UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 23, 2018

Jane Whitt Sellers
McGuireWoods LLP
jsellers@mcguirewoods.com

Re: PNM Resources, Inc.
Incoming letter dated January 22, 2018

Dear Ms. Sellers:

This letter is in response to your correspondence dated January 22, 2018 concerning the shareholder proposal (the "Proposal") submitted to PNM Resources, Inc. (the "Company") by Robert Andrew Davis (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. We also have received correspondence from the Proponent dated February 13, 2018. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Matt S. McNair
Senior Special Counsel

Enclosure

cc: Robert Andrew Davis
***

*** FISMA & OMB Memorandum M-07-16

March 23, 2018

**Response of the Office of Chief Counsel**
**Division of Corporation Finance**

Re: PNM Resources, Inc.
Incoming letter dated January 22, 2018

The Proposal requests that the board adopt a policy, and amend the bylaws as necessary, to require the chair of the board of directors to be an independent member of the board whenever possible.

We are unable to concur in your view that the Company may exclude the Proposal or portions of the supporting statement under rule 14a-8(i)(3). We are unable to conclude that the Proposal, taken as a whole, is so vague or indefinite that it is rendered materially misleading. We are also unable to conclude that you have demonstrated objectively that the portion of the supporting statement you reference is materially false or misleading. Accordingly, we do not believe that the Company may omit the Proposal or portions of the supporting statement from its proxy materials in reliance on rule 14a-8(i)(3).

We are unable to concur in your view that the Company may exclude the Proposal under rule 14a-8(i)(10). Based on the information you have presented, it appears that the Company's policies, practices and procedures do not compare favorably with the guidelines of the Proposal and that the Company has not, therefore, substantially implemented the Proposal. Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(10).

Sincerely,

Caleb French
Attorney-Adviser

**DIVISION OF CORPORATION FINANCE**
**INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS**

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the company in support of its intention to exclude the proposal from the company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes and rules administered by the Commission, including arguments as to whether or not activities proposed to be taken would violate the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversarial procedure.

It is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy materials.

February 13, 2018

U.S. Securities and Exchange Commission
Division of Corporate Finance
Office of Chief Counsel
100 F. Street, N.E.
Washington, DC 20549
(shareholderproposals@sec.gov)

Re: PNM Resources, Inc. – Exclusion of Shareholder Proposal Submitted by Robert Andrew Davis Pursuant to Rule 14a-8

Ladies and Gentlemen:

I am writing in response to the No Action request submitted by McGuireWoods on January 22nd on behalf of their client PNM Resources. I am the proponent filing the Proposal seeking an independent separate Chair. I have copied Jane Whitt Sellers of McGuireWoods who submitted the No Action request.

The No Action request argues that this Resolution, which seeks a change in policy and the bylaws to require the Chair of the Board be an independent member of the Board, be excluded under Rule 14a-8(i)(3) (materially false and misleading) and 14a-8(i) (10) (substantially implemented).

We believe the McGuireWoods letter has not presented a convincing case and request the Staff deny the No Action request and allow the Resolution to be included in the 2018 proxy for a vote by shareholders.

## DISCUSSION

The request to separate the roles of CEO and Chair and have the Chair of the Board be an independent Director is a longstanding request for governance reform and has been the subject of shareholder resolutions to hundreds of companies. It is a widely discussed governance topic raised at numerous governance conferences and debated in corporate boardrooms.

It is a common practice in many U.S. companies to have a separate independent Chair as well as the norm in the United Kingdom. However, with the rapid growth of Lead Directors by U.S. companies, many with job descriptions close to that of an independent Chair, many companies have argued that the basic concerns raised in the separate independent Chair debate have been essentially met.

We welcome this attention to improving corporate governance and strengthening the independence and power of the Board of Directors by strengthening the role and

responsibilities of the Lead Director. It is an important step forward. However we believe that it is preferable to have the role of Chair be separate from the CEO and be an independent director.

This position is supported by numerous institutional investors whose proxy voting policies support shareholder resolutions urging this change, or clarify the criteria they use in deciding how to vote on this request. These proxy voting guidelines are published on company websites like State Street, BlackRock and Vanguard as well as public pension funds like CalPERS and CalSTRS.

As noted, some investors vote "case by case" after assessing the assigned responsibilities of the Lead Director to see if they adequately provide checks and balances for the CEO.

In short, institutional investors are very conversant with the discussion about having an independent director serve as Chair. They are unlikely to be confused by this resolution which has been on the proxies of numerous companies in the last several years and is so commonplace that virtually all major investment firms stipulate in their Guidelines whether they support a YES or NO vote.

Rule 14a-8(i) (3) – False and Misleading

The No Action letter goes to great lengths to argue that the Resolution is confusing and that shareholders might interpret the Proposal differently and be "uncertain as to the matter on which he/she is being asked to vote."

We believe this is flawed logic and that shareholders will certainly understand the thrust of the Resolution, including its intent and meaning.

This Resolution, as should be clear to McGuireWoods, is a blended request that seeks a bylaw change to have an Independent Director serve as Chair (the request captured in the Resolved clause) and then supports the request by highlighting the benefits of separate roles. Obviously a change to an Independent Director being Chair (as proposed in the Resolved Clause) automatically results in a separation of the roles. You cannot have one without the other. They are not two separate requests; they are automatically intertwined.

