IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39138

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

SIERRA CLUB, NEW ENERGY ECONOMY, WESTERN RESOURCE ADVOCATES, and COALITION FOR CLEAN AFFORDABLE ENERGY,

Intervenors-Appellees.

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 Financing Order, NMPRC Case No. 21-00017-UT

PUBLIC SERVICE COMPANY OF NEW MEXICO'S CONSOLIDATED REPLY BRIEF TO THE ANSWER BRIEFS OF THE NEW MEXICO PUBLIC REGULATION COMMISSION, NEW ENERGY ECONOMY, SIERRA CLUB AND THE COALITION FOR CLEAN AFFORDABLE ENERGY

(Oral Argument Requested)

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Appellant Public Service Company of New Mexico states that the body of this Consolidated Reply Brief is 38 pages and contains 8,978 words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Word for Microsoft 365 MSO Version 2108, and is therefore within the limits permitted by the Court's order issued on May 31, 2022.

TABLE OF AUTHORITIES

Federal Cases

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I. INTRODUCTION

Public Service Company of New Mexico's ("PNM") Brief-in-Chief ("BIC") asks this Court to vacate the *Order on Recommended Decision on Request for Approval of the Sale and Abandonment of PNM's Interest in the Four Corners Power Plant and Issuance of a Securitized Financing Order* ("Final Order") issued by the New Mexico Public Regulation Commission ("Commission") on December 15, 2021, in Case No. 21-00017-UT. The Final Order unlawfully denied PNM's consolidated abandonment and financing application ("Application") related to the Four Corners Power Plant ("FCPP"), filed pursuant to the Energy Transition Act ("ETA").[1] The Final Order also improperly requires that PNM relitigate PNM's alleged imprudence regarding the FCPP, notwithstanding that the Commission previously authorized PNM to recover FCPP investments in Case No. 16-00276-UT,[2] and required PNM to fully litigate FCPP prudence issues in the proceeding below.

[1] On November 12, 2021, the Hearing Examiner issued two Recommended Decisions addressing abandonment and securitization. *See* Case No. 21-00017-UT, *Recommended Decision on PNM's Request for Approval of the Sale and of its Interest in the Four Corners Power Plant and to Recover Non-Securitized Costs* ("Abandonment RD") **[35 RP 14873-15000]**; *Recommended Decision on PNM's Request for Issuance of a Financing Order* ("Financing RD") **[36 RP 15001-15192]**. The Final Order denied PNM's request for a financing order based on its denial of PNM's FCPP abandonment request.

[2] This Reply Brief will refer to this case as the "2016 Rate Case."

The Answer Briefs[3] attempt to reframe the Commission's faulty legal determinations in misinterpreting and misapplying the ETA as factual determinations, and offer impermissible *post hoc* rationalizations to support the Final Order. These arguments cannot overcome the Final Order's fundamental legal errors. Because the Commission unlawfully denied PNM's requests under the ETA for abandonment of FCPP and issuance of a financing order, the Final Order should be reversed.

The Court should further find that the Commission's arbitrary actions cannot be used to continually revisit the question of the prudence of PNM's investment in FCPP. The ETA mandates securitization of FCPP investments on PNM's books and records and being recovered in rates as of January 1, 2019 as requested by PNM,[4] but the Commission purposefully avoided this mandate by denying abandonment as a convenient "reason" for the Commission to avoid securitizing FCPP investments. The Commission should be barred from using it improper denial of abandonment as a pretext to avoid or reduce PNM's recovery of FCPP abandonment costs as allowed by the ETA.

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[3] Answer Briefs were filed by (1) the Commission, joined by Western Resource Advocates ("WRA"), (2) New Energy Economy ("NEE"), and (3) jointly by Sierra Club and the Coalition for Clean Affordable Energy ("CCAE") (together ("SC/CCAE").

[4] NMSA 1978, §§ 62-18-2(H)(2)(c), 62-18-4 and 62-18-5.

II. ARGUMENT

The Answer Briefs attempt to defend the Final Order on new theories not articulated in the Final Order and try to inject extra-record evidence into this Court's review to bolster their arguments.[5] This Court's review, however, is limited to evaluating the *actual* determinations made and stated in the Final Order for denying PNM's Application, based on the Record Proper. Because review of the Commission's legal determinations is *de novo,* the Answer Briefs also attempt to transmute legal conclusions into factual questions to invoke a judicial deference to the agency that is not owed. The Answer Briefs' rewriting of the Final Order to sidestep such fundamental appellate review principles demonstrates why the Final Order cannot stand.

The Final Order does not rely on, or even reference, the vast majority of the numerous bases argued in the Answer Briefs to support the Final Order. Rather, the Final Order's twelve pages[6] of analysis offers only two reasons for denying the

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[5] **[***See, e.g.,* **Commission AB 20-22** (citing PNM filings in an entirely different case that is not in the Record Proper of this proceeding, including evidence that was filed in the separate case in January and February of 2022, subsequent to Final Order issuance)**] [***See also* **SC/CCAE AB 23].** While the SC/CCAE AB cites to the Final Order at paragraph 27 **[37 RP 15420 ¶ 27]** for purported supply-chain concerns related to FCPP replacement resources, the information included in the Commission's Final Order is much more limited than the extra-record evidence presented on this issue by SC/CCAE's Answer Brief.

[6] **[37 RP 15414-15427]**

Application: 1) PNM's failure to identify "the actual potential new resources that PNM is considering"[7] to replace the abandoned FCPP generating capacity; and 2) PNM's "breach," as characterized in the Final Order, of PNM's commitment in the 2016 Rate Case stipulation to analyze hypothetical early exits of FCPP in the PNM's 2020 Integrated Resource Plan ("IRP"), with such early exists based on assumed PNM contract defaults in 2024 and 2028.[8] The Commission provided little reasoning for its rejection of the law and facts set forth in the Hearing Examiner's well-reasoned Abandonment RD and Financing RD, which recommended approving PNM's application to abandon FCPP and securitize the FCPP abandonment costs.[9]

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[7] **[37 RP 15419 ¶ 22]**

[8] **[37 RP 15424 ¶ 38** ("PNM's breach is a separate basis on which to deny PNM's current application for abandonment . . . .")**]**. PNM's IRP was filed with the Commission on January 29, 2021, in pending Case No. 21-00033-UT, after the case on appeal here was filed.

