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,

Intervenor-Appellee.

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 BRIEF-IN-CHIEF
(Oral Argument Requested)

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I. INTRODUCTION

This case represents the second time that the New Mexico Public Regulation Commission ("Commission" or "NMPRC") has refused to apply the Energy Transition Act ("ETA").[1] This Court did not tolerate the Commission's first refusal. *See State ex rel. Egolf v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-018, ¶¶ 20-33. This Court should likewise expeditiously overturn the Commission's *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 on December 15, 2021, in Case No. 21-00017-UT. **[37 RP 15414-15427]**

Prompt action is required by the Court to carry out the objectives of the ETA, permitting PNM to divest itself of all remaining coal-fired generation by selling its interest in the Four Corners Power Plant ("FCPP") to the Navajo Transitional Energy Company, LLC ("NTEC"), a corporate entity owned and chartered by the Navajo Nation. **[1 RP 00003-00004]** Among the many benefits of PNM's sale to NTEC is the finding that the sale will "strengthen the Navajo Nation's position in determining the future of [FCPP]" for a facility whose operation "represents nearly a quarter of Navajo Nation general fund revenue." **[35 RP 14982-14983]** The Final Order's rejection of PNM's ETA application ("Application") and mandate that

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

PNM restart its entire case creates significant uncertainty for PNM's energy transition, as well as for important stakeholders like NTEC and the Navajo Nation.[2] Swift action by the Court to direct the Commission to apply the ETA will restore certainty for the parties.

In 2019, the New Mexico Legislature passed Senate Bill ("SB") 489, which included the ETA, establishing a comprehensive energy policy to transition electricity supply away from fossil fuel generation to renewable and carbon emission-free sources. SB 489 expands existing renewable energy requirements;[3] allows utilities to recover stranded investments in coal plants through securitization;[4] and provides community assistance and workforce benefits to tribal and local communities impacted by a coal plant closure.[5]

PNM filed its Application and supporting testimony to abandon its minority share of 200 megawatts ("MW") of FCPP under the ETA. Securitized abandonment

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[2] The Navajo Nation leadership directly expressed support for the sale of PNM's interest to NTEC, noting it as consistent with "a planned and just transition away from coal-fired power …" **[35 RP 14984]**

[3] *See* Renewable Energy Act ("REA"), NMSA 1978, § 62-16-4(A)(1)-(6) (2019) (establishing zero-carbon resources for retail customers by January 1, 2045). The ETA also requires more stringent limitations on carbon emissions from generating resources. § 62-18-10(D).

[4] *See* § 62-18-4(A) (providing for recovery of "energy transition costs" upon abandonment of a qualifying generating facility); § 62-18-2(H) (defining energy transition costs to include, *inter alia*, financing costs and abandonment costs).

[5] *See* §§ 62-18-2(H)(2), (H)(4), 62-18-16.

reduces costs to customers by accelerating PNM's divestiture from all coal generation as of 2025. **[***See, e.g.*, **35 RP 14929]**

On November 12, 2021, the Hearing Examiner issued a Recommended Decision, recommending that the Commission approve the abandonment and sale of PNM's FCPP interest ("Abandonment RD"). **[35 RP 14874-14998]** The Hearing Examiner issued a separate Recommended Decision to approve the issuance of energy transition bonds for PNM to securitize its FCPP abandonment costs ("Financing RD"). **[36 RP 15002-15185]** The Commission rejected the Abandonment RD's recommendations and denied PNM's Application. **[37 RP 15425-15426 Ordering ¶¶ A-C]** By denying abandonment, the Commission also denied PNM's request for a financing order pursuant to the ETA. **[*Id.* ¶ D]**

The Commission's Final Order misapplies the ETA and ignores the abandonment statute, which mandates the Commission approve PNM's application unless it determines the present and future public convenience and necessity require the continued use of FCPP. NMSA 1978, § 62-9-5 (2005). The Final Order never considers the Commission's long-accepted net public benefit test—whether the benefits of abandonment outweigh the costs. **[35 RP 14905 & n.72]** The Commission instead denied FCPP abandonment on two invalid grounds.

First, the Commission determined that the ETA required a "review of the *actual* replacement resource portfolio" in order to grant abandonment. **[37 RP**

15420 ¶ 24 (emphasis added)**]** This contradicts the ETA language that explicitly permits a utility to defer its replacement resource application upon a showing of "adequate ***potential*** new resources sufficient to provide reasonable and proper service." § 62-18-4(D) (emphasis added). PNM made the necessary showing pursuant to the statute; the Commission, however, refused to apply Section 62-18-4(D) as written. **[***See, e.g.,* **37 RP 15419-15422 ¶¶ 23-26, 32]**

Second, the Commission found that PNM failed to satisfy a modeling commitment required in an entirely different proceeding. **[37 RP 15423-15424 ¶¶ 36-38]** This reason cannot suffice as a legal basis to deny PNM's abandonment and financing application under the ETA.

In divorcing its abandonment decision from the terms of the ETA and public interest requirements, the Commission also refused to apply the ETA's mandate to issue a financing order if the utility's application complies with the requirements of Section 62-18-4. *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶ 8 ("*CFRE*") (citing § 62-18-5(E)). Although the Financing RD determined PNM's application met the criteria required to issue a financing order **[36 RP 15172-15185 Ordering ¶¶ 2-51]**, the Commission summarily rejected the Financing RD's conclusions on the grounds that PNM had to file its actual replacement portfolio to obtain abandonment approval, contravening the ETA's plain language and Commission precedent. The

Commission also sidestepped the ETA's financing order requirements by ignoring the definitions of abandonment costs to be securitized under Section 62-18-2(H).

