 2) to include an assessment of the OLE Project in the study; 3) to include Tucson Electric Power Company (TEP) as a participant in the study; and 4) to host a meeting of the NMPP Planning and Engineering Committee and TEP's representative to discuss the basis and scope of the study.

As I indicated to you earlier, PNM strongly supports making the study an interutility effort; however, we are concerned that belatedness in activating the joint study not delay the study schedule, as the results are urgently needed to avoid further delays in meeting transmission needs in the State of New Mexico. As we have previously discussed, we feel the NMPP is an excellent forum for joint New Mexico utility planning and operations activities. We also recognize that, at times, it will be useful to have other non-NMPP utilities contribute to these studies. In this instance, we agree that TEP should be invited to participate, though it remains a study under the control of NMPP.

With regard to scope, the study should: 1) address the impact of the Springerville-Luna-Rio Grande 345 kV line on the parties to the NMPP; 2) incorporate the results of the current 1987 NMPP studies, which will identify measures for mitigating the impacts to NMPP parties caused by the line's delay beyond June 1, 1987; and 3) focus on optimizing the performance of the New Mexico transmission system on a total New Mexico transfer capability basis. To the extent the results are sensitive to OLE, the transfer capability impacts of OLE may also need to be addressed. Toward this end, PNM will provide the necessary OLE data.



Mr. Jim Maloney

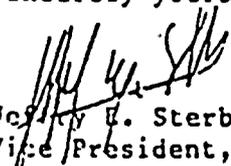
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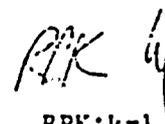
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Lastly, PNM suggests that the proposed meeting be held as quickly as possible to facilitate an expedited study schedule.

Please let me know if you have any comments or questions on this matter.

Sincerely yours,

  
Jeffrey U. Sterba  
Vice President, Revenue Management

  
RPK:krl

cc: Mr. Allan B. Davis, TNP  
Mr. Thomas A. Delawder, TEP  
NMPP Executive Committee Members