[9] NEE invokes the Commissioners' deliberations to try to bolster the Final Order, tacitly admitting that the bare bones analysis and discussion in the Final Order cannot stand on its own. **[NEE AB 48]** However, as the Supplemental Record Proper indicates, the deliberations primarily took place in a closed-door session. **[1 SRP 006-010]** None of the Commissioners summarized these deliberations after going back into public session, and instead the Chairman stated the "best way to inform everybody about exactly what we're doing and why is to read the dang Order." **[1 SRP 010]** Immediately after the Final Order was read by the General Counsel, Commissioner Maestas moved to approve the Order as presented, Commissioner Hall seconded that motion, and some Commissioners made brief comments before the vote occurred. **[1 SRP 030-035]** NEE's characterization of these Commission discussions as robust deliberations weighing the ramifications of the Final Order are belied by the record.

On appeal the Commission, NEE and SC/CCAE raise a host of reasons not addressed in the Final Order as grounds to affirm. To name a few, they argue:

- Supply chain concerns drove the Commission's decision, which ignores uncontested relevant testimony to the contrary.
- The sale of PNM's interest in FCPP to the Navajo Transitional Energy Company ("NTEC") does not align with the intent of the ETA to close coal plants early.[10] This argument ignores the ETA's recognition that a non-operator, such as PNM, could abandon its interest separately from retirement of the entire FCPP plant.[11] This argument also ignores the Hearing Examiner's determinations that the agreements between the FCPP co-owners to operate FCPP seasonally will reduce emissions overall, that PNM's abandonment will reduce its portfolio emissions, and that the only credible evidence in the record regarding a potential FCPP closure date were statements of the other FCPP owners, consistent with an as-planned retirement in 2031.[12]

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[10] **[***See, e.g.,* **NEE AB 2; SC/CCAE AB 4-5].**

[11] *See* § 62-18-2(S)(4).

[12] **[***See, e.g.,* **35 RP 14951-14952** (noting only credible date for closure was 2031); **35 RP 14933-14934** (stating that proposed abandonment of FCPP would significantly decrease carbon dioxide emissions on PNM's system); **35 RP 14938** (noting unrebutted evidence from PNM's witness that seasonal operations of FCPP resulting from agreements related to sale of FCPP to NTEC would reduce emissions at FCPP by 20-25%, which equates to closing a 400 megawatt coal plant)**]**

- The sale of PNM's interest in FCPPs to NTEC was not in the public interest, which ignores the Hearing Examiner's findings of customer benefits and that the sale resulted in numerous benefits to the Navajo Nation, not least of which was a just transition away from coal in support of the Navajo Nation's economy and revenues.[13]
- PNM's agreements with NTEC and the FCPP co-owners as a result of the sale transaction would prevent FCPP from closing sooner or would increase emissions from the coal plant, ignoring the Hearing Examiner's findings that neither of these claims were remotely true, and that the agreements would significantly reduce emissions at FCPP.[14]
- PNM's timing for its FCPP abandonment application was connected to its merger application with Avangrid, even though the evidence

[13] **[NEE AB 2; SC/CCAE AB 4-8] [35 RP 14982** ("Among other benefits of the bargain, the sale and transfer [of FCPP to NTEC] will strengthen the Navajo Nation's position in determining the future of a plant that, it should not be forgotten, has been operating on its sovereign soil and producing electricity for non-indigenous consumers and far-flung communities for nearly sixty years."); **35 RP 14982-14985** (noting the public interest benefits to the Navajo Nation and the public generally)**]**

[14] **[SC/CCAE AB 17-19, 35-36] [***See* **35 RP 14933-14934**, **35 RP 14938]**

below demonstrates no such connection or the relevance of that assertion to the statutory criteria for abandonment.[15]

The parties may not, on appeal, argue that these and other considerations not actually addressed or relied upon in the Final Order warrant the same result. The Commission's denial of the abandonment and, by extension, the financing application, must rise or fall based on the rationales articulated in the Final Order.

A. Standard of Review

A brief discussion of additional standards of review is provided, to address the Answer Briefs' *post hoc* rationalizations that were not part of the Final Order. For example, the Final Order concludes that PNM's supposed "breach" of the requirement to provide IRP modeling of hypothetical early FCPP exits constituted a stand-alone basis for denying abandonment. **[37 RP 15424 ¶ 38]** The Answer Briefs assert that the Court should affirm the Final Order on this basis, not because this was a "breach," but rather, because PNM's evidentiary failure to provide this additional modeling that deprived the Commission and parties of a hypothetical baseline against which to evaluate the sale to NTEC. **[***See, e.g.,* **Commission AB 28-31; SC/CCAE AB 30]** This impermissibly recrafts the actual basis for denial

[15] **[NEE AB 18, 23-24; SC/CCAE 5-6] [35 RP 14964** (finding that the merger issues raised by parties like NEE and Sierra Club were irrelevant and immaterial to the matter under review)**].**

articulated by the Commission in the Final Order and imposes a speculative new criterion for evaluating abandonment.

"[T]he reviewing court 'may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Atlixco Coal. v. Maggiore*, 1998-NMSC-134, ¶ 20, 125 N.M. 786 (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). Using the courts' appellate process "to supply reasons for the [agency] in this manner is not consistent with the doctrine of separation of powers because it 'foists upon the court what is essentially a function of the Executive Branch of government.'" *Atlixco Coal,* 1998-NMSC-134, ¶ 20 (quoting *McGonigel's, Inc. v. Pa. Liquor Control Bd.*, 663 A.2d 890, 893 (Pa. Commw. Ct. 1995)).

If the agency's asserted grounds are "inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery*, 332 U.S. 194, 196 (1947). New Mexico courts "are not free to accept such *post hoc* rationalizations since in dealing with a determination or judgment which an…agency alone is authorized to make, a reviewing court must judge the propriety of such action solely by the grounds invoked by the agency." *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, ¶ 19, 107 N.M. 469 (alterations and citations omitted),

superseded by statute on other grounds as stated in *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 19, 141 N.M. 41.

The Answer Briefs also impermissibly rely on materials that are not part of the record to backfill the evidence below.[16] This Court's review is limited to the record on appeal. NMSA 1978, § 62-11-3 (1982); *see also Montano v. N.M. Real Estate Appraiser's Bd.*, 2009-NMCA-009, ¶ 8, 145 N.M. 494 ("In our review of an agency's decision, we are limited to consideration only of the facts presented to the agency."). That means parties cannot rely on extra-record materials as support for factual assertions. The Answer Briefs do just that, even relying on information filed in a separate proceeding after the issuance of the Commission's Final Order.[17]

The Commission also invokes "whole record" review as if it is an invitation for the Court to conduct an expedition to find new grounds to affirm the Final Order, other than the unsupportable rationale provided. **[Commission AB 16]** "Whole record" review does not, however, allow for "*post-hoc* rationalizations" to come up with better legal grounds to affirm an administrative decision. *Tenneco*, 1987-NMCA-153, ¶ 19, 107 N.M. 469. Instead, "whole record" review means the Court must also analyze and consider evidence that undercuts the agency's decision. *See*

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[16] **[Commission AB 20-22; NEE AB 20; SC/CCAE AB 23] [34 RP 14286-14287 n. 99, 35 RP 14771-14774** (providing citations to unrefuted evidence at hearing)**].**

[17] **[***See, e.g.*, **Commission AB 20-22, nn. 6-9] [***See also* **NEE AB 20; SC/CCAE AB 23]**

Cibola Energy Corp. v. Roselli, 1987-NMCA-055, ¶¶ 8-9, 105 N.M. 774 (court considers contrary evidence and decides whether the agency's decision was, on balance, supported by substantial evidence).