The Commission's final error is its abrupt refusal to resolve the prudence of PNM's 2012-2013 decisions to remain as a FCPP participant-owner. The Commission placed FCPP prudence at issue over PNM's objections to examine whether any of PNM's ETA abandonment costs should be disallowed. **[3 RP 01352-01355, 01359-01360]** The Commission refused to render a prudence decision, however, because there was no credible evidence supporting an imprudence finding. The Hearing Examiner's record review expressly found an absence of proof as to any imprudence. **[36 RP 15095 & n.246]** The Final Order requires that PNM again re-litigate FCPP prudence in either a re-filed abandonment case or another proceeding. **[37 RP 15426 Ordering ¶¶ E, G]** This is the third case in which the Commission declined to find FCPP imprudence due to a lack of evidence, the first and second being PNM's 2015 and 2016 Rate Cases.[6]

The Court should see the Commission's decision for what it was: a pretext to avoid implementing the ETA. Because the Commission did not get the evidence it wanted—that PNM acted imprudently in the past—it simply avoided ruling on the costs to be securitized by premising its findings on arbitrary and unlawful legal

[6] The 2015 Rate Case is Case No. 15-00261-UT. **[***See* **34 RP 14313]** The 2016 Rate Case is Case No. 16-00276-UT. **[***See* **32 RP 11696]**

conclusions concerning abandonment under the ETA and, thus, refused to issue a financing order. In denying PNM's request to abandon and securitize FCPP, the Commission ignores the relevant law for determining if abandonment serves the public interest, and arbitrarily rejects the substantial evidence and often uncontested factual record.

The Commission's alternative basis for denying abandonment as a remedy for PNM's failure to file cost/benefit information on hypothetical FCPP exits in 2024 and 2028 in its Integrated Resource Plan ("IRP") filing also contravenes Commission statutes and rules, is not supported by Court precedent, and violates PNM's due process rights.

The Court should vacate the Commission's denial of abandonment in the Final Order. The Court additionally should overturn the Commission's assumption that it can decline to include in securitized bonds FCPP abandonment costs that meet the ETA's definitions for securitization. Specifically, the Court should find the ETA mandates securitization of FCPP investments on PNM's books and records and being recovered in rates as of January 1, 2019. In doing so, the Court should vacate the Commission's determination that the prudence of PNM's decision to remain as a FCPP participant-owner can be re-litigated for the fourth time.[7] *Res*

[7] PNM litigated various issues relating to FCPP prudence in its 2015 Rate Case, 2016 Rate Case, and the case below. If the Commission requires PNM to litigate prudence-related issues again regarding FCPP, it will be the fourth time.

judicata bars further litigation over the prudence of FCPP because it was fully litigated below pursuant to the Commission's own orders. **[3 RP 01359]** Permitting the Commission to conduct another round of litigation on FCPP-related prudence allows it to skirt the ETA's mandates that authorize PNM to securitize its FCPP abandonment costs. In the interest of judicial economy and to avoid repetitious litigation, the Court should apply *res judicata* principles and prohibit ongoing and repeated litigation over FCPP prudence.

The Commission's end-result is not a balanced, reasoned decision. Its decision represents another example of the Commission's efforts to thwart the Legislature's objectives of achieving an expeditious exit from coal-fired generation by a utility such as PNM. PNM respectfully requests that the Court vacate the Final Order.

II. SUMMARY OF PROCEEDINGS

A. Relationship of Past FCPP Prudence Reviews to Final Order

The Commission's previous treatment of the prudence of PNM's decision to continue using FCPP in PNM's 2015 and 2016 electric rate cases provides important context for this appeal.

Questions about PNM's decision-making in 2012 and 2013 to stay with FCPP (whose coal and operating agreements expired in 2016) were first raised in PNM's 2015 Rate Case. New Energy Economy ("NEE") challenged PNM's

extension of the FCPP coal supply agreement ("CSA"), arguing that PNM's FCPP coal supply costs should have been disallowed because PNM had not performed an analysis to show whether FCPP was its most cost-effective resource. **[32 RP 12360-12362]** The Coalition for Clean Affordable Energy ("CCAE") argued PNM had not provided evidence that its decision to extend its investment in FCPP, including extending the CSA, was prudent. **[*Id.*]** The Commission rejected these arguments for lack of sufficient evidence and found that the terms of the CSA were reasonable. **[32 RP 12358]**

This Court upheld the Commission's decision and declined to recognize NEE's arguments that were directed, "in essence, at the prudence of PNM's continued use of Four Corners as a generation resource." *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶¶ 90-95 ("*PNM*").

In PNM's 2016 Rate Case, parties again challenged PNM's decision to extend its participation in FCPP, seeking disallowances of federally-mandated environmental controls and other life-extending capital investments for continued plant operations. **[36 RP 15072]** PNM entered into a contested Stipulation with eleven parties, including CCAE and Staff (but not NEE), wherein PNM agreed to a debt-only return on the at-issue FCPP investments. **[32 RP 11721-11724]** The Stipulation provided that PNM would perform an analysis of early exits from FCPP in 2024 and 2028 as part of PNM's next IRP conducted in 2020. **[32 RP 11777]**

NEE contested the Stipulation and litigated the merits of FCPP prudence and disputed FCPP investments. The Certification of Stipulation recommended rejecting the Stipulation and disallowing the disputed investments. **[36 RP 15072-15073]**

The Commission rejected the Certification of Stipulation's recommendations and authorized PNM to recover the disputed FCPP capital investments in its rates with a debt-only return. **[36 RP 15073-15074]** The Commission decided in its Revised Final Order "to defer the issue of imprudence to PNM's next rate case" if certain modifications were accepted by the signatories of the Stipulation. **[36 RP 15073]** The Commission's deferral of prudence to PNM's next rate case offered parties the chance to develop a more complete record on whether PNM's decision to stay with FCPP was prudent, and if any remedy might be required for alleged imprudence.[8] **[36 RP 15073-15074]**

The ETA, which allows all FCPP undepreciated investments at the time of plant closure to be securitized, became effective on June 14, 2019,[9] prior to the

[8] Although NEE fully litigated the prudence of PNM's FCPP decision-making in the 2016 Rate Case, the Commission found that determining a remedy for alleged imprudence—if any—was not possible due to a lack of evidence to support any potential prudence disallowance. **[32 RP 11705 ¶ 66]**

[9] *Egolf*, 2020-NMSC-018, ¶ 31.

earliest date (in 2020) by which PNM could file its next rate case.[10] PNM has not yet filed a subsequent rate case. **[27 RP 06791:5-19]** The Commission confirmed PNM was not required to file a new rate case by any specific deadline and that PNM's existing rates, which include the previously contested FCPP investments, are just and reasonable.[11]