The Supporting Statement extols the benefits of separating these roles and is simply an attempt to convince the reader of the benefits of voting for the Resolution. It is not confusing to the reader to read through a series of cogent and convincing arguments bolstering the Resolution.

And the selected quotes from the Resolution by McGuireWoods seem to intentionally exclude points that support both independence and separation. For example, the quote from Andrew Grove, former Chair of Intel, clearly states the CEO needs a "boss" and

that is the Board, and “The Chairman runs the Board. How can the CEO be his own boss?”

It couldn’t be clearer that Mr. Grove is supporting an independent Chair who is NOT the CEO.

In addition, the next sentence states: “In our view, shareholders are best served by an independent Board Chair who can provide a balance of power between the CEO and the Board.” The rest of the paragraph adds additional information to support that argument including arguing that the combined role “creates a potential conflict of interest.”

These points naturally flow together with other arguments in the Supporting Statement providing insights into why an investor would vote for the Resolution.

The McGuireWoods argument that the Supporting Statement “is about a separate topic” (separating the roles) is not accurate.

This neither confuses the reader nor does it create a dilemma for PNM Resources about how to describe the Proposal in the proxy card. It can be simply stated as “Proposal X – a proposal to have an Independent Director serve as Chair of the Board” since a company with such a structure automatically has separated the Chair and CEO roles.

Thus there is neither ambiguity nor vagueness in this description. And in contrast to the McGuireWoods summary claiming that “neither shareholders voting on the Proposal, nor the company in implementing the Proposal (if adopted), would be able to determine with any reasonable certainty what actions or measures the Proposal requires", we believe the action to be taken is crystal clear.

The No Action request goes on to argue “the entirety of the supporting statement and title are materially false and misleading because they are irrelevant to the subject matter of the Proposal.”

This is a version of the earlier McGuireWoods argument that these are two different topics raised in the Resolution. As we argued previously, this is an extreme logical contortion. The goal to have an independent separate Chair flows throughout the Resolution and the Resolution simply describes various merits of this position in the Supporting Statement.

The history of this Resolution confirms there is no confusion. As far as I can see, there have not been resolutions in past years that called only to separate CEO and Chair roles. Thus investors voting on such proposals are well informed and their proxy voting guidelines describe their position on this issue. i.e. an Independent Chair by definition cannot be the CEO and thus the roles are automatically separated.

The Standard for Independence is Too Vague

The No Action request goes on to argue that the “standard for determining whether a Board member is “independent” is too vague." This is a foolish argument. The company itself states in its “Corporate Governance Principles” that “the Board has and will have a majority of independent Directors” and describes the definition of independence as meeting or exceeding the requirements of the NYSE. The Principles don’t explain what "meets or exceeds” means but uses it as reassurance that PNM goes beyond the minimum, for which we commend the company.

The Principles then explains that no Director is considered independent unless they have “no material relationship with the company.” The explanation is self-evident to the legal community but not necessarily to the average shareholder. Yet PNM does not go into deeper detail to explain what a “material relationship” means (and we believe they should not have to). Neither should our resolution have to provide elaborate definition of the term “Independent Director” when the term is widely understood.

Finally, the Principles go on to say the Audit, Compensation and Nominating Committees are “composed entirely of independent Directors.”

Without a deeper explanation, PNM presents their understanding of independence as self-evident. We agree. Investors certainly understand the meaning of “independent Director” and would not be confused by the use of the term.

The Proposal is False and Misleading since it allows the present governance structure to remain in effect until the next CEO transition. This will be confusing to shareholders.

In fact, this form of the resolution is meant to provide a smooth transition and not to take away the role of Chair from our present CEO.

Investors should find this reassuring since it will not send a confusing message by abruptly taking away the Chair role from our CEO Patricia Vincent-Collawn. .

Such a rapid change in roles is sometimes seen as “punishment” for a CEO, which is not our intent.

A phase in during a CEO transition is a logical and orderly process and will not confuse investors voting for it who would support it as a transition to an amended form of governance.

## Indication of Strong Investor Support

The No Action letter argues this is false and misleading. The statement that the Sullivan and Cromwell 2017 Proxy Review quote is objectively false is not true and is not a reason for amending or omitting the Resolution.

The Sullivan and Cromwell Proxy Review does indeed talk about trends in this debate noting that many investors support having a Lead Director with suitable Board powers and responsibilities and that many investors do a company specific analysis before voting. We have no disagreement with that description. It is true some investors vote "case by case" and others vote for a separate independent Chair as a matter of Principle. In fact, this resolution often gets votes over 40% and Sullivan and Cromwell notes the average 2017 vote was 30%.

We believe this is clearly an "indication of strong investor support." Weak investor support would be in the 10-15% range, overwhelming investor support would be over 50%, as the Access to the Proxy Resolution received in the past years.

## Rule 14a-8 (i) (10) – Resolution is Substantially implemented

Curiously after challenging the Resolution for being vague and misleading and difficult to understand, McGuireWoods now turns to say the goal has been implemented. If they don't understand what is being requested, how can McGuireWoods confidently state it is "implemented"?

Their logic is that the Board has decided to "retain discretion" to make this decision.

Our Resolution asks for a vote on a specific position – an independent separate Chair.