B. The Commission's Denial of Abandonment Was Unlawful.

The Commission unlawfully denied abandonment because the Commission: (1) misinterpreted Section 62-18-4(D); (2) acted arbitrarily and capriciously and ignored substantial evidence; (3) failed to properly adhere to applicable abandonment standards; and (4) unlawfully decided that denial of PNM's abandonment request under the ETA was justified by the "breach" of a pre-ETA requirement to analyze hypothetical FCPP exits in PNM's future IRP. **[***See* **BIC 23-37]** The Answer Briefs propose lines of reasoning not applied by the Commission to contend that the Final Order was premised on factual (rather than legal)[18] determinations; this attempt to rehabilitate an unlawful order is not permitted. *See Tenneco, supra.*

[18] **[***See, e.g.*, **Commission AB 31** (claiming Commission's determination was factual rather than legal regarding modeling of 2024 and 2028 FCPP exit scenarios, despite the Final Order stating repeatedly that the additional basis to deny PNM's application was PNM's "breach" of the stipulation in the 2016 Rate Case**]**. **[37 RP 15424 ¶ 38].**

1. *The Commission's denial of abandonment based on its determination that PNM failed to provide evidence of "actual" replacement resources to satisfy Section 62-18-4(D) is contrary to the law and should be reversed.*

Section 62-18-4(D) gives PNM the option to defer presentation of, and request for approval of, any new resources that might replace resources being abandoned under the ETA. The Commission ignored the statute's plain meaning, denying PNM's abandonment application because PNM did not present actual replacement resources for the Commission's consideration. This was legal error. Section 62-18-4(D) states: "The qualifying utility or the commission may defer applications for needed approvals for new resources to a separate proceeding; provided that the application identifies adequate potential new resources sufficient to provide reasonable and proper service to retail customers."

The Answer Briefs present a variety of arguments to justify the Commission's misapplication of the statute, first searching for a colorable legal explanation or interpretation to justify the Commission's error in misapplying Section 62-18-4(D). For example, the Commission contends that past practices, rather than current statutory language, are determinative of what the ETA requires. **[Commission AB 10-12]** SC/CCAE try to bridge the logical gulf in the Final Order's construction of Section 62-18-4(D) by arguing that it allows the Commission to require *identification* of actual resources without requiring the utility to request *approval* of those actual resources. **[SC/CCAE AB 27]** NEE

attempts to minimize the Commission's misreading of Section 62-18-4(D) by arguing that the deferral option for new resources is merely a "process question." **[NEE AB 19]** Finally, NEE relies on pre-ETA arguments by PNM to this Court in another proceeding to contend that PNM must provide evidence on actual replacement resources to meet its burden and obtain an ETA abandonment order. **[NEE AB 15-16]**

These arguments are primarily new theories meant to bolster the Commission's misreading of Section 62-18-4(D). The Commission's Final Order must rise or fall based on the articulated rationale therein. Furthermore, any argument elevating Commission analysis conducted prior to the ETA's enactment above the language of the ETA itself is unavailing on its face. The ETA expressly allows bifurcating the issue of replacement resources from the issue of abandonment under the Section 62-18-4(D) deferral option, and no prior Commission precedent can trump the change in law adopted by the Legislature. *See State ex rel. Egolf v. N.M. Pub. Regulation Comm'n,* 2020-NMSC-018, ¶ 33.

Having misread—like the Final Order—the plain language of Section 62-18-4(D), appellees then purport to demonstrate why PNM's presentation of adequate potential replacement resources was insufficient. For instance, the Commission asserts that uncontested evidence of modeling and competitive solicitation results are legally insufficient because they are not evidence of *actual or identified*

replacement resources.[19] The Answer Briefs argue that the data PNM relied upon for potential replacement resources were stale, in that PNM's modeling was based, in part, on its prior competitive solicitation conducted for replacement resources for the SJGS.[20] These purported factual assertions are not supported by the Record Proper and cannot in any event overcome the Commission's failure to apply the proper legal standard.

a. The Commission legally erred in its interpretation of Section 62-18-4(D) and applicable abandonment standards under the ETA.

The proper construction of Section 62-18-4(D) is a legal issue that this Court reviews *de novo*. In applying Section 62-18-4(D), the Commission replaced the statute's phrase "adequate potential" with the words "actual" and "actual proposed." **[***See* **37 RP 15418-15422, ¶¶ 15-31** (repeatedly referring to "actual" resources).**]** That was error; nothing in the statutory language requires the utility to identify "actual" replacement resources to obtain an abandonment and financing order under the ETA. *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation*

[19] **[Commission AB 15** ("PNM did not identify the actual proposed resources resulting from bids…."), **16** ("PNM did not identify any actual proposed replacement resources."), and **19** (stating PNM did not provide "actual identified replacement resources." (emphasis in original))**]**

[20] **[NEE AB 8; SC/CCAE AB 23-25; Commission AB 17]**

Comm'n, 2022-NMSC-010, ¶ 14 ("*CFRE*") (Court will reverse if the Commission's statutory interpretation is "unreasonable or unlawful").

As PNM's BIC explained, "actual" is the opposite of "potential." [*See* **BIC 24** (citing dictionary)**]**; *Leger v. Leger*, 2022-NMSC-007, ¶ 34, (when statute's plain meaning is clear, the Court's obligation is to uphold it as written).[21] Requiring PNM to bring forward actual resources or to identify specific resources for Commission consideration simply writes Section 62-18-4(D) out of the ETA.

i. Past Commission practice is not indicative of the current statutory mandate.

The Commission argues that the Final Order rests on the fourth *Commuters' Committee* factor, which the Commission newly claims, without support, Section 62-18-4(D) was meant to codify. **[Commission AB 10-11** (suggesting that this can be "inferred")**].** The Final Order provides no actual basis to correlate the fourth factor with Section 62-18-4(D). *See Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-083, ¶¶ 12, 14, 112 N.M. 379 (Commission reasonably relied on *Commuters Committee* factors where there was no precedent for construing operative terms in abandonment statute in determining whether there was a need for continued use of a generating facility).