B. PNM's ETA FCPP Abandonment Application and Showing of Adequate Potential Replacement Resources

On January 8, 2021, PNM applied for approval to abandon its minority share of FCPP by December 31, 2024, and to recover its energy transition costs through securitized financing under the ETA. **[1 RP 00003-00034]** To achieve this early exit, the Application sought approval to sell and transfer PNM's interest in FCPP to NTEC. **[1 RP 00003-00004]**

Among the energy transition costs PNM seeks to recover through securitization are $271.3 million for PNM's actual and estimated undepreciated FCPP investments as of the proposed abandonment date, which includes

[10] Under the approved 2016 Rate Case Stipulation, PNM agreed not implement any new base rate changes before January 1, 2020. **[27 RP 06788:8-23]**

[11] Case No. 20-00210-UT, *Order on Complaint*, 3, ¶ 10 (PNM continues to operate FCPP and recover costs in accordance with established rates); 3-4, ¶ 12 (the Commission made no finding that the rates it established were imprudent nor set forth any requirement to file the next rate case by a date certain).

approximately $180 million for investments included in rates as of January 1, 2019. **[30 RP 10266:4-10267:12, 10319:2-10320:8]**

PNM's testimony in support of FCPP abandonment compared the long-term costs of retaining PNM's FCPP interest through 2031 (when current coal and operating agreements end) with the costs of abandoning FCPP at the end of 2024. PNM's analysis, based on robust model inputs and forecasts **[35 RP 14918]**, found that abandoning FCPP early with ETA securitization would save customers between $30 million and $300 million over twenty years, with a median expected savings of $143.7 million. **[35 RP 14917, 14921]**

PNM explained that its analysis used typical resource types, whose average costs were known, in presenting various proxy resource modeling scenarios to demonstrate the likely composition of a replacement portfolio for FCPP. **[35 RP 14922]** PNM's experts testified that adequate potential replacement resources, sufficient to provide reasonable and proper service to retail customers, would be available when needed. This testimony was based on bidders' information from responses to PNM's recent requests for proposals ("RFP") for new resources. **[27 RP 06801:10-06803:8, 06821:10-21, 06851:22-06852:13; 29 RP 08854:20-08856:13; 30 RP 09759:22-09760:14, 09776:16-09777:3, 09782:1-09783:7, 09820:24-09821:6, 09825:7-09827:4]**

Not a single opposing witness offered countervailing evidence. Staff expert Eli LaSalle agreed with and supported PNM's findings on the sufficiency and availability of potential replacement resources. **[32 RP 11441:4-11442:23; 35 RP 14956]** The Hearing Examiner credited PNM's and Staff's testimony as reasonable and sufficient. **[35 RP 14955-14957]**

C. Injection of a FCPP Prudence Review in ETA Abandonment and Financing Application

Prudence issues were injected into PNM's Application through the Hearing Examiner's *Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding*[12] issued February 26, 2021 ("February Order"), directing PNM to amend and supplement its Application so that the life-extending investments in FCPP that were at issue in the 2016 Rate Case would be subject to a prudence review. **[3 RP 01359-01360]** The February Order implemented a Commission order issued on February 10, 2021, in response to a request to reopen Case No. 16-00276-UT.[13] That order stated that prudence would be determined in the already-pending ETA abandonment and financing case. **[3 RP 01352, 01355, 01359]** The February Order acknowledged that PNM preserved its argument that the ETA

[12] The February Order also required supplemental testimony on the sale of PNM's interest in FCPP to NTEC, ungermane to this appeal. **[3 RP 01359]**

[13] Case No. 16-00276-UT, *Order on Sierra Club's Motion to Re-Open Docket to Implement the Revised Final Order*, 7-8, ¶¶ 24-25 (Feb. 10, 2021).

prohibits any prudence review of FCPP investments in rates as of January 1, 2019. **[3 RP 01355, 01360]**

PNM filed supplemental testimony from an expert economic consultant, Frank Graves, on the prudence of PNM's decision to stay with FCPP. **[31 RP 10896-10960]** Mr. Graves explained why the modeling and analysis that PNM performed in 2012 supported the choice to remain with FCPP in late 2013. **[31 RP 10915-10923]** Mr. Graves also performed his own independent quantitative analysis, finding that staying with FCPP would have had a lower expected cost than the alternative resource considered at the time. **[31 RP 10923-10936]** Mr. Graves further testified that even if PNM had acted imprudently, which he did not accept, no disallowance remedy was required because there was no significant financial harm to customers from that decision. **[31 RP 11017-11023]**

All parties were provided the opportunity to litigate and present opposing testimony on FCPP prudence so that the Commission could complete its final evaluation on this issue in this case.

D. Hearing Examiner Recommendation to Approve Abandonment and Securitization But Defer Prudence

The Abandonment RD recommended that the Commission approve PNM's Application to abandon FCPP and issue a companion financing order. **[35 RP 14997 ¶ B; 36 RP 15172-15173 ¶¶ 2-3]** The Abandonment RD rejected Sierra Club's argument that PNM's calculated savings of $30 million to $300 million from

the sale and transfer to NTEC should have been compared against hypothetical 2024 and 2028 contractual breach scenarios in which customers would still incur plant costs under FCPP operating and coal supply agreements set to terminate in 2031. The Abandonment RD found that analyzing such hypotheticals "would not be a worthwhile or sensible exercise." **[35 RP 14948]**

The Abandonment RD also rejected factually unsupported legal arguments from Staff that PNM failed to demonstrate adequate potential replacement resources. **[35 RP 14955-14957]** The Abandonment RD found that because PNM had already conducted an RFP for replacement resources and provided undisputed testimony that developers would have adequate time to place projects in service when needed for the 2025 summer peak season, PNM had made the required showing of adequate potential resources under Section 62-18-4(D) of the ETA. **[35 RP 14957]**

In recommending securitization of the $271.3 million in FCPP investments, the Financing RD noted that only one party critiqued Mr. Graves's actual quantitative analysis supporting FCPP prudence, without overcoming his findings. **[36 RP 15079-15080]** Other parties simply "rel[ied] heavily … on citing to the [2016] Certification of Stipulation for their evidence of [] PNM's alleged imprudence." **[36 RP 15080]** The Hearing Examiner stated that citations to proposed findings rejected by the Commission in a prior rate case carries no

evidentiary meaning where the Commission had required that issue to be fully re-litigated. **[36 RP 15095]** The Financing RD found that "the record the parties attempted to make on the 'issue of prudence' in this case was inadequate" and that the sole critique of Mr. Graves's quantitative analysis was insufficient "to base a recommend[ed] finding that PNM acted imprudently or withstand appellate review." **[36 RP 15095 & n.246]** Although recommending issuance of an ETA financing order which included securitizing all of the estimated FCPP abandonment costs, the Hearing Examiner rationalized a further FCPP prudence deferral on the ground that the record did not provide the Commission the ability to determine that PNM had made imprudent FCPP decisions.

