BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL OF THE ABANDONMENT OF THE FOUR CORNERS POWER PLANT AND ISSUANCE OF A SECURITIZED FINANCING ORDER	)	**Case No. 21-00017-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	
Applicant.	)	

ORDER ON SUFFICIENCY OF PNM'S APPLICATION AND SCOPE OF ISSUES IN PROCEEDING

THIS MATTER comes before the Hearing Examiner upon his February 1, 2021 Order Requesting Briefing on Sufficiency of PNM's Application and Scope of Issues in Proceeding ("Feb. 1st Order") as informed by the briefs filed pursuant to the February 1st Order by intervenors and the Utility Division Staff ("Staff") (collectively "Responding Parties")[1] and the consolidated response of Public Service Company of New Mexico (PNM) to the intervenor and Staff briefs and the motions to dismiss or for alternative relief filed by Sierra Club[2] and jointly by NEE and Citizens for Fair Rates and the Environment (CFRE).[3] This Order addresses the sufficiency of PNM's Application and the scope of issues in this proceeding. It does not address the Sierra Club and NEE/CFRE

[1] The "Responding Parties" include: Albuquerque Bernalillo County Water Utility Authority (ABCWUA) and Bernalillo County ("County") (filing jointly); Sierra Club; San Juan Citizen's Alliance (SJCA), Diné CARE and Tó Nizhóní Aní (filing jointly and referred to herein as "Sierra Club et al."); New Energy Economy (NEE); Coalition for Clean Affordable Energy (CCAE); Western Resources Advocates (WRA); and Staff. The New Mexico Attorney General ("Attorney General" or NMAG) filed its brief late and requested that the Commission accept its untimely filing. PNM states it in its February 18, 2021 consolidated response that it has no objection to consideration of the Attorney General's brief. Finding, thus, no prejudice in accepting the late filing submitted February 12, 2021, the Attorney General's brief is included in the discussion below.

[2] Sierra Club filed a Motion for an Order Requiring PNM to File Supplemental Testimony Addressing the Prudence of Four Corners Investments, or in the Alternative, to Dismiss PNM's Application on January 26, 2021.

[3] NEE and CFRE filed Joint Movants' Motion to Dismiss Application and Supporting Brief on January 28, 2021.

motions, which shall be dealt with separately in due course. Accordingly, being fully informed of the premises, the Hearing Examiner **FINDS** and **CONCLUDES**:

I. INTRODUCTION

Because, *inter alia*, PNM's January 1, 2021 Application in this case did not include an express request for approval of the sale and transfer of its interest in the Four Corners Power Plant (FCPP) to the Navajo Transitional Energy Company, LLC (NTEC) pursuant to Sections 62-6-12 and 62-6-13 of the Public Utility Act[4] and its supporting testimony barely addressed the governing standard, and because PNM's revised form of Notice contained an unsolicited definition of the scope of issues to be addressed in its supplemental testimony due, at that time, on March 15, 2021,[5] in the February 1st Order the Hearing Examiner asked the parties to brief a series of specific questions regarding the sufficiency of the Application and the scope of issues in this proceeding. The parties' responses to those seven questions are summarized in the discussion section below. Following that discussion is the Hearing Examiner's analysis, conclusions, and ordering clauses.

Ultimately, the Hearing Examiner determines that, subject to starting the nine-month statutory review period under the Energy Transition Act (ETA)[6] to commence anew with its amended filing, PNM should be allowed to file an amended application in this docket by March 15, 2021 supported by direct testimony that, among other things, more explicitly addresses the statutory standard for approval of the proposed transfer of the Company's interest in the FCPP to NTEC.

[4] NMSA 1978, §§ 62-6-12 and -6-13 (1941, as amended through 1989).

[5] That deadline was subsequently vacated in the February 1st Order as was the remainder of the procedural schedule established and orally ordered by the Hearing Examiner at the January 28, 2021 prehearing conference. *See* Feb. 1st Order at 9, ¶ C.

[6] NMSA 1978, §§ 62-18-1 to -18-23 (2019).

Further, regarding the scope of issues to be covered in PNM's supplemental testimony, this Order follows the Commission's recent Order on Sierra Club's Motion to Re-open Docket to Implement the Revised Final Order ("Order on Motion to Re-open") in Case No. 16-00276-UT.[7] In denying Sierra Club's motion to reopen Case No. 16-00276-UT to conduct "the prudence review of certain [FCPP] expenditures that the Commission deferred in its [Revised Final Order],"[8] the Commission concluded that its order was not intended

> to reach beyond the immediate request that the Commission order a prudence review to pre-empt PNM's possible recovery of its undepreciated investments in FCPP. Such issues as whether the terms of the ETA may provide an opportunity for consideration of the prudence of undepreciated investments requested to be include in a financing order as energy transition costs or what the effect of the 'black box' rates approved in the Revised Final Order may have on determining energy transition costs are properly raised and considered in Case No. 21-00017-UT consistent with the due process requirements that all parties to that case have full notice and opportunity to be heard on those issues.[9]

Accordingly, as delineated specifically below and conditioned on acknowledging PNM's preclusion argument,[10] this Order requires PNM to address in supplemental testimony to be filed with the amended application the prudence of undepreciated investments for which PNM seeks inclusion in a financing order as energy transition costs as well as corollary issues such as the effect that the rates authorized by the Revised Final Order in Case No. 16-00276-UT – whether based on a so-called

[7] *In the Matter of the Application of Public Service Company of New Mexico for Revisions of its Retail Electric Rates Pursuant to Advice Notice No. 533*, Case No. 16-00276-UT, Order on Sierra Club's Motion to Re-open Docket to Implement the Revised Final Order ("Order on Motion to Re-open") (Feb 10, 2021).