[21] The dictionary definition also makes sense read in context alongside Section 62-18-4(C).

The Commission ignores that it has now has new legislative guidance for determining the ongoing need for a coal generation facility. A primary purpose of the ETA is to promote a utility's accelerated transition away from coal plants, in favor of renewable and carbon emissions-free resources. The ETA authorizes securitized financings for plants such as FCPP if they are abandoned by dates-certain, in advance of a 2045 transition to carbon-free generating facilities. Thus, the ETA now informs the Commission that the public convenience and necessity *does not require* the continued use coal generation such as FCPP. It is illogical for the Commission to argue the Legislature embedded the fourth *Commuters' Committee* factor into the ETA to such an extent that Section 62-18-4(D) must be administratively re-written to require PNM to identify specific, actual replacement resources for the Commission to determine whether abandonment is warranted.

The Commission also argues against the ETA's plain meaning under the logic that prior to the ETA, Commission precedent always required a utility to provide evidence of *actual* replacement resources. First, that is demonstrably untrue.[22] Regardless, whether pre-ETA abandonment applications included actual

[22] *See, e.g., In the Matter of the Application of Pub. Serv. Co. of N.M. for the Abandonment and Decertification of the Las Vegas Generation Station in Las Vegas, N.M.,* NMPRC Case No. 10-00264-UT, *Recommended Decision* (Jan. 21, 2011), at 17 (finding PNM that the fourth *Commuters' Committee* factor is not applicable, as PNM had no need for replacement resources given other sufficient sources of generation), *approved by Final Order Granting Application* (Feb. 22, 2011).

replacement resources is irrelevant given the plain language in Section 62-18-4(D). The Commission acknowledged as much in the abandonment of the San Juan Generating Station ("SJGS"), stating that the ETA supersedes any previous "requirement" to submit actual replacement resources as part of an abandonment filing.[23]

NEE makes a similar argument, stating that PNM's failure to provide actual replacement resource information is a departure from PNM's past abandonment applications. NEE provides three cases as examples. **[NEE AB 17-18]** One of those cases, Case No. 13-00390-UT regarding abandonment of SJGS units 2 and 3, was pre-ETA. Another proceeding, Case No. 21-00083-UT regarding the Palo Verde Nuclear Generating Station ("PVNGS") abandonment proceeding, was not an ETA application as it concerned abandonment of nuclear leases. Notably, in the PVNGS abandonment proceeding discussed in PNM's BIC, the Commission refused to initiate its six-month review process for replacement resources until *after*

[23] *See In the Matter of Pub. Serv. Co. of N.M.'s Abandonment of San Juan Generating Station Units 1 and 4,* NMPRC Case No. 19-00018-UT, *Corrected Order on Consolidated Application* (July 10, 2019), ¶ 14 (noting that most respondents did not support separate abandonment and replacement resource proceedings but "…in Case 13-00390-UT, the Commission contemplated proceeding with a determination on abandonment pending a separate proceeding on replacement resources. Moreover, the ETA would now expressly afford the Commission the discretion to defer consideration of a replacement resource application to a separate proceeding."). Utilities are expressly accorded that same discretion.

the "need" for any resources was triggered by a Commission determination on abandonment, and removed the issue of replacement resources to a separate docket.[24]

The last example provided by NEE concerns the abandonment and replacement resources approval for SJGS units 1 and 4, which was filed and approved pursuant to the ETA. In this previous ETA filing, the Commission granted PNM's abandonment and financing application without relying on specifically identified actual replacement resources.[25] Citing Section 62-18-4(D), the Commission used its authority to bifurcate and remove the question of SJGS replacement resources from the abandonment docket, deferring Commission

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[24] The PVNGS case preceded this Final Order and was not an abandonment application under the ETA. *See In the Matter of the Application of Pub. Serv. Co. of N.M. for Decertification and Abandonment of 114 MW of Leased Palo Verde Nuclear Generating Station Capacity ... and for Approval to Procure New Resources,* NMPRC Case No. 21-00083-UT*, Partial Order on Recommended Decision* ¶ 7 (Aug. 25, 2021) (finding abandonment order was not required for leases; request for new resources no longer dependent on abandonment to supply basis for requisite "need"). The Commission then bifurcated consideration of replacement resources to a separate proceeding, Case No. 21-00215-UT. [*See also* **BIC 33-34, n. 19].**

[25] *See In the Matter of Pub. Serv. Co. of N.M.'s Abandonment of San Juan Generating Station Units 1 and 4,* NMPRC Case No. 19-00018-UT*, Recommended Decision on PNM's Request for Authority to Abandon its Interest in San Juan Units 1 and 4 and to Recover Non-Securitized Costs* ("*San Juan RD*") at 17-28, 35, Decretal ¶ B (Feb. 21, 2020*), approved by Final Order on Request of Public Service Company of New Mexico for Authority to Abandon Its Interests in San Juan Generating Station Units 1 and 4 and to Recover Non-Securitized Costs ("San Juan Final Order")* (Apr. 1, 2020).

consideration of PNM's request to approve replacement resources until after the decision was reached to grant abandonment. **[***See* **BIC at 33]**

The Commission also discusses the prior SJGS abandonment proceeding, suggesting that because PNM's included actual replacement resources in its abandonment application for SJGS units 1 and 4, the ETA necessarily requires such inclusion.[26] This inference is belied by the Commission's removal of replacement resources from the SJGS abandonment proceeding in favor of a deferred, independent review. Thus, the Commission has established that it will concern itself with actual resource proposals only if abandonment approval has established the need for the resources.

Moreover, the Commission did not consider or evaluate actual SJGS replacement resources to determine whether SJGS met abandonment standards. Instead, the Commission relied solely on resource planning models PNM witness Nicholas Phillips presented depicting a variety of potential replacement portfolios without evaluating specific resources, concluding that "[t]he ***modeling presented at the hearing shows*** that the abandonment will cost ratepayers less over the next 20 years than PNM's continued operation of the plant."[27] Upon this basis, the

[26] **[Commission AB 12-16].**

[27] *San Juan RD* at 26 (Feb. 21, 2020) (emphasis added), approved by the *San Juan Final Order* (Apr. 1, 2020).

Commission determined that PNM had satisfied the *Commuters' Committee* standard.[28] Thus, prior ETA abandonment approval was granted based solely on modeling, the same proof as was provided in this case, and not based on presentation of a portfolio of identified actual replacement resources.