E. Exceptions to the Recommended Decision

The parties that filed exceptions to the Abandonment and Financing RDs focused on preserving additional opportunities to challenge PNM's FCPP investments. **[36 RP 15281, 15294, 15323]** The arguments to deny abandonment had one goal: to avoid application of the ETA so that PNM could not securitize its undepreciated FCPP investments.

Sierra Club acknowledged that PNM's position that its FCPP capital costs should be recovered through bond financing, "is based on the plain language of the ETA concerning costs being recovered in rates." **[36 RP 15250]** Sierra Club argued against approval of PNM's Application because "it is uncontested that if PNM's

abandonment application denied [sic], the Commission can make the imprudence findings it deferred in Case No. 16-00276-UT." **[*Id.*]**

Staff's exceptions disregarded its own witness's position that PNM had demonstrated there would be sufficient potential replacement resources when needed, and opposed applying the ETA, opining that: "Instead of allowing this cynical cash grab, the Commission should simply deny PNM the authority to abandon the FCPP at this time[.]" **[36 RP 15281;** *see also* **36 RP 15294, 15323** (other similar intervenor exceptions)**]**

F. Final Decision Denying Abandonment and Ordering Prudence to Be Determined in Subsequent Proceeding

The Commission rejected the Abandonment and Financing RDs, finding that PNM should not be authorized to abandon and transfer its FCPP interest to NTEC because (1) PNM had failed to identify actual replacement resources and (2) PNM had not properly complied with the agreement that in its 2020 IRP it would model 2024 and 2028 exits from FCPP. **[37 RP 15418-15422 ¶¶ 15-32, 15423-15424 ¶¶ 36-38]** Because the Commission denied abandonment, it summarily denied PNM's request for a financing order. **[37 RP 15426 ¶ D]**

The Commission determined PNM should have included a portfolio of actual replacement resources in its Application. **[37 RP 15419 ¶ 22]** This contradicts the unchallenged ruling of its Hearing Examiner that such a requirement would nullify the ETA's Section 62-18-4(D) provision that approval of abandonment does not

require concurrent approval of replacement resources. **[35 RP 14955-14957]** The February Order requiring parties to address FCPP prudence had also denied a separate argument that PNM's Application should be re-filed because it did not include actual replacement resources. The February Order specifically found that requiring PNM to present for approval the exact proposed replacement resources would effectively nullify the provisions of Section 62-18-4(D). **[3 RP 01358]** Thus, the Commission knew in February—months before reams of testimony were filed and a seven-day hearing was held—that PNM had not filed for approval of its replacement resources and had a ruling that it need not do so. Only in the Final Order did the Commission develop a statutory construction that the ETA mandated PNM re-file its application with actual replacement resources.

Although the Commission cited Section 62-18-4(D) (which gives the utility the discretion to defer a request for replacement resources), the Commission nevertheless repeatedly called for "actual" resources to satisfy a Commission desire for more "up-to-date information." **[37 RP 15419-15421 ¶¶ 21-22, 24, 26-27, 31]** Relying on its desire to learn about actual rather than potential resources, the Commission dismissed PNM's resource modeling [14] of likely replacement

[14] Proxy modeling uses known performance and pricing data for electric generation resource types likely to bid into an RFP. **[30 RP 09779:14-09781:5]** PNM populated its modeling database, which was also used to quantify customer savings, with data from recently conducted RFPs. **[1 RP 00671:15-00674:4, 00681:4-00683:13]**

portfolios and evidence that sufficient resource availability was demonstrated by bidder responses to current RFPs. **[37 RP 15419 ¶ 21]** The Commission acknowledged (but did not analyze) other facts that demonstrate availability of adequate potential resources. The Commission also acknowledged PNM would be filing its FCPP resource replacement case upon completing the RFP bid evaluation and contracting process. **[37 RP 15419-15422 ¶¶ 23-26, 32]**

The Commission additionally found that PNM "breached of [sic] the terms of the [S]tipulation" from Case No. 16-00276-UT, where PNM agreed to model a 2024 and 2028 exit from FCPP in its 2020 IRP. **[37 RP 15423-15424 ¶¶ 36-38]** However, a lack of alternative scenarios in PNM's separate 2020 IRP filing does not constitute a legal basis on which to deny an abandonment application.[15]

Concerning FCPP prudence, the Final Order modified the Financing RD's deferral of the issue to PNM's next rate case and ordered that prudence should be re-litigated in either a re-filed abandonment case or in another unspecified future case. **[37 RP 15426 Ordering ¶¶ E, G]**

III. STANDARD OF REVIEW

PNM bears the burden of demonstrating that the Final Order is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's

[15] The Hearing Examiner rejected the notion that there was any evidentiary meaning in comparing the proposed lawful sale to NTEC against hypothetical costs of PNM breaching its legal obligations as a FCPP owner in the future. **[35 RP 14947-14948]**

authority or otherwise inconsistent with law. *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533 ("*NMIEC 2007*"). If PNM carries this burden, the Court must vacate the Commission's decision. *Hobbs Gas Co. v. N.M. Pub. Regulation Comm'n,* 1993-NMSC-032, ¶ 6, 115 N.M. 678.