[8] Order on Motion to Re-open, at 1, ¶ 1. The Revised Final Order refers to the Commission's Revised Order Partially Adopting Certification of Stipulation issued in Case No. 16-00276-UT on Jan. 10., 2018. The Commission also noted, at 1, ¶ 2, that Sierra Club had requested, in the alternative, "an order providing 'that the deferred prudence review be conducted, and given effect as appropriate, in [PNM's] Four Corners abandonment filing.'"

[9] Order on Motion to Re-open, at 7-8, ¶ 25.

[10] *See* PNM Resp. at 19-22.

"black box" settlement of revenues, a cost-of-service compliance filing, or some other instrument[11] – may have on determining energy transition costs in this case.

II. DISCUSSION

The seven questions posed in the February 1st Order are addressed below sequentially. The Responding Parties' positions are summarized first followed by PNM's response on each issue. However, given limited time and for the sake of brevity, while the Hearing Examiner has carefully considered all the points made in the Responding Parties' and PNM's submissions, not all positions and arguments are reflected below.

1) whether PNM's Application is sufficient as plead (i.e., whether the request for approval of the proposed abandonment can be granted without also requesting approval in the Application of the transfer of PNM's interest in the FCPP pursuant to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13).

With the exception of WRA, who thinks the Application is sufficient as plead,[12] the Responding Parties contend that the Application is deficient, cannot be granted as plead, and therefore should either be dismissed or, as alternatively suggested by Staff and others, filed as amended in this case with the statutory review period starting over upon the filing of the amended application.[13]

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[11] As set forth in its consolidated response, PNM's position is that

> the rates authorized by the Commission were not a so-called 'black box' settlement of revenues. The Commission required that the detailed basis of any stipulated revenue requirement be justified through 'a cost-of-service agreed to by the stipulating parties that shall have the same force and effect as a cost-of-service approved by the Commission in a fully-litigated rate case,' and the minimum requirements for rate base information and a stated return on equity. PNM's allowable Four Corners investments as of January 1, 2019, are reflected in the cost-of-service compliance filing, which also detailed the Commission's further adjustments to PNM's allowable rate base and expenses, and the compliance Advice Notice required by the Commission in the 2016 Rate Case. The rates set in the 2016 Rate Case are still in effect. Thus, these FCPP investments were in PNM's rates as of February 1, 2019, and, therefore, the undepreciated amounts of these investments are fully recoverable and subject to securitization under the ETA."

PNM Resp. at 21 (internal citations omitted).

[12] WRA Br. at 2-3.

[13] Staff Br. at 2-3.

Most of the Responding Parties focus on PNM's failure to explicitly seek approval to transfer the FCPP to NTEC pursuant to NMSA 1978, §§ 62-6-12 and 62-6-13. CCAE, for instance, notes that while the Commission does not have a Rule that applies to applications filed pursuant to § 62-6-13 of the ETA, the statute contains the minimum requirement for an application to be sufficient:

> Application shall be made by the interested public utility by written petition *containing a concise statement of the proposed transaction*, the reason therefor and such other information as may reasonably be required by the commission. . . .[14]

CCAE asserts a seemingly irrefutable point, i.e., that nowhere in PNM's Application is a "concise statement of the proposed transaction" between PNM and NTEC to transfer the FCPP made. Therefore, CCAE and all but one of the other Responding Parties maintain that PNM's application is not sufficient as plead because it does not meet the minimum pleading requirement of the statute.[15]

Responding Parties also challenged the sufficiency of the testimony PNM filed in support of the proposed transfer, arguing that PNM had failed to address various issues related to the transfer of PNM's interest in the FCPP to NTEC necessary to establish "no net detriment" or a "net public benefit" in the proposed transaction.[16]

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[14] NMSA 1978, § 62-6-13 (emphasis added).

[15] CCAE Br. at 4; ABCWUA/County Br. at 2-3; NEE Br. at 1 (incorporating by reference arguments made in NEE/CFRE Mtn. to Dismiss); Staff Br. at 2-3; Attorney General Br. at 1; Sierra Club, et al. Br. at 5 (Sierra Club, SJCA, Diné CARE, and Tó Nizhóní Aní also note that the Application's "vague catch-all request" for any other such authorizations necessary to implement the proposed actions "cannot cure [PNM's] failure to specifically request approval of the sale of its interest in Four Corners, as the Public Utility Act expressly requires. The purpose of an Application is to put the Commission and the parties on notice of the legal approvals that are being requested. It would frustrate this purpose if an applicant could merely request any and all approvals it needs without enumerating the specific approvals it is requesting, without citing the specific legal standards governing the requested approvals, and without providing supporting testimony.")

[16] *See, e.g.*, ABCWUA/County Br. at 5; CCAE Br. at 4; Sierra Club, et al. Br. at 2-4; NEE Br. at 1 (incorporating by reference Jt. Movant's Mtn to Dismiss at 34-35); NMAG Br. at 2;

ABCWUA and the County further contend that that PNM's Application fails to satisfy the requirement for allowing a utility or the Commission to defer an application for replacement resources under § 62-18-4(D) of the ETA. Section 62-18-4(D) provides that "the qualifying utility or the Commission may defer applications for needed approvals for new resources to a separate proceedings; provided that the application identifies adequate potential new resources sufficient to provide reasonable and proper service to retail customers." ABCWUA and the County argue that PNM's testimony, specifically the Direct Testimony of PNM witness Nicholas L. Phillips, does not identify adequate potential new replacement resources. They note that PNM merely indicates that there "were" potential new replacement resources. They also take the Phillips' testimony to task for indicating "the proxy resources used in the abandonment analysis may not reflect what may actually be developed through the competitive bid process for replacement resources."[17] ABCWUA and the County thus conclude that "without the identification of replacement resources, it is no wonder Mr. Phillips could not quantify the savings from early divestiture of FCPP assets that is required to show that the quantifiable and unquantifiable benefits of the transfer of FCPP assets to NTEC at against the costs of the transfer."[18]

On the other hand, WRA, joining PNM on the issue, maintains that PNM's testimony includes direct testimony (alluding to Thomas G. Fallgren's testimony), which, according to WRA, "describes the transfer with specificity, explains the reasons for this transaction and further, attaches the Purchase and Sale Agreement between PNM dated November 1, 2020."[19]

[17] ABCWUA/County Br. at 6 (citing Phillips Dir. at 18).