There is no way the Board position to "retain flexibility" implements our Resolution which asks for an actual, specific change.

## The Board has already implemented a leadership structure that provides for independent oversight.

We are pleased to see the multiple ways in which the Board implements oversight. It is an impressive list and clearly delineates the role of the Lead Director.

We could commend the company for each and every one of the bullet points listed while still seeking additional changes in governance such as a separate independent Chair.

The bullet points listed do not moot the Resolution's requested change and certainly do not implement it.

In summary, for these reasons we believe the Proposal may not be excluded from the proxy materials.

Feel free to contact me at *** if you have any questions. I am out of the country until March 13; if you wish to talk by phone before then, please contact me by email and I will return your call.

Sincerely,

Robert Andrew Davis

Cc: Patrick V. Apodaca, Senior Vice President, General Counsel and Secretary
Leonard Sanchez, Associate General Counsel
Jane Whitt Sellers, McGuireWoods



*** FISMA & OMB Memorandum M-07-16

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McGUIREWOODS

January 22, 2018

**VIA E-MAIL** (shareholderproposals@sec.gov)

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F. Street, N.E.
Washington, D.C. 20549

Re: PNM Resources, Inc. – Exclusion of Shareholder Proposal Submitted by Robert Andrew Davis Pursuant to Rule 14a-8

Ladies and Gentlemen:

On behalf of our client PNM Resources, Inc., a New Mexico corporation (the "Company"), we hereby respectfully request that the staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission" or "SEC") advise the Company that it will not recommend any enforcement action to the SEC if the Company omits from its proxy materials to be distributed in connection with its 2018 annual meeting of shareholders (the "Proxy Materials") a proposal (the "Proposal") and supporting statement submitted to the Company on November 17, 2017 by Robert Andrew Davis (the "Proponent"). References to a "Rule" or to "Rules" in this letter refer to rules promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the SEC in accordance with the deadline specified in Rule 14a-8(j); and
- concurrently sent a copy of this correspondence to the Proponent.

The Company anticipates that its Proxy Materials will be available for mailing on or about April 10, 2018. We respectfully request that the Staff, to the extent possible, advise the Company with respect to the Proposal consistent with this timing.

The Company agrees to forward promptly to the Proponent any response from the Staff to this no-action request that the Staff transmits by e-mail or facsimile to the Company only.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D ("SLB 14D") provide that a shareholder proponent is required to send the company a copy of any correspondence that the proponent elects to submit to the SEC or Staff. Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the SEC or the Staff with respect to the

Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

## THE PROPOSAL

The Proposal states:

> **RESOLVED**: The shareholders request the Board of Directors to adopt as policy, and amend the bylaws as necessary, to require the Chair of the Board of Directors, whenever possible, to be an independent member of the Board. This policy would be phased in for the next CEO transition.
>
> If the Board determines that a Chair who was independent when selected is no longer independent, the Board shall select a new Chair who satisfies the requirements of the policy within a reasonable amount of time. Compliance with this policy is waived if no independent director is available and willing to serve as Chair.

A copy of the Proposal and supporting statement, as well as the related correspondence regarding the Proponent's share ownership, is attached to this letter as Exhibit A.

## BASIS FOR EXCLUSION

**The Company may exclude the Proposal from the 2018 Proxy Materials pursuant to Rule 14a-8(i)(3) because the Proposal is materially false and misleading and, in the alternative, pursuant to Rule 14a-8(i)(10) because the Proposal has been substantially implemented.**

## DISCUSSION

### *A. The Proposal is materially false and misleading and therefore may be excluded pursuant to Rule 14a-8(i)(3).*

*1. Background.*

Under Rule 14a-8(i)(3), a shareholder proposal may be excluded from a company's proxy materials if the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a- 9, which prohibits materially false or misleading statements in a company's proxy materials. Rule 14a-9 provides that no solicitation may be made by means of any proxy statement containing "any statement, which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." In Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B"), the Staff articulated the application of this exclusion by explaining that it is appropriate where "the resolution contained in the proposal is so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires — *this objection also may be appropriate where the proposal and the supporting statement, when read together, have the same result*" (emphasis added). The Staff earlier articulated how this exclusion applies by noting that a proposal can be sufficiently misleading and therefore excludable under Rule 14a-8(i)(3) when the company and its shareholders might interpret the proposal differently such that "any action ultimately taken by the [c]ompany upon implementation [of the proposal] could be significantly different from the actions envisioned by the shareholders voting on the proposal." *Fuqua Industries, Inc.* (Mar. 12, 1991).

In addition, the Staff also recognized in SLB 14B two other circumstances under which a proposal may be excluded pursuant to Rule 14a-8(i)(3). First, exclusion is also warranted where "substantial portions of the supporting statement are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which she is being asked to vote." See, e.g., *The Kroger Co.* Mar. 27, 2017 (concurring in the exclusion of supporting statements involving "neonics" as irrelevant to a consideration of whether to adopt a policy requiring an independent chair because there was "a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote"). Second, exclusion is warranted where the "company demonstrates objectively that a factual statement is materially false or misleading." See, e.g., *JPMorgan Chase & Co. (*Mar. 11, 2014, *recon. denied* Mar. 28, 2014) (concurring in the exclusion of a proposal as false and misleading because, among other things, it misrepresented the company's vote counting standard for electing directors and mischaracterized the company's treatment of abstentions).