Statutory interpretation is a question of law, which this Court generally reviews *de novo*. *NMIEC 2007*, 2007-NMSC-053, ¶ 19. The Court will afford some deference to legal interpretations involving special agency expertise. *Id.* However, the Court will reverse the Commission's statutory interpretation "if it is unreasonable or unlawful." *CFRE*, 2022-NMSC-010, ¶ 14.

Under arbitrary and capricious review, this Court determines whether the decision was unreasonable or without a rational basis, when viewed in light of the whole record. *PNM*, 2019-NMSC-012, ¶ 16. An agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand. *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-015, ¶ 8 ("*NMIEC 2019*").

This Court will affirm the Commission's factual findings if they are supported by substantial evidence, considering the whole record. *CFRE*, 2022-NMSC-010, ¶ 13. Substantial evidence is evidence that a reasonable mind might

accept as adequate to support a conclusion. *N.M. Exch. Carrier Grp. v. N.M. Pub. Regulation Comm'n*, 2016-NMSC-015, ¶ 28. However, substantial-evidence review does not "ignore[e] evidence unfavorable to the agency decision." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 12.

IV. PRESERVATION OF ISSUES

PNM preserved each of the following issues in post-hearing briefing and responses:

The misapplication of Section 62-18-4(D) and subsequent denial of an abandonment and financing order. **[34 RP 14503 & n.99; 35 RP 14771-14774]**

The misapplication of Section 62-9-5 in denying abandonment. **[34 RP 14501-14508; 35 RP 14721-14751]**

Denial of abandonment for noncompliance with a requirement in its IRP proceeding. **[34 RP 14476, 14529-14533; 35 RP 14729-14731]**

The improper deferral of a prudence determination and subsequent denial of ETA securitization of abandonment costs. **[34 RP 14554-14575; 35 RP 14793-14807]**

V. ARGUMENT

The Commission contravened its regulatory standards and executed an end-run around the ETA by denying PNM's request to abandon FCPP. The

abandonment denial allowed the Commission to summarily refuse to issue a financing order despite unrefuted evidence that PNM's request for a financing order met the terms of the ETA.

The Commission's refusal to implement the ETA derails PNM's early exit from and securitization of FCPP. Based on a lack of evidence on which to base FCPP disallowances **[36 RP 15095 n.246]**, the Commission arbitrarily denied abandonment and the requested financing order in furtherance of another bite at the apple on FCPP prudence. **[37 RP 15426 ¶ D]**

In order to pursue FCPP disallowances of ETA abandonment costs, the Commission necessarily had to deny abandonment. The only argument presented for doing so was the pretextual conclusion that PNM's Application should have included the actual FCPP replacement resources. The Commission voided the discretion provided in the ETA that permits PNM to demonstrate "adequate *potential* new resources sufficient to provide reasonable and proper service" in its application for abandonment and a financing order. § 62-18-4(D) (emphasis added). No party submitted testimony that challenged the adequacy of PNM's evidence supporting potential replacement resources, and the one Staff witness addressing this issue specifically stated in sworn testimony that PNM had demonstrated there would be adequate potential replacement resources. **[32 RP 11441:4-11442:23; 35 RP 14956]** The Commission improperly leaned on Staff's

bare, post-hearing assertion that PNM failed to identify adequate potential replacement resources as required by the ETA. *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 51, 128 N.M. 434. ("[A]rguments of counsel are not evidence." (citations omitted)). Staff's cursory legal position is directly contradicted by Staff's actual testimony. The Commission used its misinterpretation of Section 62-18-4(D) to justify summary denial of the ETA financing order under Section 62-18-5(A).

This decision not only runs counter to the terms of the ETA, but also to the Commission's prior decisions in accordance with the ETA. In the San Juan Generating Station ("San Juan") abandonment case, the Commission granted abandonment by relying on PNM's modeling of savings to ratepayers *without* evaluating the Company's preferred portfolio of replacement resources, and expressly deferred that evaluation to a separate subsequent proceeding.[16] The Commission departed from this precedent and other case rulings by imposing—post-hearing—a requirement that actual replacement resources were required to be identified and included in PNM's ETA Application.

[16] *In re Public Service Company of New Mexico's Abandonment of San Juan Generating Station Units 1 and 4*, NMPRC Case No. 19-00018-UT, *Recommended Decision* on Abandonment ("*San Juan RD*") at 17-28, 34, Decretal ¶ B (Feb. 21, 2020), approved by *Final Order on Abandonment* ("*San Juan Final Order*") (Apr. 1, 2020).

By misinterpreting Section 62-18-4(D) and deviating from its past application of that provision in PNM's previous ETA abandonment and financing case, the Commission dismissed a year's worth of proceedings and testimony from nearly twenty witnesses over seven days of hearing—all to avoid its "nondiscretionary duty to apply the ETA." *CFRE*, 2022-NMSC-010, ¶ 9 (*quoting Egolf*, 2020-NMSC-018, ¶¶ 2, 16, 33).

A. The Commission Unlawfully Denied PNM's Abandonment Application

1. *The Commission Ignored the Plain Language of the ETA*

As a qualifying utility seeking to abandon a qualifying generating facility, PNM filed its Application for FCPP abandonment and approval of a financing order to recover its energy transition costs pursuant to Section 62-18-4(A) of the ETA. To obtain a financing order, "a qualifying utility must obtain approval to abandon a qualifying facility pursuant to Section 62-9-5 NMSA 1978." § 62-18-4(A).

The ETA permits the utility the choice to "include requests for approval for new resources necessitated by the abandonment" in the financing order application or to "defer applications for approvals of replacement resources to a separate proceeding[.]" §§ 62-18-4(C)-(D); *see also* § 62-18-3(A) (application for replacement resources to be filed no later than one year after abandonment approval for facilities to be abandoned prior to January 1, 2023). This deferral accommodates the longer statutory deadline for consideration of new resources (up to 15 months)

than allowed for a financing case under the ETA that includes replacement resources (up to 9 months). *Compare* § 62-9-1(C) *with* § 62-18-5(A). If a utility defers its application for approval of replacement resources, the only requirement the ETA imposes is that the financing order application must "identif[y] adequate potential new resources sufficient to provide reasonable and proper service." § 62-18-4(D).