The Commission's SJGS abandonment order actually confirms that the ETA does not require PNM to present actual resources because there the Commission itself removed from consideration the information on actual replacement resources in the abandonment phase of that proceeding. The Commission granted SJGS abandonment approval under the ETA subject to the Commission approving replacement resources in a subsequent proceeding, Case No. 19-00195-UT. *San Juan RD* at 17-28, 35, Decretal ¶ B, approved by *San Juan Final Order*. While the Commission argues this conditional approval somehow supports its position, it instead demonstrates the opposite.

ii. A plain reading of Section 62-18-4(D) does not require identification of actual replacement resources before approval is sought, and such a requirement may detrimentally affect PNM's efforts to sign competitive bids.

SC/CCAE argue that Section 62-18-4(D) allows the Commission to require *identification* of actual resources without requiring the utility to request *approval*

[28] *See id.* ("The evidence indicates that the abandonment of PNM's interest in San Juan Units 1 and 4 satisfies both the net public benefit and *Commuters' Committee* standards.").

of those actual resources. **[SC/CCAE AB 27]** However, that would mean that any such "actual" resources identified in the abandonment proceeding would be illustrative only—and therefore no different from PNM's proxy replacement resource evidence that the Answer Briefs claim is inadequate.[29] Beyond this misapplication of Section 62-18-4(D), none of the Answer Briefs explain how a utility could present such "actual replacement power packages" for Commission consideration if the utility has not yet actively negotiated new resource acquisitions—which the ETA does not require.

FCPP is the perfect example of this quandary in that PNM filed for abandonment approximately 4.5 years before replacement resources would be needed in the summer of 2025, in order to facilitate an orderly, non-rushed and timely abandonment approval process separate from replacement resource acquisition for FCPP. **[35 RP 14956-14957]** Given that PNM would not need FCPP replacement resources for over four years, PNM appropriately did not propose actual replacement resources in its abandonment application and exercised its right pursuant to the ETA to defer its actual replacement resource approval until closer in time to the need for those resources. The new standard advanced by the appellees could influence the actual replacement resource selection process to the

[29] [*See, e.g.,* **NEE AB 22** (contending "*actual* replacement power packages," rather than "proxy replacements," are required to satisfy the abandonment standard in Section 62-18-4(D) (emphasis in original))**]**

potential detriment of customers. If, for example, some specific projects are identified during the abandonment proceeding as being preferential to certain parties, PNM's bargaining position in execution of agreements with those bidders is weakened before negotiations ever begin.

iii. PNM's right to defer approval of actual replacement resources is not merely a process question.

NEE argues that the deferral option for new resources is merely a "process question." **[NEE AB 19]** NEE contends that PNM is conflating what it views as a procedural provision with the legal standard for abandonment. **[*Id.*]** That argument cannot be reconciled with the Final Order, where PNM's election to defer approval of its replacement resource portfolio served as the primary basis to deny the abandonment application. This was no mere procedural question. To the extent it is a "process question" the ETA answers it in PNM's favor, by determining that a utility can pursue actual replacement resources after obtaining an abandonment and financing order.

iv. NEE's reliance on PNM's prior arguments in another Court proceeding is misplaced.

NEE argues that PNM has acknowledged in another proceeding before this Court that PNM must provide evidence on actual replacement resources to meet its burden and obtain an abandonment approval order. **[NEE AB 15-16]** PNM's concerns about replacement resources in that case were two-fold. First, the

mandamus proceeding discussed by NEE sought relief from a January 30, 2019, Commission order directing PNM to file an SJGS abandonment application with full supporting direct testimony by March 1, 2019.[30] PNM responded, addressing the impossibility of this task: "PNM cannot adequately meet its burden of proof under the *Commuters' Committe*e test [] because the impacts of discontinuance of service are still being developed, and service from SJGS remains warranted unless adequate replacement resources are identified and available."[31] Second, the ETA had not yet been enacted. Section 62-18-4(D) of the ETA now unambiguously allowed deferral in the selection of actual replacement resources based on a lesser showing of adequate *potential* new resources. *See also* Section 62-18-3(A) (separating replacement application from abandonment). Thus, PNM's pre-ETA discussion cannot "rebut" (as NEE asserts) PNM's ETA arguments here. Section 62-18-4(D) is the applicable law, and speaks for itself, but the Commission chose to write this deferral option of out of the ETA.

In total, the Commission has once again executed an end-run of its non-discretionary duty under the ETA. This Court has found that the ETA serves as the

[30] *Emergency Verified Petition of Public Service of New Mexico for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument*, New Mexico Supreme Court, No. S-1-SC-37552 (Feb. 27, 2019).

[31] *Id.* at 10. Under the Commission's order, PNM did not have the benefit of as long a lead time for SJGS abandonment as PNM had in the underlying FCPP case.

statutory scheme for abandonment proceedings for coal plants, and directed that "the Commission therefore ha[s] a nondiscretionary obligation to apply the ETA …. Equivocation by the Commission as to the ETA's applicability indicate[s] that the Commission potentially intend[s] to modify or ignore applicable law…." *Egolf,* 2020-NMSC-018, ¶ 33. The Commission cannot avoid the ETA by relying on abandonment decisions issued prior to the ETA that are no longer controlling in light of Section 62-18-4(D). Similarly, the appellees' attempts to put forth new legal theories to shore up the Commission's misapplication of the ETA mandates do not survive rational application of the plain language in Section 62-18-4(D).

b. The Answer Briefs' arguments on the evidence of adequate potential new resources are unpersuasive.

The Commission also attempts to impermissibly reframe the legal interpretation of Section 62-18-4(D) as a factual question. **[***See* **Commission AB 7-27** (arguing paucity of the evidence supported the Final Order)**]** But the evidence that the Commission contends is lacking would go to the Commission's preferred, but inaccurately stated legal standard ("actual or proposed resources"). The Commission cannot transform a *de novo* statutory construction review into a question of "missing" facts by misstating the legal standard, and then declaring that this misstated legal standard was not met.

As outlined in its BIC, PNM demonstrated there would be adequate potential new resources for the 2025 peak season, based on data from two recent competitive

solicitations, with proposals totaling 10,000 MW and 6,500 MW in new resources with robust pricing results, which included bidder responses to PNM's anticipated abandonment of its 200 MW interest in FCPP. **[***See, e.g.,* **BIC at 26-27]** This evidence was unrefuted, and Staff's witness supported the same conclusion. **[***See* **BIC 12]** The Abandonment RD agreed. **[35 RP 14955-14957]** As noted above, this evidence was no different from what the Commission relied on in the SJGS ETA abandonment case and its departure from that evidentiary standard is arbitrary.

The Commission also asserts that uncontested evidence on modeled portfolios and testimony that developers provided PNM, with bids for available new projects in PNM's competitive solicitation processes, is legally insufficient because it is not evidence of *actual or identified* replacement resources.[32] This again measures PNM's evidence against a non-existent standard.[33] When Section 62-18-4(D) is applied as written, PNM satisfied that standard.