[18] ABCWUA/County Br. at 6-7.

[19] WRA Br. at 4.

PNM argues that its Application and supporting testimony of several PNM witnesses summarized in the Response in addition to the Fallgren and Phillips testimonies referred to above adequately outline PNM's requests for approvals with respect to the abandonment and proposed sale of its interests in FCPP to NTEC state a claim upon relief can be granted pursuant to a Rule 1-012(B)(6) NMRA and establish a *prima facie* showing for the requested approvals under 1.2.2.12(B) NMAC.[20] Therefore, PNM concludes, any claim that PNM's Application is legally deficient with respect to these matters must be rejected.

Responding to ABCWUA and the County's argument that the Application fails to satisfy the requirements for allowing a utility or the Commission to defer an application for replacement resources under § 62-18-4(D) of the ETA, PNM contends that PNM witnesses Fallgren, Phillips, and Fenton's testimonies satisfy the requirement.

PNM points out that PNM witness Fallgren confirms that the proposed December 31, 2024 exit date for FCPP allows time for PNM to complete a request for proposals (RFP) process, and to seek Commission approval of appropriate replacement resources so that they can be online prior to PNM's exit of FCPP.[21] PNM notes that Fallgren testifies that PNM will issue an RFP in the first quarter of 2021, after PNM files its 2020 Integrated Resource Plan (IRP). Once PNM finalizes the competitive bid selection process, it will file an application for approval of replacement resources in the fourth quarter of 2021 after the abandonment request has been reviewed by the Commission.[22]

PNM adds that witness Phillips confirms that for purposes of this abandonment filing, PNM reasonably used the most recent available data to develop proxies for alternative resources options

[20] PNM Resp. at 9-14, 23.

[21] Fallgren Direct, at 26.

[22] PNM Resp. at 23-24 (citing Fallgren Dir. at 26, 28).

for replacement resources. Phillips further confirms that the amount of potential capacity bid into PNM's RFP for the replacement resources related to the retirement of the San Juan Generating Station (SJGS) far exceed the identified capacity needs for replacement resources for FCPP, and that there is an adequate amount of new capacity that can be added to PNM's system by 2025.[23]

Finally, PNM points out that Mr. Fenton's testimony notes that the deferral of the approval for replacement resources is consistent with the Commission's bifurcation of the abandonment proceedings and replacement resources proceedings with respect to the SJGS.[24] Moreover, in its order granting abandonment for PNM's interest in the SJGS, the Commission expressly conditioned the abandonment upon the selection of adequate replacement resources; PNM submits the same condition can be imposed on PNM's proposed transfer and abandonment of its FCPP interests to ensure that adequate resources are available to serve customers.[25]

2) whether PNM's Application is sufficient as plead (i.e., whether the request for approval of the proposed abandonment can be granted without also requesting approval in the Application of the transfer of PNM's interest in the FCPP pursuant to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13).

This question was largely answered under the Question No. 1 above with the Responding Parties, excepting WRA which takes the contrary position,[26] asserting either that the deficient Application cannot be granted as plead and thus warrants dismissal[27] or that the potential problems

[23] PNM Resp. at 24 (citing Phillips Dir. at 18).

[24] *Id*. (citing Fenton Dir. at 3).

[25] *Id*. (citing Recommended Decision on PNM's Request for Authority to Abandon its Interest in SJGS Units 1 and 4 and to Recover Non-Securitized Costs, Case No. 19-00018-UT, at 34-35, (Feb. 21, 2020)).

[26] WRA Br. at 3-4.

[27] ABCWUA/County Br. at 3-5; CCAE Br. at 5; Sierra Club, et al. Br. at 7; NEE Br. at 1; NMAG Br. at 2.

created by failing to properly plead the request for transfer could be cured if PNM files an amended application in this case to include the proposed transfer of the Four Corners facility.[28]

PNM, appropriately, incorporates by reference its arguments against dismissal in response to Question No. 1 above and Section III.B. of its Response, whereunder for the reasons asserted there, PNM claims that the Application is sufficient for the Commission to grant approval of PNM's proposed abandonment and transfer of its interests to NTEC.[29]

3) whether the Commission's consideration of PNM's Application for approval of the proposed abandonment should be conditioned upon its filing of an amended application in which it also requests approval of the transfer of PNM's interest in the FCPP pursuant to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13.

Most but not all of the Responding Parties are resistant to the idea of allowing PNM to file an amended application, arguing, for instance that it is not the job of the Commission to accept defective pleadings and grant an applicant additional time to correct a defective pleading, and that it would prejudice intervenors if the Commission allowed PNM to correct the application and filed new testimony in this docket.[30] Taking the opposite approach, WRA thinks consistent with its position stated above, that an amendment to include an express approval of the sale and transfer to NTEC pursuant to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13 is not required for the case to go forward.[31]

Between those two poles, certain Responding Parties think the Commission could allow PNM to file a conforming amended application, but only if as NEE puts it, "PNM agrees in advance to reset the statutory timeclock and/or waive any time periods for abandonment/securitization

[28] Staff Br. at 3.