2. *The resolution and the supporting statement, when read together, are inherently inconsistent, indefinite and misleading such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote.*

The subject matter of the Proposal, as highlighted by the title of the Proposal - *Separate Chair & CEO* and as further articulated by the entirety of the supporting statement, appears to be the separation of the roles of CEO and chairman of the Company's board of directors (the "Chair"). However, in contrast to the supporting statement, the Proposal's resolution refers to adoption of a policy that the Chair be an independent member of the Company's board of directors (the "Board"), without reference to separating the roles of Chair and CEO. This creates an obvious disconnect between the substance of the resolution (independence of the Chair) and the apparent purpose of the Proposal (separation of CEO and Chair roles). Specifically, in the supporting statement's twenty one sentences, only one makes reference to the independence of the Chair. Instead, the title and supporting statement focus almost exclusively on separating the roles of Chair and CEO, citing the following arguments for separating the two roles:

- "There is a potential conflict of interest for a CEO to be her/his own overseer as Chair while managing the business."
- "PNM Resources' CEO Patricia Vincent-Collawn serves both as CEO and Chair of the Company's Board of Directors. We believe the combination of these two roles in a single person weakens a corporation's governance structure."
- "The separation of the two jobs goes to the heart of the conception of a corporation. Is a company a sandbox for the CEO, or is the CEO an employee? If he's an employee, he needs a boss, and that boss is the Board. The Chair runs the Board. How can the CEO be his own boss?"
- "The primary duty of a Board of Directors is to oversee the management of a company on behalf of shareholders. A combined CEO / Chair creates a potential conflict of interest, resulting in excessive management influence on the Board and weaker oversight of management."
- "Numerous institutional investors recommend separation of these two roles. For example, California's Retirement System CalPERS' Principles & Guidelines encourage separation, even with a lead director in place."

- "According to ISS '2015 Board Practices', (April 2015), 53% of S&P 1,500 firms separate these two positions and the number of companies separating these roles is growing."
- "Chairing and overseeing the Board is a time intensive responsibility. A separate Chair also frees the CEO to manage the company and build effective business strategies."
- "Shareholder resolutions urging separation of CEO and Chair received approximately 30% in 2017 according to Sullivan & Cromwell's 2017 Proxy Review, an indication of strong investor support."

Additionally, this statement in the resolution ("this policy would be phased in for the next CEO transition") is relevant to a proposal to separate the CEO and Chair.

This fundamental inconsistency between the resolution and the supporting statement is not one that the Company could appropriately address in its statement of opposition as contemplated by SLB 14B. If required to include this Proposal in the 2018 Proxy Materials, management would face a dilemma in determining how to describe the Proposal throughout the Proxy Materials, including in the proxy statement summary, table of contents, narrative description of the Proposal, the statement of opposition, and even on the proxy card. For example, how should the Company title the Proposal in the table of contents to the Proxy Materials? It cannot identify the Proposal by its own title, "Proposal X: Separate Chair & CEO," without inviting confusion because the resolution statement has little to do with separating the two roles. Likewise, it cannot identify the Proposal as "Proposal X: Independent Chair" without inviting confusion because the title and supporting statements relate to a different governance matter than appointing an independent chair. Shareholders who read only the title of the Proposal will think they are voting for a substantively different resolution than the one proposed.

The Company's dilemma continues with respect to how to describe the matter to be acted upon in the proxy card. How should the proposal be described: (1) a proposal to require an independent Board Chair or (2) a proposal to separate the role of CEO and Board Chair. This is not an insignificant technical issue. Rule 14a-4(a)(3) requires that the "form of proxy… [s]hall identify clearly and impartially each separate matter intended to be acted upon." Having to include this Proposal, therefore, might put the Company in a position where it cannot comply with Rule 14a-4(a)(3) because the Company would have to provide an ambiguous or vague description of the matter to be acted upon, but the Staff made clear in its Questions & Answers of General Applicability (Mar. 22, 2016) that describing voting matters in an ambiguous, highly general, or vague way is not permitted under Rule 14a- 4(a)(3).

The discrepancies between the resolution and the supporting statement are not minor. Rather, this is a clear-cut situation for application of SLB 14B: "[T]he proposal and the supporting statement, *when read together*, have the… result" of being "so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires." We respectfully submit that this is the type of proposal that should be totally excluded under Rule 14a-8(i)(3).

*3. Revisions of the Proposal should not be permitted because the entirety of the supporting statement and title are materially false and misleading because they are irrelevant to the subject matter of the Proposal.*

We note that the Staff has developed a practice of issuing no-action responses to Rule 14a-8(i)(3) requests that permit proponents to make "revisions that are minor in nature and do not alter the substance of the proposal" under SLB 14B. However, this Proposal is substantially different from situations where the Staff's practice would allow minor revisions. The problem is not merely that the Proponent has included extraneous comments, unsupported complaints, dubious assertions or objectively false statements. Instead, the *entire* Proposal, other than the resolution, addresses one substantive governance question, and the resolution addresses a different substantive governance question. Deleting or revising a single sentence or even an entire paragraph would not cure these defects. Rather, the defects rendering the Proposal materially false and misleading are so fundamental and pervasive that it would require a detailed and extensive revision. Specifically, it would require either (a) revising the entire resolution to address the distinct substantive question of separating the roles of Chair and CEO, so that the Proposal is internally coherent and does not contain false and misleading statements, or (b) permitting the Proponent to revise the entirety of the supporting statement and the title of the Proposal. As currently written, neither the shareholders voting on the proposal, nor the Company in implementing the Proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the Proposal requires.