While the Commission concedes that the "express unambiguous language" of Section 62-18-4(D) requires it to determine whether the application includes identification of "adequate potential new resources … sufficient to provide reasonable and proper service to retail customers[,]" the Final Order nevertheless concludes PNM could only meet this showing by identifying the ***actual*** replacement resources PNM will propose. **[37 RP 15419 ¶¶ 20-21;** *see also* ***id.*** **¶¶ 22, 24, 26, 27, 31]** This legal interpretation fails to give effect to the plain language of the statute and legislative intent. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11 (Court uses plain language of statute as primary indicator of legislative intent) (citation omitted).

The plain meaning of the word "potential" is defined as "existing in possibility; ***capable of development into actuality***."[17] Because the plain meaning

[17] *Potential*, Merriam Webster Online Dictionary (emphasis added), https://www.merriam-webster.com/dictionary/potential.

of the term "potential" must indicate an action is "capable of development into actuality," the Commission cannot assume the Legislature meant to use the term "actual" when it said "potential." *Leger v. Leger*, 2022-NMSC-007, ¶ 34, ("When the plain meaning of statutory language is as straightforward as it is here, it is our obligation to uphold the statute as written.").

The language in Section 62-18-4(D) requiring potential resources to be "sufficient to provide reasonable and proper service" cannot be interpreted to require identifying "actual" resources. That interpretation renders as surplusage Section 62-18-4(C), which states that as part of a financing application a utility ***may*** request, but need not, the approval of new resources. *Katz v. N.M. Dep't of Human Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530 (statutes should be interpreted to avoid rendering parts of the statute "surplusage or superfluous").

No deference can be given to the Final Order's statutory analysis because it flies in the face of the ETA's plain language allowing the utility the choice whether to include a request for approval of new resources in its ETA abandonment filing by demonstrating there will be adequate potential resources for future needs.

2. *The Final Order is Unsupported by Substantial Evidence and is Arbitrary and Capricious*

The Court should also overturn the Final Order's decision as unsupported by substantial evidence and arbitrary and capricious.

In its unrefuted testimony, PNM populated its database of potential or generic replacement resources using actual bidder data information from two recently conducted RFPs, to model the resources needed for 2025 and to calculate a range of savings for customers. **[1 RP 00671:15-00672:17, 00681:4-00683:13]** PNM demonstrated that the data used from its last two RFPs were recent enough to serve as a proxy for alternative resource options for FCPP while PNM was conducting its FCPP-specific RFP. **[1 RP 00673:8-16]** In response to those RFPs, PNM received proposals for approximately 10,000 MW and 6,500 MW of replacement resources on PNM's system, respectively, multiple times the amount of capacity needed to replace the 200 MW of FCPP. **[1 RP 00686:4-15]** No witness disputed PNM's substantial evidence, and Staff's witness testified that PNM demonstrated the sufficiency and availability of potential replacement resources. **[32 RP 11441:4-11442:23; 35 RP 14956]**

At hearing, PNM also testified that it had conducted the RFP process specifically to replace FCPP. PNM's testimony confirmed that the FCPP RFP yielded robust results "in terms of the number of bidders, the amount of megawatts, and average pricing" as compared to the other two RFPs. **[30 RP 09820:24-09821:6, 09825:19-09827:4]** The record showed, based on PNM experts' past experience, there was sufficient time to negotiate replacement supply contracts, request and receive regulatory approvals, and for construction of approved

resources by the time resources were needed in 2025. **[30 RP 09774:24-09777:3]** The substantial evidence demonstrated that the FCPP-specific RFP identified bidders that offered sufficient new resource capacity to serve future customer needs, further validating the results of the RFPs used to populate PNM's proxy modeling for replacement resources. No witness challenged PNM's evidence of the adequacy of the potential replacement resources based on PNM's most recently conducted FCPP RFP. **[32 RP 11441:4-11442:23; 35 RP 14956]**

Based on the unrefuted evidence, the Hearing Examiner found that PNM reasonably and credibly demonstrated that replacement resources can be deployed prior to its abandonment of FCPP. **[35 RP 14932, 14957]** The Hearing Examiner found that PNM had conducted the RFP for replacement resources for FCPP and planned to file its replacement resource case in the first quarter of 2022. Noting the planned schedule for bringing resources online before the summer peak of 2025, the Hearing Examiner found that "[t]he evidence adduced by PNM on the issue of potential resource adequacy, therefore, is sufficient to satisfy the Company's deferral of an application for [FCPP] replacement resources pursuant to ETA Section 62-18-4(D)." **[*Id.*]**

While the Final Order credited this uncontested evidence **[37 RP 15420 ¶ 25]**, it reached internally inconsistent conclusions directly contradicted by the record. The Final Order concludes that "proxy modeling alone" is not sufficient to

meet Section 62-18-4(D), while also acknowledging that PNM had already conducted an RFP and had "actual resources already under consideration." **[37 RP 15419 ¶¶ 21, 23-24]** "[A]n internally inconsistent analysis is arbitrary and capricious." *Nat'l Parks Conservation Ass'n v. Envtl. Prot. Agency*, 788 F.3d 1134, 1141 (9th Cir. 2015) (citations omitted).

Further, the Commission's rejection of proxy resource modeling, which it has previously accepted as reliable evidence, is arbitrary and capricious. 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). A regulatory body is not free to change its position without good cause and prior notice to the affected parties. *Hobbs Gas. Co.*, 1993-NMSC-032, ¶ 12.

The Final Order necessarily recognizes that adequate replacement resources are identified and available because it also concludes that PNM can nearly immediately re-file "in the first quarter of 2022" an application that includes a request for actual replacement resources, as part of repeating its request for abandonment and demonstration of prudence. **[37 RP 15420, ¶ 26]** The

Commission clearly understood that PNM had identified sufficient potential available resources to allow PNM to replace its 200 MW FCPP interests. **[37 RP 15419 ¶ 23]** The Commission further negated the logic of its ruling when it said, "Based on applicable timeframes, if PNM re-files its application as anticipated, sufficient time will remain for approval of the replacement resources." **[37 RP 15422, ¶ 32.]**

The Final Order's internal inconsistencies demonstrate it is not based on substantial evidence, viewing the record as a whole and considering evidence both favorable and unfavorable to the Commission's decision. *N.M. Exch.*, 2016-NMSC-015, ¶ 28; *Morningstar*, 1995-NMSC-062, ¶ 12.