[29] PNM Resp. at 9.

[30] Sierra Club et al. Br. at 7-8; NMAG Br. at 2; NEE Br. at 1-2.

[31] WRA Br. at 5.

proceedings until the parties have had adequate time to develop the record related to the benefits of the proposed sale, should the PRC allow consideration of the proposed sale to go forward."[32] Staff, likewise, submits that the statutory review period should commence with the filing of the amended application, "as it would for any other amended application before this Commission."[33]

PNM, for its part, maintains that while it is unnecessary to require it to file an amended application, the Company is nevertheless willing to amend its application and reset the statutory deadline under the ETA to commence upon the filing of the amended application, with one caveat and one request. The caveat is that PNM's amended filing would not waive PNM's legal position that the ETA governs PNM's recovery of its FCPP abandonment costs. The request is that the Hearing Examiner and Commission re-adopt the essential elements and deadlines of the initial schedule developed by the Hearing Examiner at the pre-hearing conference on January 28, 2021, "so that," in PNM's words, "this case may proceed on a timely basis and in accordance with the ETA. PNM believes that this schedule remains workable and does not prejudice the rights of parties."[34]

4) whether the statutory review period for the Commission's review of PNM's Application for both the abandonment and securitization approvals should start anew upon the filing of an amended application.

Roughly speaking and with one exception,[35] PNM's position appears to reflect a general consensus of the parties as a whole, some of whom still press for dismissal,[36] others of whom are

[32] NEE Br. at 2.

[33] Staff Br. at 3.

[34] PNM Resp. at 3-4, 25.

[35] Given WRA's position that the Application is sufficiently plead and, thus, does not require amending, WRA takes the position that the statutory review period should not start anew. WRA Br. at 5-6.

[36] Sierra Club et al. Br. at 9-10; NMAG Br. at 2.

open to an amended application if PNM essentially consents to restarting the statutory review clock upon the amended filing.[37] PNM's statement on Question No. 4 is as follows:

> The ETA requires that the Commission rule on an application within nine months, if the time for ruling has been extended for good cause. If the Commission fails to timely act on an application, it is deemed approved. There is no provision in the ETA that allows the Commission to unilaterally extend the statutory deadline under the ETA based on an amended application. While the ETA does not have any provision that allows the Commission to unilaterally extend the statutory deadline under the ETA based on an amended application, there is no provision that precludes PNM, as the applicant, from agreeing to an extended period of time in conjunction with the submittal of an Amended Application.[38]

5) whether, in the alternative to starting the statutory review period anew upon the filing of an amended application, the statutory review period should be extended for some specific and reasonable period of time to account for the filing of an amended application to address the deficiencies in the current Application or, at the very minimum, to account for the additional time required to address the matters implicated herein.

In hindsight, as reflected in the parties' positions summarized above, the problem implicit in this question was effectively solved in the parties' responses to Question No. 4. In other words, mirroring PNM's response above, the ETA requires that the Commission rule on an application within nine months, if the time for ruling has been extended for good cause.[39] If the Commission fails to timely act on an application, it is deemed approved.[40] Thus, the general consensus view is that there is no provision in the ETA that allows the Commission to unilaterally extend the statutory deadline under the ETA due to the filing of an amended application. Nevertheless, there is no provision in the ETA or other governing law or rule that prevents the utility applicant from consenting to start the statutory review period anew triggered by the filing of its amended application.

[37] ABCWUA/County at 7; CCAE Br. at 5-7; NEE Br. at 2-3; Staff Br. at 2.

[38] PNM Resp. at 10 (internal citations to NMSA 1978, §§ 62-18-5(A), 62-18-5(B)).

[39] NMSA 1978, §§ 62-18-5(A).

[40] NMSA 1978, § 62-18-5(B).

6) address the scope of issues that should be covered in PNM's supplemental testimony inasmuch as a) there was already discussion at the prehearing conference over whether the parties should brief the scope of issues, b) PNM has already broached its interpretation of issues to be addressed, and c) the Commission is set to consider at its February 3, 2021 Open Meeting potential orders addressing Sierra Club's related Motion to Reopen Docket No. 16-00276-UT to Implement the Revised Final Order and NEE's formal complaint against PNM in Case No. 20-00210-UT for the Company's alleged "Continued Reliance on Expensive and Climate-Altering [FCPP] Coal resulting in Unfair, Unreasonable, and Unjust Rates."

With a couple of exceptions discussed below (particularly NEE and Staff), the Responding Parties appear in general agreement that PNM should be required to address in this case through supplemental testimony the prudence of the FCPP investments for which the Commission expressly deferred the "issue of imprudence" or "potential imprudence" in the Revised Final Order in Case No. 16-00276-UT.[41] From that vantage point of incomplete consensus, their opinions diverge and expand. Accordingly, set forth below is a recitation of the Responding Parties' positions on the scope of issues that they believe should be addressed in PNM's supplemental testimony, or in NEE and Staff's opinions are not addressable due to perceived legal impediments, followed by PNM's statement of position.