The Answer Briefs also contend that supply chain concerns drove the Commission's decision, citing as support, however, extra-record PNM filings

[32] *See supra,* n. 19.

[33] The Commission has determined that models are appropriate, and the results emanating from their use are not so speculative as to not provide substantial and reliable evidence. *Re Pub. Serv. Co. of N.M.,* 101 P.U.R. 4th 126, 1989 WL 418588, pp. 47-48 (NMPSC Case No. 2146, Pt. II); *see also N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n,* 1986-NMSC-059, ¶ 36, 104 N.M. 565 (affirming use of projected future demands and costs even though such numbers are unknowable).

(some of which were even made after the Final Order). **[Commission AB 20-23; NEE AB 20; SC/CCAE AB 23]** The Answer Briefs ignore the relevant testimony of PNM witness Mr. Phillips to the contrary.[34] Mr. Phillips testified that supply chain issues were expected to be temporary and would not affect FCPP replacement resources, which would be needed for the summer peak of 2025.[35] **[30 RP 9775-9778]** Additionally, the testimony indicated that some delays associated with SJGS replacement resources were unrelated to supply chain issues. **[*Id.*]** Mr. Phillips' testimony on the effects of supply chain and other issues regarding replacement resources was uncontroverted. The Commission's Final Order acknowledges the unconverted expert testimony of Mr. Phillips that supply chain issues would not be a concern when FCPP replacement resources were coming online in 2025 but concluded nonetheless the FCPP abandonment request should be rejected (after a

[34] The Commission asserts that "[t]he only evidence that PNM presented regarding replacement resources is on eight pages of the Direct Testimony of Nicholas Phillips." **[Commission AB 16]** This is demonstrably incorrect as evidenced by the actual hearing record. **[34 RP 14286-14287 n. 99, 35 RP 14771-14774** (providing citations to additional unrefuted evidence at hearing)**].**

[35] In yet another *post-hoc* rationalization to support the Final Order, SC/CCAE argue that because PNM's approach did not allow the Commission to assess what resources would be available in 2025, its "application presented risks to the reliability of the electricity grid." **[SC/CCAE AB 25]** The uncontested evidence discussed above demonstrates the opposite. No party challenged Mr. Phillips' assertion that the supply chain issues were expected to be temporary and that recent competitive solicitations for new resources produced robust results for FCPP replacement. **[***See, e.g.,* **BIC 26-27]**

year-long process) and refiled along with proposed actual replacement resources as part of the "do-over" abandonment case because of resource uncertainties. **[***See* **37 RP 15420-15422 ¶¶ 27-32]**

The Commission speciously claims that this expert testimony was appropriately discounted because it was improper, from an evidentiary perspective. **[***See, e.g.*, **Commission AB 23** (claiming a legal basis—hearsay—for the Commission to ignore unrefuted testimony regarding the sufficiency of potential replacement assets)**]** No party, however, objected to or challenged the expert testimony of PNM witness Mr. Phillips, based on his knowledge and expertise, that supply chain issues were short-term. **[30 RP 9776]** "If a proper objection is not made, the evidence may be considered in the same manner as any other relevant evidence and has sufficient probative value to support a finding." *Attorney Gen. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 10, 101 N.M. 549. Neither the Abandonment RD nor the Final Order made any such hearsay determination on Mr. Phillips' expert opinion, nor found his testimony to be untrustworthy. Absent a finding of circumstances that show lack of trustworthiness, the Commission may not arbitrarily reject a witness's testimony. *See Alto Vill. Servs. Corp. v. N.M. Pub. Serv. Comm'n*, 1978-NMSC-085, ¶ 14, 92 N.M. 323.

The Answer Briefs also argue that the data PNM relied upon for potential replacement resources were stale, because PNM's modeling was based, in part, on

its prior competitive solicitation conducted for replacement resources for SJGS.[36] However, PNM witness Mr. Phillips testified that the data PNM used to demonstrate adequate potential replacement resources were not stale and were sufficiently robust to rely upon to satisfy the ETA's deferral option. Mr. Phillips testified to having recently completed a competitive solicitation for 2025 FCPP replacement resources and compared the competitive solicitation results to its proxy modeling, stating: "looking at a comparison of what's happened in those [competitive solicitations], we've had very similar bidders, … a very similar amount of megawatts, a very similar average pricing, so there's nothing that I did previously that I would be unsure about." [**30 RP 9820**] Mr. Phillips added that he was "very confident" that the analysis conducted in the FCPP case "is going to be representative of the savings that we will see coming out of the replacement case" anticipated to be filed thereafter, even stating that "[g]iven the technology curves for solar and batteries" along with tax credits, the likely result may be lower bid prices. [**30 RP 9820**] Mr. Phillips' testimony was uncontroverted.

Both the NEE witness and the Sierra Club witness argued the costs of available renewable resources *were lower* as compared to the cost of FCPP. **[14 RP 3761-3764, 15 RP 3856-3857]**. Indeed, the irony of the positions of NEE and SC/CCAE to deny abandonment is that, in effect, these environmental

[36] **[NEE AB 8; SC/CCAE AB 23-25; Commission AB 17]**

stakeholders—along with the Commission—are implicitly arguing that customers should continue to rely on FCPP through 2031 rather than take power from carbon-emission free resources at the end of 2024.

2. *The Commission's legal conclusion that abandonment can be denied because PNM "breached" an IRP commitment is unlawful and should be reversed.*

The Court should vacate the Final Order's determination that PNM's lack of modeling 2024 and 2028 FCPP exit scenarios in its IRP proceeding was a "breach" that constituted "a separate basis on which to deny PNM's current application for abandonment[.]" **[37 RP 15424 ¶ 38]** Any reliance on this purported "breach" to reject abandonment is error and cannot stand.[37]

The 2016 Rate Case decision required that PNM include in its next IRP a cost-benefit analysis of a hypothetical exit assuming a PNM breach of the FCPP ownership and coal supply agreements in 2024 and 2028. **[37 RP 15423-15424 ¶ 37]** The requirement to model hypothetical 2024 and 2028 FCPP exits was directed at a future IRP proceeding, which examines long-range planning under Rule 17.7.3 NMAC, not an actual abandonment proceeding. **[*Id.*]** When the ETA was enacted in 2019, it introduced a new public interest paradigm, and a different path for abandonment of coal generation. Nothing in the ETA requires the utility

[37] No party testified at hearing that this lack of modeling constituted a separate basis for denying abandonment. BIC at 36.