The Commission's own statements indicate that a reasonable mind could not conclude from the record that PNM failed to identify adequate potential replacement resources sufficient to provide reasonable and proper service. A Commission decision is arbitrary and capricious if it lacks a rational basis, was not the product of reasoned decision-making, and provides no rational connection between the facts found and the choices made or entirely omits consideration of relevant factors. *See Resolute Wind 1 LLC v. N.M. Pub. Regulation Comm'n*, ¶ 26, 2022-NMSC-___ (S-1-SC-37320, Feb. 9, 2022); *NMIEC 2019*, 2019-NMSC-015, ¶ 8. The Commission's decision does not demonstrate its ultimate conclusion has a rational connection to the facts found or to the plain and unambiguous statutory

language giving PNM the option to defer its application for approval of a replacement portfolio to a later proceeding. *See NMIEC 2019*, 2019-NMSC-015, ¶ 8.

3. *The Final Order Denied Abandonment Without Evaluating Applicable Standards or Prior Precedent*

To obtain a financing order, "a qualifying utility must obtain approval to abandon a qualifying facility pursuant to Section 62-9-5 NMSA 1978." § 62-18-4(A). This Court has recognized that "Section 62-9-5 governs the process in which a public utility may abandon a facility." *Egolf*, 2020-NMSC-018, ¶ 24. Section 62-9-5 mandates that the Commission authorize a utility to abandon a plant upon a finding that the present and future public convenience and necessity do not require the continuation of service. To make this finding, the Commission requires abandonment applications to demonstrate a net public benefit. **[35 RP 14905, 14908]** The Commission also utilizes *Commuters' Committee* factors as criteria for consideration in abandonment proceedings, where applicable. **[*Id.*]**; *see also Commuters' Comm. v. Pa. Pub. Util. Comm'n*, 88 A.2d 420, 424 (Pa. Superior Ct. 1952).

Tellingly, the Final Order makes no mention of Section 62-9-5. In rejecting the Abandonment RD's proposed approvals, the Commission did not determine that the present and future public convenience and necessity requires the continued use

of FCPP. Equally telling, no party argued that the present or future public convenience and necessity requires PNM to continue to rely on FCPP after 2024.

In reference to exceptions filed by Staff and NEE, the Commission briefly discusses the *Commuters' Committee* standards without any evaluation of the evidence relating to those factors; its only determination is that PNM was required to provide its proposed new resources in its Application in order to prove FCPP can be abandoned. **[37 RP 15415-15419 ¶¶ 4, 6, 10, 15-16, 22]**

The Commission also failed to conduct a net-benefit test to address long-held standards for abandonment, thus providing no rationale for rejecting the Abandonment RD. The Hearing Examiner determined that PNM's credible modeling of potential replacement resources demonstrated abandonment would generate significant customer savings, with the median of cost savings for customers around $143.7 million. **[35 RP 14929-14930, 14991-14992]** While the Hearing Examiner indicated that these economic benefits alone may be "dispositive," he cited several "additional significant benefits of the proposed abandonment," including the substantial benefits to the Navajo Nation and local communities of a just energy transition. **[35 RP 14930-14934, 14942, 14992-14995]** The Hearing Examiner applied the net public benefit standard, finding "the preponderance of the evidence supports an affirmative finding that the proposed

sale and transfer is in the public interest." **[35 RP 14984-14985;** *see also* ***id.*** **at 14991-14993]**

The Final Order makes no mention of this record evidence. Rather, the Final Order determines that actual replacement resources must be filed in an abandonment proceeding to satisfy the *Commuters' Committee* factors **[37 RP 15419 ¶ 22, 15426 ¶ B]**, in spite of clear language in the ETA that utilities may choose to defer filing for replacement resource approvals. § 62-18-4(C)-(D); § 62-18-3(A). It is presumed that the Legislature is aware of existing statutes and agency rules and orders when it makes law, and therefore a change in statute is presumed to change policy. *In re PNM Gas Services*, 2000-NMSC-012, ¶ 73, 129 N.M. 1. Given that rule, the Commission cannot elevate a new interpretation of its regulatory criteria above the ETA's plain language.

Further, Staff testified that PNM's application satisfied the net public benefit test and the *Commuters' Committee* standards.[18] Having raised an initial reservation about PNM's satisfaction of the first factor of the *Commuters' Committee* standards in pre-filed testimony, Staff clarified at hearing that the *Commuters' Committee* factors "have been viewed holistically" in the net public benefit analyses in prior Commission cases and concluded application of that factor

[18] NEE merely listed the *Commuters' Committee* factors and stated conclusorily that PNM failed to meet them; NEE's testimony provided no further evaluation or facts. **[33 RP 13325:3-19]**

does "not affect the overall adequacy of the Application." **[31 RP 11340:5-11341:19; 32 RP 11439:14-22; 35 RP 14954-14955]** To the extent the Commission relies on a new interpretation of a single *Commuters' Committee* factor to require actual replacement resources be included, that finding must yield to the language in Section 62-18-4(D) explicitly providing utilities a choice to defer replacement resource approval in a financing order application.

The Commission's purported faithfulness to this *Commuters' Committee* factor also is not credible or reasonable in the face of its prior abandonment orders. PNM's previous ETA request to abandon San Juan Units 1 and 4 was approved in Case No. 19-00018-UT without evaluating actual replacement resources; rather, abandonment approval was subject to Commission evaluation of replacement resources in the subsequent Case No. 19-00195-UT docket. *San Juan RD* at 17-28, 34, Decretal ¶ B, approved by *San Juan Final Order*. The Commission actually deferred Case No. 19-00018-UT's replacement requests pursuant to Section 62-18-4(D), and bifurcated consideration of San Juan replacement resources in Case No. 19-00195-UT until after it determined whether San Juan should be abandoned in the ETA abandonment and securitization hearings in Case No. 19-00018-UT. The Commission also has decided that it will not consider replacement resources for

other PNM retiring capacity until after the Commission determines whether abandonment should be authorized.[19]