ABCWUA and the County list eight specific issues, some of which would presumably be addressed, as appropriate, in PNM's direct testimony filed in support of an amended application. Nonetheless, ABCWUA and the County believe PNM should submit supplemental testimony that:

1. Addresses the requirements of §§ 62-6-12(A)(4) and 62-6-13 and how PNM's Application satisfies the standards of these statutes;

2. Provides calculations demonstrating that the proposed abandonment and transfer of PNM's FCPP interests to NTEC provides a net public benefit considering all costs,

[41] *See* Revised Final Order, Case No. 16-00276-UT, at 23 ¶¶ 66, 67 ("The Commission finds merit in the Signatories' arguments that the benefit to ratepayers under the Revised Stipulation are so significant that the Commission is justified in deferring, for the limited duration of the period that the revised Stipulation will be in effect, a finding on the issue of PNM's prudence in its continued participation and investment in the FCPP until PNM's next rate filing." . . . . "The Certification found that an appropriate remedy for PNM's imprudence included denying all costs associated with the $90M SCR and $58M in additional investments and improvements at FCPP, but settled on a disallowance of any return on the $149M of SCR and additional capital investments at FCPP.").

including abandonment and other energy transition costs and securitization costs to include anticipated carrying costs;

3. Identifies the adequate potential new replacement resources for abandoned FCPP interests required by NMSA 1978 Section 62-18-4(D);

4. Addresses the prudence issue of PNM's continued participation and investment in the FCPP that was deferred in Case No. 16-00276-UT;

5. Provides an estimate of the number of the employees losing their jobs as a result of the transfer of PNM's interest in the FCPP to NTEC and estimate the severance pay and job training expenses for affected employees as required by NMSA §§ 62-18-4(B)(2);

6. Provides an estimate of carrying costs for the requested securitized bonds;

7. Addresses the salvage value of PNM's interest in FCPP (assuming the plant were abandoned and not transferred) and the estimated market value for PNM's interest in the FCPP with separate items related to plant upgrades and stranded costs related to expenditures and the relation to items found imprudent in the 16-00276-UT Certification of Stipulation; and

8. If PNM does not recover energy transition costs pursuant to the Energy Transition Act, how would the energy transition costs be recovered pursuant to other applicable provisions of the Public Utility Act. NMSA 1978, § 62-18-4.[42]

CCAE mentions the "prudence issue" in observing that "more time" to address the issues in this case "would be preferable" if PNM is granted "permission to amend its application on 'such conditions as are deemed appropriate.'"[43] However, CCAE does not address Question No. 6 directly.[44]

Sierra Club, SJCA, Diné CARE, and Tó Nizhóní Aní take the position that if PNM's Application is not dismissed "in its entirety for being deficient with respect to the important issue of requesting approval for the sale of PNM's Four Corners interest to NTEC," then "the Hearing Examiner should direct PNM to file supplemental testimony concerning the prudence of the Four

[42] ABCWUA/County Br. at 7-8.

[43] CCAE Br. at 7-8.

[44] *See id*. at 8 ("…").

Corners investments that were at issue in Case No. 16-00276-UT and which PNM has included in its proposed financing order."[45] However, they believe that

> the optimal sequencing of cases is for the Commission to determine the prudence of the Four Corners investments in a docket separate from, and prior to, considering PNM's abandonment and sale of its Four Corners interest, and approval of an ETA financing order. The primary disadvantage to conducting the prudence review in this docket is the nine-month deadline for the Commission to issue a final decision in this case. PNM indicated at the pre-hearing conference that it would need until at least mid-March to prepare supplemental testimony on the prudence issues. But as noted above, the ETA does not allow the Commission to extend the nine-month deadline, which would mean that the time PNM takes to prepare its supplemental testimony would result in less time for the intervenors and the Commission to review PNM's supplemental testimony, which would cause prejudice. Thus, the optimal outcome is dismissal of PNM's current application and the opening of a new docket to conduct the prudence review. We further note that PNM's proposed abandonment and sale of its Four Corners interest does not take effect until December 31, 2024, almost four years in the future. Thus, if this case were dismissed, there should be ample time to open a new docket to resolve the prudence issues and for PNM to later file a new abandonment application.[46]

WRA begins its response by noting that at its February 10, 2021 Open Meeting, the Commission indicated that the prudence of FCPP investments at issue in Case No. 16-00276-UT, specifically PNM's $90.1 million in Selective Catalytic Reduction (SCR) technology and $58 million in additional life-extending investments and improvements, will be addressed in this proceeding.[47] WRA therefore believes that PNM should be ordered to file supplemental testimony covering those FCPP investments in this proceeding. Additionally, WRA submits that PNM should be ordered to address the prudence of all other FCPP investments included in PNM's request for securitization of $271.3 million in undepreciated investments, "specifically including but not limited

[45] Sierra Club et al. Br. at 11 (Sierra Club et al. note that their rationale for ordering this supplemental briefing is contained in Sierra Club's Jan. 25, 2021 Motion for Supplemental Testimony).

[46] Sierra Club et al. Br. at 11-12.

[47] WRA Br. at 6.

to a line-by-line justification of the $73 million in 'Capital Clearings' identified in PNM Table TSB-4 [to the Direct Testimony of Thomas S. Baker] and how they satisfy the criteria of NMSA § 62-18-2(H)(2)(d)."[48]

NEE, on the other hand, does not believe "traditional legal principles" like a prudence determination are justiciable in an ETA abandonment and securitization proceeding. Expanding on its argument, NEE says that it

> concurs with Sierra Club that if this abandonment and securitization is approved and results either in PNM's recovery of 100% of its claimed costs in FCPP, or in the sale and transfer of PNM's interest in FCPP so it will continue to pollute and contribute to climate disruption, that will result in "manifest injustice" and is contrary to the public interest thereby violating the law and "net public benefit" standard as more fully articulated in their *Motion for an Order Requiring PNM to File Supplemental Testimony Addressing the Prudence of Four Corners Investments, Or, in the Alternative, to Dismiss PNM's Application*, p. 6 and *Joint Movants' Motion to Dismiss and Supporting Brief*, 1/28/2021, *passim*. Seldom does NEE concur with PNM, but as much as we don't like it, PNM has repeatedly stated that the case herein "must be decided under the legal framework of the ETA." NM PRC Case No. 16-00276-UT, *Response of PNM In Opposition to Sierra Club's Motion to Re-Open Docket No. 16-00276-UT to Implement the Revised Final Order*, 1/11/2021, p.12. Under the ETA there is no ability for traditional legal principles to be applied (e.g., prudence determination, rates must be fair, just and reasonable, the fair balancing of interests between consumers and shareholder investors). This is what was found by the Hearing Examiners in 19-00018-UT and adopted by the Commission."[49]