seeking abandonment to provide multiple hypothetical "baselines" for cost-benefit evaluation. The Abandonment RD correctly rejected arguments that this alternative early exit modeling was required by the ETA. **[35 RP 14948]**

Apparently recognizing the Final Order's flawed legal reasoning that PNM's "breach" was an independent basis to deny PNM's abandonment request, the Answer Briefs seek to recast the Commission's legal breach determination as a factual decision, arguing that real concern was that parties and the Commission were not able to compare the proposed actual exit against other hypothetical scenarios (rather than the Commission's traditional *Commuters' Committee* comparison to continued operations). **[***See, e.g.,* **Commission AB 28-29, 31; SC/CCAE AB 30]** The Final Order's text contradicts that reframing. Paragraph 37 of the Final Order acknowledges the Abandonment RD's finding that such modeling comparisons would be "meaningless." **[37 RP 15423-15424 ¶ 37]** Rather than reject that recommended finding based on facts in the record, the Commission opted to reject it on purely legal grounds: "the fact remains that PNM breached an obligation under the stipulation that was directed [*sic*] related at the very issues presented in this case." **[*Id.*]** The Final Order thus determined that "PNM's breach is a separate basis on which to deny PNM's current application for abandonment . . .." **[37 RP 15424 ¶ 38]** This determination of "breach" was a legal determination, not a finding of fact. This Court must determine *de novo* whether

PNM's failure to take an action in another proceeding constitutes a basis, as a matter of law, to deny PNM's abandonment application under the ETA.

The Commission also argues unconvincingly that "the [Commission]'s authority to enforce the requirement [from the 2016 Rate Case] arises from a final order, not [the Commission's rules]." **[Commission AB 31]** This is also specious because the Commission was not engaged in an enforcement action on PNM's IRP filing. As *Egolf* held, the Commission's enforcement authority does not encompass the power to compel PNM to file an abandonment proceeding; conversely, the Commission cannot enforce an order by denying a pending abandonment application. 2020-NMSC-018, ¶¶ 27-30.

Notably, the Abandonment RD rejected post-hearing arguments that modeling those exit hypotheticals would have been useful or beneficial, given the unrefuted evidence that PNM's customers would still have been responsible for the costs associated with the remainder of the FCPP coal supply and operating agreements through 2031 under those scenarios. **[***See* **35 RP 14948]** The Commission never rejected the Abandonment RD's *factual* findings. **[***See* **37 RP 15423-15424 ¶ 37]** There are no facts in evidence that the contractual breach analysis required in PNM's IRP docket could have provided cost-benefit information in favor of the continued operation of FCPP. In fact, PNM witnesses

testified that the opposite was true, in that exiting FCPP by defaulting on its obligations would have been uneconomic and detrimental to customers.[38]

NEE raises a novel argument that if PNM had conducted this analysis, it would have demonstrated the availability of cost-competitive resources for purposes of satisfying Section 62-18-4(D). **[NEE AB 22]** As noted above, the analysis PNM was required to conduct in its IRP was for a hypothetical breach of its contractual obligations in 2024 and 2028.[39] It is illogical, or at best speculative, to assert that a cost-benefit analysis of a hypothetical contractual default on PNM's FCPP obligations would aid in identifying actual replacement resources.

C. The Commission May Not Impose Further Review of the Prudence of Four Corners on Remand.

PNM asked this Court to direct that the Commission not revisit FCPP prudence in applying the ETA on remand, or in the alternative, that the Commission limit its prudence review on remand to the record below and in accordance with the ETA. **[BIC 38-49]** The Answer Briefs argue that the application of the ETA to

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[38] **[35 RP 14730-14731** (noting that without the sale to NTEC, there was no viable option to exit FCPP and defaulting on PNM's obligations would have been an uneconomic outcome); **30 RP 9796** (stating that "had PNM exited without the proposed transaction, it would remain on the hook for the vast majority of costs, and thus it would eliminate any potential customer benefit."); *see* **36 RP 15207** (correcting transcript citation in 30 RP 9796)**]**

[39] Sierra Club characterized the 2024/2028 analysis as requiring the costs and benefits of contractual breach. **[***See* **34 RP 14039**, **35 RP 14666]. [***See also* **SC/CCAE 32]**

prudence at FCPP has not been decided by the Commission. [*See, e.g.*, **SC/CCAE AB 38-40; NEE AB 24-27]**

This is incorrect. The Commission determined that a prudence review of FCPP was a prerequisite component of PNM's abandonment and financing requests filed under the ETA and in fact required PNM to essentially refile its ETA case so that the Commission could conduct the prudence review in the proceeding below. After a full hearing on the prudence issue and dissatisfaction with the lack of evidence demonstrating imprudence, the Commission summarily reversed course in favor of requiring yet another FCPP prudence review to occur in a subsequent abandonment case or other case. **[***See* **37 RP 15426 ¶¶ E, G]**

Under the two-pronged ripeness inquiry, this Court can review the basis of the Commission's decisions that a prudence review is a prerequisite to an ETA abandonment and financing application, and that the entire prudence proceeding must be repeated despite conducting a full evidentiary hearing below. Under the first prong (fitness of the issues for judicial decision), this constitutes "agency action [that] is sufficiently final or definitive so that there is no judicial interest in awaiting a more concrete formulation of the issues." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 1991-NMSC-018, ¶ 26, 111 N.M. 622. The purpose of ripeness is to conserve judicial resources. *Am. Fed'n of State, County & Mun.*

Empls. v. Bd. of County Comm'rs of Bernalillo County, 2016-NMSC-017, ¶ 18. A ruling by this Court will save judicial resources.

The second ripeness prong (hardship to the parties) is also met. PNM would be forced to re-litigate prudence questions that have already been fully litigated if this Court does not address the Commission's authority on remand. **[BIC at 41]** Further, any asserted obligation stemming from the 2016 Rate Case stipulation to continue to examine the use of FCPP must be tempered by the application of the ETA. PNM disagrees with NEE that the 2016 Rate Case stipulation, as it pertains to any future consideration of FCPP prudence, is a "contract like any other" that must be enforced and that a determination by this Court, that the question of prudence has been answered, would make the ETA unconstitutional. **[NEE AB at 40-41]** *See CFRE,* 2022-NMSC-010, ¶¶ 53-58 (application of ETA does not interfere with asserted vested or contractual rights for deferred review of issues related to FCPP because neither stipulation nor Commission decisions confer such rights to consumers and the Legislature is free to change underlying policy in enacting ETA).