For these reasons, it is not feasible for the Staff, consistent with SLB 14B and recent no-action correspondence, to preserve a variation of the Proposal. Neither the Proponent's editing of the Proposal nor the Company's opportunity to draft a statement of opposition to the Proposal would provide an adequate remedy for curing the Proposal's fundamental defects. Instead, this Proposal is analogous to recent proposals reviewed by the Staff where the proposal and the supporting statement, when read together, are so fundamentally vague and misleading that total exclusion is warranted. *See, e.g., Walgreens Boots Alliance, Inc.* (Sep. 19, 2016) (concurring in the total exclusion of a proposal asking that the board determine there was a "compelling justification" whenever it took "any action whose primary purpose is to prevent the effectiveness of shareholder vote" because the substance of these terms and the effects of adopting the proposal were likely to be inherently vague and misleading to shareholders).

Therefore, the Company believes that the entire Proposal may be excluded from its Proxy Materials pursuant to Rule 14a-8(i)(3) as materially false and misleading.

*4. The Proposal is materially false and misleading because the standard for determining whether a Board member is "independent" is too vague such that there is a strong likelihood that reasonable shareholders would be uncertain as to the matter on which they are being asked to vote.*

The Staff has consistently concurred with the exclusion under Rule 14a-8(i)(3) of proposals that use terms and phrases that are vague or undefined or otherwise fail to provide necessary guidance for implementation. See, e.g., *AT&T Inc.* (Feb. 21, 2014) (concurring in exclusion under Rule 14a-8(i)(3) of a proposal requesting board review of the company's policies relating to the "directors' moral, ethical and legal fiduciary duties and opportunities" to ensure the protection of privacy rights, where the proposal did not describe or define the meaning of "moral, ethical and legal fiduciary duties and opportunities"); *AT&T Inc.* (Feb. 16, 2010) (concurring in exclusion under Rule 14a-8(i)(3) of a proposal due to the vagueness of the term "grassroots lobbying communications").

The Proposal seeks a policy (and bylaws amendments as necessary) to require the Chair to be an "independent" member of the Board but fails to provide any definition for that critical concept.

The Staff has granted no-action relief to companies seeking to exclude shareholder proposals seeking similar policies (or governing document amendments) that failed to provide an applicable definition of "independent director" within the text of the proposal or the supporting statement itself. See, e.g., *Clorox Company* (Aug. 13, 2012) (concurring in the exclusion under Rule 14a-8(i)(3) of a proposal to provide that the chairman of the board of directors must be an independent director in accordance with the meaning set forth in the New York Stock Exchange ("NYSE") listing standards); *Boeing Co.* (Feb. 10, 2004) (concurring in the exclusion under Rule 14a-8(i)(3) of a shareholder proposal requesting a bylaw requiring the chairman of the company's board of directors to be an independent director "according to the 2003 Council of Institutional Investors ("CII") definition" on the basis that the definition was vague and indefinite because it "fail[ed] to disclose to shareholders the definition of 'independent director' that it [sought] to have included in the bylaws"). The Staff's determinations cited above recognized that there are meaningful differences in what constitutes an "independent" director under various definitions—sufficient differences that, when evaluating proposals that fail to define independence within the proposals and the supporting statements themselves, neither the shareholders voting on the relevant proposal, nor the company called upon to implement the proposal, would be able to determine with reasonable certainty exactly what measures the proposal would require.

The Proposal is even more vague than the above-referenced proposals referring to the NYSE or the CII definitions that were found to be impermissibly vague. The Proposal does not include any applicable definition of director independence whatsoever, and the Company's shareholders would likewise not understand what standard of independence would apply. An "independent director" could mean a director who meets the independence requirements the NYSE listing standards, the independence standards set by the SEC under the requirements of Sarbanes-Oxley for all members of audit committees, the definition of independence set by groups like the CII, the standard used by proxy advisory firms like Institutional Shareholder Services or any other available definition or standard for director independence. Perhaps, the Proponent merely intends for an "independent member" to mean the Chair is not a member of Company management. These distinctions are not academic. Some directors, for example, may be determined to not be an independent Board member under NYSE or other standards, despite the fact that the director is not a member of the Company's management.

In the absence of a definition of an "independent" member, the Company believes that the Proposal is sufficiently vague and ambiguous that it is impossible to ascertain exactly what actions or measures the Company is expected to take or when these actions or measures should be taken, and neither the resolution nor the supporting statement provide sufficient insight to ensure that the actions taken by the Company are not significantly different from the actions envisioned by the shareholders if the Proposal is included in the Proxy Materials. Furthermore, this ambiguity in the Proposal is material because it concerns the essential objective of the Proposal: attempting to set a new independence standard for the Chair. Thus, for the reasons set forth above, the Company believes that the Proposal should be excluded from the Company Proxy Materials under Rule 14a-8(i)(3).