Additionally, NEE maintains "that the Parties should continue to urge the PRC to address those prudence issues in NEE's Complaint case, 20-00210-UT, which was filed before the case herein. This approach will allow the PRC to address those issues in a timely manner before it rules on any amended PNM Application for abandonment of FCPP, i.e., with or without selling its interest in that plant to any other party."[50]

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[48] WRA Br. at 6-7.

[49] NEE Br. at 3-4 (internal citations omitted).

[50] NEE Br. at 4.

NEE postulates, in conclusion, that "[w]hen signing SB 489, the Energy Transition Act, into law New Mexico Governor Lujan Griham [sic] touted the law as establishing a pathway for an energy transition away from coal. The only way the requirements of the ETA can be suspended is by recognizing that PNM, too, presented the ETA as a mechanism for closing coal and that now they are saying they are not going to do it unless they get permission to violate the ETA's ban on the sale of coal plants."[51]

Staff believes that PNM's filing of this abandonment proceeding prior to its next rate case, invoking the provisions of the ETA to ensure full recovery of its undepreciated investments in Four Corners, "is in effect a collateral attack on the provisions of the order in Case No. 16-00276-UT that directed a prudence review of PNM's continued participation in the Four Corners facility."[52] Staff, thus, "does not see how the Commission can conduct such a review within the confines of the 21-00017-UT proceeding, as it was submitted using the prescriptively narrow confines set forth within the ETA for review of an abandonment."[53]

The Attorney General concurs with Staff "that PNM's filing of this Application before its next rate case appears to be a means of invoking the provisions of the Energy Transition Act to undo a stipulation agreed to in 16-00276-UT in order to guarantee full recovery of its undepreciated investment in the FCPP. While Staff has a valid concern regarding the Commission's authority to address these issues in this docket, short of the Commission reconsidering Sierra Club's motion to reopen 16-00276-UT, or this Application being denied, the Attorney General agrees that the due

[51] *Id.*

[52] Staff Br. at 4.

[53] *Id.*

process rights of all parties would [be] best served by requiring PNM to file testimony that addresses the deferred prudence in this docket."[54]

Lastly, PNM states that it "does not believe that the issue of FCPP prudence with respect to the amount of investments included in rates prior to January 1, 2019, may be properly considered in this or any other proceeding in light of the change in law under the ETA, which sets forth the standards for the inclusion of undepreciated investments in the requested securitized financing."[55] Nevertheless, "PNM acknowledges that in its Order on Motion to Re-open, the Commission stated that the issue of whether the ETA may provide an opportunity for consideration of the prudence of undepreciated investments to be included in a financing order is an issue that is properly raised and considered in this case."[56] Therefore, "[b]ased on the Commission's ruling, PNM is prepared to address why the ETA preempts consideration of FCPP prudence through the establishment of standards for the securitized financing of undepreciated investments. PNM is prepared to file supplemental testimony on the issue of FCPP prudence as articulated by the Commission in its Order on Motion to Re-open, in accordance with the initial date of March 15, 2021 contemplated by the Hearing Examiner, and without waiving its legal positions as stated above."[57]

7) any other comments or concerns regarding PNM's proposed notice in its revised form.

CCAE notes that the proposed form of notice, even as revised to include notice of the request for approval of the transfer to NTEC, "does not cure the deficiency in the application, or with the caption of the case. The amended notice gives notice of something the application does not contain.

[54] NMAG Br. at 3.

[55] PNM Resp. at 27.

[56] *Id*.

[57] PNM Resp. at 27-28.

The defects in the application must be cured by amendment pursuant to the Commission's Rules (or by dismissal and re-filing). Merely amending the notice is not sufficient to cure the fact that the application does not include a request for Approval under NMSA § 62-6-13."[58]

Sierra Club Sierra Club, SJCA, Diné CARE, and Tó Nizhóní Aní add that PNM's revision to the notice "underscores that, in all of PNM's original pleadings, PNM did not adequately address the proposed sale to NTEC."[59]

WRA, not shying away from the request for relief missing from the Application and original proposed notice, states that the Hearing Examiner "may require notice may require that the notice of proceeding to be published, posted and mailed by PNM contain an express reference to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13."[60]

Finally, PNM asserts that the revised proposed form of notice it submitted on January 29, 2021 "provides the requisite information and notice to customers and the public with respect to PNM's Application. However, because the originally contemplated pre-hearing schedule was vacated pursuant to the Order, some adjustments to the proposed Notice, specifically with respect to deadlines for notice and intervention, is warranted. PNM requires five weeks to effect public notice through customer bills and publication. PNM, therefore, proposes that the deadline for intervention be extended to May 14, 2021. PNM proposes that the hearing date and other prehearing deadlines remain the same as initially set by the Hearing Examiner."[61]

[58] CCAE Br. at 8.

[59] Sierra Club et al. at 13.

[60] WRA Br. at 7.

[61] PNM Resp. at 29.