Not only has the law changed under the ETA after the 2016 Rate Case,[40] PNM has *already* litigated the merits of FCPP prudence in the case below and in

[40] *See CFRE*, 2022-NMSC-010, ¶ 55 (noting that the Commission's decision approving the 2016 case stipulation was made pursuant to its statutory authority, which the Legislature is free to change).

the 2016 Rate Case.[41] In the 2016 Rate Case, the Commission declined to adopt a finding of FCPP imprudence and authorized PNM to recover FCPP investments in rates; the Commission agreed with the Hearing Examiners that there was little or no evidence to "consider the necessity and scope of any remedy [] of PNM's alleged imprudence … in light of the limited record on that issue developed in this proceeding." **[32 RP 11705.]** In this case, the Hearing Examiner's record review expressly found an absence of proof as to any imprudence. **[36 RP 15095 & n.246]** While PNM put on a substantial case for prudence, as ordered by the Commission, no party raised a challenge that was sufficient to "withstand appellate review." **[36 RP 15095 & n.246]** The Hearing Examiner's Financing RD detailed the other parties' failed efforts. **[*Id.*]**

Allowing multiple chances to re-litigate claims of imprudence undermines the adversarial system where each party is expected to put on its best case the first time. *See Resolute Wind 1 LLC v. N.M. Pub. Regulaton Comm'n*, 2022-NMSC-011, ¶¶ 24-26 (holding that Commission's irregular fact-finding process violated due process or was arbitrary and capricious or an abuse of discretion). The Commission's decision to perpetuate litigation until it develops a record favoring

[41] Parties also had the opportunity to litigate FCPP prudence in PNM's 2015 rate case. *See Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶¶ 90-95 (noting parties' lack of proof but not lack of opportunity to challenge FCPP prudence).

its preferred outcome is arbitrary given that the Commission made prudence an issue in this case, and all of the parties in the underlying case had a full and fair opportunity to litigate the prudence issue.[42] **[3 RP 01352-01355, 01359-01360]**

In an apparent effort to mitigate PNM's argument as to hardship to the parties, NEE agrees with PNM to a degree, requesting that the Court "limit" the Commission's review of prudence to the entirety of the evidentiary record in the 2016 Rate Case and this underlying proceeding. **[NEE AB 48]** NEE's support of a limited record review undercuts its primary argument that ongoing re-litigation is not a hardship to the parties. NEE's proposal for a limited record review of prudence cannot yield a new and different result, given that no party appealed the Commission's final order authorizing recovery of FCPP investments in the 2016

[42] NEE, in its Answer Brief, tries to fault the Hearing Examiner for the limited evidence in the underlying case, stating the Hearing Examiner did not permit NEE to take administrative notice of the entire record of the 2016 Rate Case, as required by the Commission's order in that case. **[NEE AB 26]** As was extensively documented below, the fault is with NEE, who despite multiple opportunities failed to follow the Commission's procedures for taking administrative notice. **[34 RP 14525-14529 (**stating that exhibits were not admitted in to the record given "NEE's inability to comply with Commission regulations and the Hearing Examiner's Procedural Order regarding the procedural steps that needed to be undertaken to accomplish administrative notice …."); *see also* **36 RP 15095** ("Although the Hearing Examiner developed early on in this case a streamlined procedure to have parties take administrative notice of evidence on the issue of prudence admitted in Case No. 16-00276-UT in observance of the *Revised Final Order's* instruction, the process did not go smoothly.") (citation omitted)**]**

Rate Case, and the parties below failed to produce evidence of imprudence despite multiple opportunities.

It is fundamentally unfair to PNM for the Commission to continuously defer or require re-litigation of the FCPP prudence question until the Commission determines opposing parties have mustered a preponderance of evidence supporting disallowance that is sufficient to "withstand appellate review." The Commission's decisions regarding prudence represent an arbitrary and capricious and results-oriented approach lacking any semblance of "reasoned decision-making." *Resolute Wind*, 2022-NMSC-011, ¶ 26 (citing *Attorney Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 10).

D. Other Irrelevant Arguments Should be Rejected.

SC/CCAE discuss their one-sided version of the effects that PNM's proposed abandonment of FCPP would have had. **[***See* **SC/CCAE 3-19]** PNM first notes that none of these factual disputes were addressed or decided upon in the Final Order.[43] Nevertheless, to the extent this Court is interested in the public policy

[43] SC/CCAE argue that if the Court remands the Final Order to the Commission, the Commission should be able to re-deliberate all of the exceptions filed as to the Abandonment RD and the Financing RD to find other reasons to reject PNM's application. **[SC/CCAE AB 9]** However, the Final Order at ¶ H says: "All other pending motions or exceptions not expressly addressed are deemed resolved consistent with this order." **[37 RP 15427]** Remand does not give the Commission another bite at the apple to try to bolster its flawed ruling as even the Commission's Final Order acknowledges. The Commission's Final Order must rise or fall based on the issues addressed in the Final Order.

benefits of the abandonment proposal that PNM brought forward, PNM directs this Court to the Abandonment RD's analysis on this issue, where the Abandonment RD found numerous benefits resulting from PNM's exit from Four Corners, including benefits to the Navajo Nation that are consistent with a just energy transition under the ETA. **[***See* **35 RP 14916-14995]**

NEE claims that PNM's sale of FCPP to NTEC would violate Section 62-16-4(B)(4). Again, the Abandonment RD addressed this issue. **[***See* **35 RP 14933 & n.169** ("The express directive of Section 62-16-4(B) that the Commission prevent CO_2 emitting electricity-generating resources from being sold or transferred as a means of complying with RPS standards [that] kick in *nineteen* to *twenty-four years* from now is an attenuated proposition even if this were an RPS proceeding.")**]** PNM did not file its abandonment and financing request to accelerate its exit from coal to comply with Section 62-16-4(A)'s renewable percentage targets, and PNM demonstrated the sale to NTEC would not be necessary for PNM to meet its compliance obligations until 2040 or 2045.

Appellees also contend that the sale to NTEC might keep FCPP open longer because, while NTEC itself is prohibited from voting on early closure **[35 RP 14983]**, it might sell its interest acquired from PNM to a third party, who would then not vote with the plant's other co-owners to close FCPP early. **[SC/CCAE AB 15-16, n. 3]** What SC/CCAE fail to tell the Court, however, is that NTEC

entered into new agreements that contractually prohibit it from selling its interest acquired from PNM without the other co-owners' consent. **[35 RP 14983]** Thus, if the other co-owners wanted to proceed with an early closure of FCPP, they would presumably not allow an NTEC transfer to a new buyer that would vote to prevent an early closure. ***[Id.]***

III. CONCLUSION

PNM respectfully requests that the Final Order be vacated and that the Court remand with instructions on how to properly apply the ETA.

Respectfully submitted this 17th day of June 2022.

PUBLIC SERVICE COMPANY OF NEW MEXICO

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on June 17, 2022.

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