*5. The Proposal is materially false and misleading since phasing the new policy in for the next CEO transition allows the allegedly problematic governance structure to remain in effect, which will be confusing to the shareholders being asked to vote on the Proposal.*

The first sentence of the Proposal requests that the Company's Board adopt a policy that applies "whenever possible." The proposal also states "that this policy would be phased on for the next CEO transition" and "compliance with this policy is waived if no independent director is

available and willing to serve as Chair". These exceptions allow a non-independent member of the Board to serve as Chair. The Proponent claims that this situation as a number of adverse effects, including a "potential conflict of interest," "excessive management influence on the Board" and "weaker oversight of management." Shareholders will be confused as to why this allegedly problematic governance structure would be allowed to continue for indefinite period – including for whatever period the Company's current CEO remains in that role. It creates an inconsistency between the stated purpose of the resolution – to require the Chair to be independent - and the impact of its adoption – where the role of Chair will continue to be held by Board member who is not independent for the indefinite future.

The Staff has permitted the exclusion of shareholder proposals under Rule 14a-8(i)(3) where the proposal is so internally inconsistent that neither shareholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires. See *Bank of America Corp*. (Mar. 12, 2013) (concurring in the exclusion of a proposal that requested the formation of a committee to explore "extraordinary transactions that could enhance stockholder value" where proposal used "ambiguous and inconsistent language" providing for "alternative interpretations"); *SunTrust Banks, Inc.* (Dec. 31, 2008) (concurring in the exclusion of a proposal under Rule 14a-8(i)(3) where the proposal sought to impose executive compensation limitations with no duration stated for the limitations, but where correspondence from the proponent indicated an intended duration); and *Wendy's International, Inc.* (February 24, 2006) (concurring in the exclusion of a proposal that did not state the duration of its requirements). A shareholder who votes for the Proposal with the understanding that the policy will result in the appointment of an independent Chair will be misled by the other provisions in the Proposal that suspend the policy until the next CEO transition or when an independent member is available. Furthermore, the shareholders voting on the Proposal would not have any reasonable certainty as to when the actions or measures upon which they would be voting would take effect. Accordingly, the Company believes that the Proposal should be excluded under Rule 14a-8(i)(3).

6. *If the Staff does not concur that the entire Proposal may be excluded as materially false and misleading under Rule 14a-8(i)(3), then the phrase "an indication of strong investor support" should be deleted from this supporting statement because it is objectively false: "Shareholder resolutions urging separation of CEO and Chair received approximately 30% in 2017 according to Sullivan & Cromwell's 2017 Proxy Review, an indication of strong investor support."*

Consistent with SLB 14B, the Staff has permitted companies to exclude one or more statements from a proposal's supporting statement under Rule 14a-8(i)(3) where those statements were materially false or misleading. See, e.g., *Ferro Corp.* (Mar. 17, 2015) (permitting exclusion under Rule 14a-8(i)(3) of a proposal mischaracterizing certain facets of Ohio and Delaware corporate law, noting that the company had "demonstrated objectively that certain factual statements in the supporting statement are materially false and misleading"); *Rite Aid Corp.* (Mar. 13, 2015) (permitting exclusion under Rule 14a-8(i)(3) of a sentence included in the supporting statement falsely claiming, among other things, that the SEC supported the proposal); *Bob Evans Farms, Inc.* (June 26, 2006) (permitting exclusion under Rule 14a-8(i)(3) of a paragraph included in the supporting statement falsely claiming that the proposal had received "tremendous shareholder support"); *Piper Jaffray Cos.* (Feb. 24, 2006) (permitting exclusion under Rule 14a-8(i)(3) of a paragraph included in the supporting statement falsely claiming that management had demonstrated a disregard for shareholders' interests).

The Sullivan & Cromwell's 2017 Proxy Review actually states in its analysis of shareholder proposals regarding adoption of policies to require independent board chairs that

> The declining frequency and lower success rate for these proposals is consistent with the view of many investors that having a lead independent director with suitably broad powers and responsibilities is a suitable alternative to mandatorily separating the CEO and chair roles. Shareholders broadly do not appear to demand the separation of the roles as a matter of principle, but instead vary in their support for this proposal depending on company-specific issues, including the company's performance, other governance issues, and the merits of the individuals serving in the CEO, chair, and/or lead director roles.

The Proponent's statement that it is an "indication of strong investor support" is objectively false compared to the actual analysis in the Sullivan & Cromwell 2017 Proxy Review. Given the objectively false statement included in the supporting statement, as well as the impact that the false statement could have on shareholder voting decisions, the phrase identified above is materially false and misleading. Accordingly, consistent with SLB 14B and the precedent described above, the Company should be able to exclude the phrase from the Proposal to be included in the Proxy Materials.

***B. The Proposal has been substantially implemented and may be excluded pursuant to Rule 14a-8(i)(10).***

Alternatively, and to the extent that the Staff does not concur that the entire Proposal may be excluded as materially false and misleading under Rule 14a-8(i)(3), the Company believes the Proposal may be excluded pursuant to Rule 14a-8(i)(10) as substantially implemented.