III. ANALYSIS AND CONCLUSIONS

The Hearing Examiner finds that PNM's Application is deficient on its face. The Application fails to plead and adequately support a necessary claim for relief, that being an explicitly plead and sufficiently supported request for the approval of the sale and transfer of its minority interest in the FCPP to NTEC pursuant to Sections 62-6-12(A)(4) and 62-6-13 of the Public Utility Act as a condition of abandoning the FCPP pursuant to Section 62-9-5, which, notably, PNM did not also omit from the Application in listing as the first of "two" specific "actions"[62] for which it seeks Commission approval, i.e., the "abandonment of PNM's 200 MW share of Four Corners, representing a minority interest of thirteen percent (13%) of the total generation capacity at the plant[.]"[63] But the Application fails to include the analogous but equally essential statement of the requested action subsequent to abandonment – Commission approval of the transfer of PNM's minority interest in the FCPP to NTEC –expressly required by Section 62-6-13.[64]

Moreover, judging from PNM's acknowledgment that it needs to be more explicit next time, the purported testimony filed in support of the required action omitted from the Application, viewed in the best light, assists the finder of fact rather meagerly in attempting to cogently articulate – let

[62] The second "action" being the "securitized financing of plant abandonment and financing costs along with funding for state-administered tribal and community programs." Application at 3.

[63] *Id*. And, unlike the omission of Sections 62-6-12 and 62-6-13, PNM expressly cites and discusses the abandonment provision in the Application twice, on page 9, and once in PNM's proposed Recommended Decision on PNM's Request for Issuance of a Financing Order, also on page 9 of that document.

[64] Which is to say, if the Commission approves the condition precedent, i.e., that the proposed abandonment of utility property and service is in the public interest, "the Commission then determines whether the proposed sale of utility assets is in the public interest." *See In the Matter of the Application of Continental Divide Elec. Coop., Inc. for Approval of the Transfer of Certain Assets to the Pueblo of Acoma and for Abandonment of Such Assets and Service Therefrom Upon Transfer*, Case No. 20-00199-UT, Recommended Decision at 9 (Dec. 7, 2020), *approved by* Order Adopting Recommending Decision (Dec. 30, 2020).

alone find as required by a preponderance of the evidence – the grounds for approval of the proposed transfer, i.e., that the transfer would produce a net public benefit.[65]

The Application, therefore, is insufficient. To hold otherwise would be tantamount to countenancing a fundamentally defective pleading practice to the probable detriment of this matter[66] and inevitable detriment of future Commission proceedings.[67]

As for the other grounds for insufficiency of the Application raised by the Responding Parties, the Hearing Examiner agrees with PNM that the interpretation by ABCWUA and the County that Section 62-18-4(D) requires a utility to have the exact proposed replacement resource identified at the time an abandonment filing is made pursuant to the ETA misapprehends this section of the ETA and would effectively nullify it if applied as ABCWUA and the County advocate. For purposes of pleading, at this nascent stage of the proceeding PNM's Application and supporting testimony appear to sufficiently address the requirement under Section 62-18-4(D) that adequate potential new resources be identified. For purposes of ultimate proof, however, whether this requirement has been satisfied awaits a ruling based on the evidence adduced at hearing.

[65] *See id.* Recommended Decision, Case No. 20-00199-UT, at 9-10.

[66] *See* Staff Br. at 1-2 ("It appears to Staff that PNM's proposed abandonment is inextricably tied to the transfer of its interest in the Four Corners Power Plant. It is not clear how the facility, once abandonment has been granted, could then be transferred to another entity by PNM, since it would no longer have an interest in the plant. PNM could file separately for the transfer under NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13), and the Commission could consolidate those proceedings. However, it is unclear how such a consolidated proceeding could be completed within the time frame envisioned under NMSA 1978, § 62-18-5(A), which PNM seeks to invoke in its Application. . .. The Application for abandonment in this case could conceivably be granted, but doing so would cause problems for any subsequent attempt to transfer the interest in the Four Corners Power Plant, as explained above. In order to properly process the abandonment and transfer, the matters should be considered in the same docket.").

[67] Indeed, as noted in the February 1st Order, in all the Commission cases involving requests to approve the transfer of utility assets cited in the Order, the petitioning utility expressly plead Sections 62-6-12 and 62-6-13 in their applications and included references to the statutes in their proposed notices to cooperative members. *See* Feb. 1st Order at 5 n.15.

In any case, having found the Application deficient for the reasons stated, in ordinary circumstances the appropriate remedy would be to dismiss the Application for good cause pursuant to Rule 1.2.2.12(B) NMAC. In this instance, the dismissal ordered would be without prejudice to filing a conforming application in a new Commission docket.

However, two compelling factors militate against dismissal in this case. First, in its Order on Motion to Re-open in Case No. 16-00276-UT, the Commission plainly expressed its preference that issues such as whether the ETA may provide an opportunity to consider the prudence of undepreciated FCPP investments includable in a financing order should be considered in this case.

Moreover, in its consolidated response, PNM made two significant and constructive concessions that, viewed in conjunction with the Commission's preference and expectation, dictate continuing this case while simultaneously maintaining the due process rights of all parties to have full notice and a reasonable opportunity to be heard on all salient issues.

First, PNM has volunteered to file an amended application and supporting testimony more explicitly addressing the statutory standard of approval for the proposed transfer of its interest in the FCPP to NTEC as well as, subject to not waiving its legal positions, supplemental testimony responding to the Commission's ruling in Paragraph 25 of its Order on Motion to Re-open regarding the impact of the ETA with respect to prudence considerations and the rates established in that case.

Second, and crucially, PNM agreed that the nine-month statutory deadline under the ETA will commence upon the filing of the amended application, which if filed as proposed by PNM on March 15, 2021, would extend the deadline for Commission action on the amended application to December 15, 2021.