*1. Background*

Rule 14a-8(i)(10) provides that a company may exclude a proposal from its proxy materials if "the company has already substantially implemented the proposal." According to the Commission, this exclusion "is designed to avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by management." See Release No. 34-20091 (Aug. 16, 1983) (the "1983 Release"). The Staff has articulated this standard by stating that "a determination that the company has substantially implemented the proposal depends upon whether particular policies, practices and procedures compare favorably with the guidelines of the proposal." See, e.g., *Oshkosh Corp*. (Nov. 4, 2016); *NetApp, Inc.* (June 10, 2015); *JPMorgan Chase & Co*. (Mar. 6, 2015); *Peabody Energy Corp*. (Feb. 25, 2014); *Medtronic, Inc.* (June 13, 2013); *Starbucks Corp.* (Nov. 27, 2012), *Whole Foods Market, Inc.* (Nov. 14, 2012), and *Texaco, Inc.* (Mar. 28, 1991). A company need not implement every detail of a proposal in order for the Staff to permit exclusion under Rule 14a-8(i)(10). See 1983 Release. Rather, the Staff has consistently permitted companies to exclude proposals from their proxy materials pursuant to Rule 14a-8(i)(10) where a company satisfied the essential objective of the proposal, even if the company did not take the exact action requested by the proponent or implement the proposal in every detail or if the company exercised discretion in determining how to implement the proposal. See, e.g., *Cisco Systems, Inc*. (Sept. 27, 2016) (allowing exclusion under Rule 14a-8(i)(10) of a proxy access proposal despite its including eligibility criteria distinguishable from those in the company's existing proxy access bylaw); *Walgreen Co.* (Sept. 26, 2013) (allowing exclusion under Rule 14a-8(i)(10) of a proposal requesting an amendment to the company's organizational documents that would eliminate all super-majority vote requirements, where such company eliminated all but one such requirement).

*2. The Board of Directors has already implemented a policy addressing the appointment and independence of the Chair.*

The Proposal requests the Board to adopt a policy regarding independence of the Board Chair. The Board has already adopted a policy in its Corporate Governance Guidelines regarding the Board Chair's independence. The Board has determined, as stated in the Corporate Governance Guidelines, that the best policy is to retain its discretion to make its own determination about the status of the Board Chair depending on what is best for the Company in light of all circumstances prevailing at the time. Accordingly, the Company's current policy substantially implements, compares favorably to, and satisfies the essential objective of the Proposal, which is to adopt a policy regarding the independence of the Board Chair. The Proposal may therefore be excluded pursuant to Rule 14a-8(i)(10).

*3. The Board of Directors has already implemented a leadership structure that provides independent oversight of management.*

The Proposal (although not consistent between the resolution and supporting statements as discussed above) focuses on separating the roles of Chair and CEO, establishing oversight of the management and the CEO, and balancing power between the CEO and the Board. The Company has implemented these objectives with its current board leadership structure. Under the Company's Corporate Governance Guidelines, the Board has recognized its primary responsibility to oversee the management of the Company to optimize its long-term value for its shareholders and to advise and counsel the CEO and the executive management team relative to matters of policy, business affairs, and overall strategy. Furthermore, the Board conducts its leadership role at the Company consistent with the Company's Corporate Governance Guidelines, which means that the Board is the ultimate decision-making body of the Company, and among the Board's most important responsibilities are the election, evaluation and compensation of the Company's CEO and the other members of the executive management team.

In addition, the Board has established the position of lead director and separate Board's committees (comprised entirely of independent directors) to provide strong, independent oversight of the Company's management and affairs. The lead director, Bruce W. Wilkinson who is independent as defined with reference to specific independence criteria under applicable law, including the NYSE listing standards, performs the following functions:

- approves Board meeting agendas and information sent to the Board;
- approves meeting schedules to ensure sufficient time for discussion of all agenda items;
- chairs all meetings of the independent directors, including executive sessions of the independent directors, and presides at all meetings of the Board in the absence of the Chair;
- works with committee chairs to ensure coordinated coverage of Board responsibilities;
- ensures the Board is organized properly and functions effectively, independent of management;
- in consultation with the Board, is authorized to retain independent advisors and consultants on behalf of the Board;
- facilitates the annual self-evaluation of the Board and Board committees;
- serves as a liaison for communications between (1) management and the independent directors, and (2) the Board and the Company's shareholders and other interested parties; and

- performs such other duties as the Board may from time to time delegate.

The lead director, with the above described duties, facilitates independent oversight of management. Augmenting the Board's oversight of the CEO and providing yet another check-and-balance, the Compensation and Human Resources Committee oversees the annual performance evaluation of the CEO and sets the CEO's and other executive officers' compensation, giving that Committee significant control over management.

Accordingly, the Company's current board leadership and management structure substantially implements, compares favorably to, and satisfies the essential objective of the Proposal. The Proposal may therefore be excluded pursuant to Rule 14a-8(i)(10).

**CONCLUSION**

For the reasons stated above, we believe that the Proposal may be properly excluded from the Proxy Materials. If you have any questions or need any additional information with regard to the enclosed or the foregoing, please contact me at (804) 775-1054 or at jsellers@mcguirewoods.com or my colleague, Katherine K. DeLuca, at (804) 775-4385 or at kdeluca@mcguirewoods.com.

Sincerely,

Jane Whitt Sellers

Enclosures
cc: Patrick V. Apodaca – Senior Vice President, General Counsel and Secretary
Leonard D. Sanchez – Associate General Counsel
Robert Andrew Davis

Exhibit A

November 17, 2017

Corporate Secretary
PNM Resources, Inc.
414 Silver Avenue SW
Albuquerque, NM 87102-3289

Greetings:

PNM Resources' CEO Patricia Vincent-Collawn serves both as CEO and Chair of the Company's Board of Directors. We believe the combination of these two roles in a single person weakens a corporation's governance structure.

In our view, shareholders are best served by an independent Board Chair who can provide a balance of power between the CEO and the Board. The primary duty of a Board of Directors is to oversee the management of a company on behalf of shareholders. A combined CEO / Chair creates a potential conflict of interest, resulting in excessive management influence on the Board and weaker oversight of management.

PNM Resources faces a series of special challenges and opportunities as the utility and energy sectors confront a rapidly changing energy future and the additional challenges of climate change. It is therefore especially important that PNM's board governance model help strengthen and empower board oversight

I am therefore submitting a shareholder resolution which asks that the Board of Directors adopt as policy that the Chair of the Board of Directors, whenever possible, be an independent member of the Board. This policy would be phased in for the next CEO transition.

The attached proposal is submitted for inclusion in the 2018 Proxy statement in accordance with Rule 14a-8 of the general Rules and Regulations of the Securities Act of 1934.

I, Robert Andrew Davis, have been the beneficial and continuous owner of 100 shares of PNM Resources stock which is worth more than $2000 for over a year and will continue to be a holder of the requisite number of shares through the 2018 stockholders' meeting. Proof of ownership from US Bank, a DTC participant and the sub-custodian of my portfolio manager Walden Asset Management, is forthcoming.

As required by SEC rules, either I or my representative will attend the shareholders' meeting to move the resolution.

I may be joined by other co-filers but will act as primary filer and can be contacted as indicated below. I look forward to discussing this issue with you.

Sincerely,

R. A. D

Robert Andrew Davis
PO Box 1354
Santa Fe, NM 87504
***



*** FISMA & OMB Memorandum M-07-16

## RESOLUTION: SEPARATE CHAIR AND CEO

**RESOLVED**: The shareholders request the Board of Directors to adopt as policy, and amend the bylaws as necessary, to require the Chair of the Board of Directors, whenever possible, to be an independent member of the Board. This policy would be phased in for the next CEO transition.

If the Board determines that a Chair who was independent when selected is no longer independent, the Board shall select a new Chair who satisfies the requirements of the policy within a reasonable amount of time. Compliance with this policy is waived if no independent director is available and willing to serve as Chair.

**SUPPORTING STATEMENT:**

We believe:

- The role of the CEO and management is to run the company.
- The role of the Board of Directors is to provide independent oversight of management and the CEO.
- There is a potential conflict of interest for a CEO to be her/his own overseer as Chair while managing the business.

PNM Resources' CEO Patricia Vincent-Collawn serves both as CEO and Chair of the Company's Board of Directors. We believe the combination of these two roles in a single person weakens a corporation's governance structure.

As Andrew Grove, Intel's former chair, stated, "The separation of the two jobs goes to the heart of the conception of a corporation. Is a company a sandbox for the CEO, or is the CEO an employee? If he's an employee, he needs a boss, and that boss is the Board. The Chairman runs the Board. How can the CEO be his own boss?"

In our view, shareholders are best served by an independent Board Chair who can provide a balance of power between the CEO and the Board. The primary duty of a Board of Directors is to oversee the management of a company on behalf of shareholders. A combined CEO / Chair creates a potential conflict of interest, resulting in excessive management influence on the Board and weaker oversight of management.

Numerous institutional investors recommend separation of these two roles. For example, California's Retirement System CalPERS' Principles & Guidelines encourage separation, even with a lead director in place.

According to ISS "2015 Board Practices", (April 2015), 53% of S&P 1,500 firms separate these two positions and the number of companies separating these roles is growing.

PNM Resources faces a series of special challenges and opportunities as the utility and energy sectors face a rapidly changing energy future and the additional challenges of climate change. It is therefore especially important that PNM's Board governance model help strengthen and empower board oversight.

Chairing the Board is a time intensive responsibility. A separate Chair frees the CEO to manage the company and build effective business strategies.

Shareholder resolutions urging separation of CEO and Chair received approximately 30% in 2017 (Sullivan & Cromwell's "2017 Proxy Review), an indication of strong investor support.

Institutional Trust and Custody
425 Walnut Street
Cincinnati, OH 45202

usbank.com

Date: November 17, 2017

To Whom It May Concern:

U.S. Bank has acted as sub-custodian for Boston Trust & Investment Management Company (Boston Trust) since July 18, 2016, who is the custodian for the account of Robert Andrew Davis.

We are writing to confirm that Robert Andrew Davis has had continuous beneficial ownership of a least $2,000 in market value of the voting securities of **PNM Resources, Inc. (Cusip #69349H107)** from November 17, 2016 to November 17, 2017.

U.S. Bank serves as the sub-custodian for Boston Trust and Investment Management Company. U. S. Bank is a DTC participant.

Sincerely,

Joanne MacVey
Officer, Client Service Manager
Institutional Trust & Custody