Accordingly, having found PNM's concessions reasonable, the Hearing Examiner will allow PNM to file an amended application subject to commencing, for good cause duly established and

effectively admitted by PNM, the full nine-month review period pursuant to Section 62-18-5 of the ETA on the date of filing.

With regard to the scope of the supplemental testimony the Hearing Examiner is ordering PNM to file with the understanding that PNM is not waiving its legal positions in filing such testimony, and in accord with the Commission's Order on Motion to Re-open and the parties' input, the supplemental testimony shall, at a minimum,

1) address the prudence of all undepreciated investments in the FCPP for which PNM seeks inclusion in a financing order as energy transition costs, demonstrating the consequent impact (specified in dollars) on ratepayers attributable to such itemized energy transition costs through recovery in energy transition bonds, including but not limited to,

a) a line-by-line justification of the $73 million in "Capital Clearings" identified in PNM Table TSB-4 to the Direct Testimony of Thomas S. Baker and how they satisfy the criteria of NMSA 1978, § 62-18-2(H)(2)(d).

2) address and defend with particularity the prudence of the FCPP investments for which the Commission deferred the "issue of imprudence" or "potential imprudence" in Case No. 16-00276-UT.

3) address whether or not the FCPP investments for which the Commission deferred the issue of imprudence, or framed obversely, the determination of prudence, were in PNM's rates after the issuance of the Revised Final Order in Case No. 16-00276-UT and, thus, were being recovered in PNM's rates as of January 1, 2019.

4) if the answer to Issue No. 3 above is in the affirmative,

a) discuss the events or circumstances surrounding when, how, and in what instrument(s) or document(s) filed with the Commission in Case No. 16-00276-UT or some other docket or Records Bureau process, identifying in particular,

i. the FCPP investments, or, if applicable, the constituent elements of the investments, for which the Commission deferred a determination of prudence were recorded; and

ii. the precise locations and amounts (in dollars) of the FCPP undepreciated investments for which the Commission deferred a determination of prudence were recorded in such instrument(s) or document(s).

b) identify the precise amounts (in dollars) of the FCPP undepreciated investments for which the Commission deferred the determination of prudence have already been recovered from ratepayers in rates; and

c) identify the precise amounts (in dollars) of the FCPP undepreciated investments for which the Commission deferred a determination of prudence remain subject to recovery from ratepayers in rates or through the issuance of energy transition bonds.

In addition, another technical but nevertheless essential requirement must be fulfilled. The Commission's rule covering the withdrawal of pleadings, Rule 10(E), provides that pleadings, such as applications,[68] may be withdrawn or amended "only with leave of the commission or presiding officer and upon such conditions as the commission or presiding may deem appropriate."[69] Accordingly, as provided for below, PNM should formally move for leave to withdraw its Application, in its discretion, through a pleading filed before or conterminously with the amended application.

Finally, given the effective extension of the nine-month review period to December 15, 2021 and bearing in mind the due process rights of intervenors and Staff, the Hearing Examiner declines,

[68] 1.2.2.7(S) NMAC (defining a "pleading" to mean an "*application*, petition, complaint, answer, motion, response to motion, exception, or other formal written statement filed in any formal proceeding.") (emphasis added).

[69] 1.2.2.10(E)(1) NMAC.

at this time, to re-institute the remainder of the procedural schedule, as suggested by PNM. The procedural schedule for this case will be developed after consulting with the parties at the prehearing conference, scheduled by separate Order issued on this date, for March 18, 2021.

IV. ORDERING CLAUSES

THEREFORE, having incorporated herein the foregoing Introduction, Discussion, and Analysis and Conclusions as findings of fact and conclusions of law, the Hearing Examiner **ORDERS** as follows:

A. PNM shall file an amended application in this case by March 15, 2021.

B. The nine-month statutory period for review of the amended application pursuant to NMSA 1978, § 62-18-5(A) shall start anew on the date of its filing and thus shall run through December 15, 2021.

C. In addition to submitting testimony in support of the amended application consistent with the foregoing discussion, PNM shall file by March 15, 2021 supplemental testimony addressing the issues set forth *supra*, at 22-23, regarding undepreciated investments in the FCPP and the determination of prudence of the FCPP investments for which the Commission deferred such determination in Case No. 16-00276-UT.

D. Prior to or in conjunction with filing the amended application, PNM shall move for leave to withdraw the January 8, 2021 Application pursuant to Rule 1.2.2.10(E) NMAC.

E. Upon their filing, PNM shall email the Hearing Examiner the amended application, proposed form of notice, direct testimony, and supplemental testimony in Word.[70]

[70] This request for documents in Word excludes exhibits to testimony, which should be provided, for efficient searchability, as PDFs with an optical character recognition (OCR) resolution of 300 dpi.

F. A procedural schedule for this case shall be established at or after the Prehearing Conference to be held in this case on March 18, 2021 at 2:00 p.m. as more specifically provided for in the Order Scheduling Prehearing Conference issued contemporaneously on this date.

G. This Order is effective immediately.

ISSUED at Santa Fe, New Mexico this **26th** day of **February 2021**.

NEW MEXICO PUBLIC REGULATION COMMISSION

Anthony F. Medeiros

[*electronic signature*]
Anthony F. Medeiros
Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL OF THE ABANDONMENT OF THE FOUR CORNERS POWER PLANT AND ISSUANCE OF A SECURITIZED FINANCING ORDER	))))))	**Case No. 21-00017-UT**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused to be sent to the individuals listed below, via email only, a true and correct copy of the ***Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding*** issued February 26, 2021.

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DATED this **26th** day of **February 2021**.

NEW MEXICO PUBLIC REGULATION COMMISSION

Anthony F. Medeiros

[*electronic signature*]
Anthony F. Medeiros
Hearing Examiner