4. *The Commission's Alternative Basis for Denying Abandonment Is Unlawful*

The Commission also denied abandonment based on an alleged lack of an analysis that PNM was required to present in a separate IRP rule compliance proceeding. This requirement stemmed from the 2016 Rate Case Stipulation that PNM would 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.[20] **[37 RP 15424 ¶ 37]** The Commission acts outside its authority in denying abandonment based on the purported lack of such modeling scenarios in a completely separate case. This Court should not grant any deference to this

[19] *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*, Case No. 21-00083-UT, Initial Order Assigning Hearing Examiner, ¶ 7 (April 21, 2021) ("PNM's requests for approval of the replacement resource [purchased power agreements] are necessarily dependent on the Commission's approval of PNM's request for abandonment of the Leased Interests to supply the basis for the requisite finding of 'need' for the replacement resources" and therefore, "any applicable time period begins only after the Commission acts on the abandonment request."). The Commission bifurcated the replacement resources to a separate proceeding, Case No. 21-00215-UT.

[20] PNM's IRP was filed January 29, 2021, in Case No. 21-00033-UT.

Commission conclusion because the Final Order treated it as a question of law. **[37 RP 15423-15424 ¶¶ 36-38]**

Egolf held that the Commission does not have authority to enforce a prior Commission order by compelling PNM to file an abandonment proceeding. 2020-NMSC-018, ¶¶ 27-30 (citing NMSA 1978, Section 62-12-1 (1941)). The Court found that Section 62-12-1 provides for a statutory enforcement mechanism if the Commission believes a utility has failed to comply with a prior order. *Id*. In this regard, the Commission's IRP Rule, 17.7.3.12 NMAC, explicitly provides the enforcement action to remedy noncompliance with IRP requirements: "If the commission determines the proposed IRP does not comply with the requirements of this rule, the commission will identify the deficiencies and return it to the utility with instructions for re-filing." Accordingly, an appropriate remedy would have been to instruct PNM in Case No. 21-00033-UT (PNM's relevant IRP case) to re-file the 2020 IRP with the FCPP exit analyses.

Although the facts here are obverse of those in *Egolf* (*i.e.*, the Commission denied—rather than compelled—an abandonment application as a remedy for noncompliance in a separate proceeding), *Egolf*'s broader principle applies. As a matter of law, denial of an abandonment application is not a remedy for a perceived violation of the stipulated requirement to file specific information in PNM's 2020 IRP. *See Egolf*, 2020-NMSC-018, ¶ 29; *cf. New Energy Econ. v. N.M. Pub. Reg.*

Comm'n, 2018-NMSC-024, ¶ 13 ("Other statutes [rather than IRP Rule] govern the circumstances under which a utility may procure, construct, or abandon generation resources").

Moreover, the Commission denied PNM's due process rights in concluding that the lack of modeling contractual breach exit scenarios constituted a legal basis for denying abandonment separate from the net public benefit test. Because no party ever argued for such a result during the hearing process, a denial of PNM's abandonment application on this basis without any consideration in the case below results in a violation of PNM's due process rights. *See PNM*, 2019-NMSC-012, ¶¶ 60-65 (holding the Commission violated utility's due process rights where an issue was "first raised by the Commission in its final order").

Sierra Club first raised a lack of IRP modeling in post-hearing briefing. Sierra Club argued, without evidentiary support, that by not analyzing the hypothetical 2024 and 2028 exits in its IRP, PNM was able in the abandonment case to compare its proposed sale and transfer to NTEC against a "worst-case" baseline of PNM's continued use of FCPP until 2031 (when existing contractual obligations end). **[34 RP 14039]** Sierra Club also contended PNM's testimony addressing why a contractual breach would be more costly to customers than a lawful sale and transfer to NTEC should not substitute for a cost-benefit analysis that modeled 2024 and 2028 FCPP contractual breach scenarios. **[35 RP 14666]**

Sierra Club claimed: "[T]he very reason that the parties included this [IRP] provision in the stipulation was to have a quantitative analysis of the economics of exiting Four Corners by breaching PNM's contractual obligations." **[36 RP 15254]** Sierra Club never argued that the lack of a cost-benefit analysis of a hypothetical FCPP 2024 and 2028 exit via contractual breach required as part of PNM's IRP was an independent and *legal* basis for denying abandonment.

The Abandonment RD rejected Sierra Club's post-hearing factual argument, which was unsupported by any testimony. The Abandonment RD found that a comparison of the benefits and costs of a hypothetical contractual breach to the benefits and costs of the proposed NTEC transaction would not provide meaningful information on whether the continued use of FCPP was necessitated under the abandonment statute. **[35 RP 14948]**

PNM was not given reasonable notice that the Commission could as a matter of law deny abandonment as a remedy for IRP noncompliance. Accordingly, the Commission violated PNM's due process right to be heard. *See Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 21, 148 N.M. 21 (due process in administrative context requires reasonable notice and opportunity to be heard).

B. The Commission's Deferral of FCPP Prudence in a Subsequent Case Should Be Vacated

In denying abandonment and rejecting the Financing RD, the Final Order directed that "prudence issues" concerning the investments in FCPP would be addressed in a re-filed abandonment or other proceeding. **[37 RP 15425-15426 ¶ 43, Ordering ¶¶ E, G]** Because the ETA defines the abandonment costs to be securitized, it precludes any prudence review or disallowance of PNM's undepreciated investments in FCPP being recovered in rates as of January 1, 2019, or investments made for enumerated purposes. This Court should vacate this aspect of the Final Order and instruct the Commission to properly apply the ETA on remand.

The Court also should apply *res judicata* principles to the Commission's efforts to re-litigate prudence for FCPP, particularly given the Commission's intentions were to summarily deny abandonment and provide another opportunity to argue FCPP imprudence when faced with insufficient evidence to make such a finding.

1. *The Commission Cannot Avoid Application of Section 62-18-2(H)(2)(c) By Deferring a Prudence Decision*

After ordering parties to address previously deferred FCPP prudence issues, and after the Hearing Examiner concluded the parties failed to present credible evidence of imprudence, the Final Order decided to yet again defer a FCPP

prudence decision. The Commission relied in part on its purported authority under Section 62-18-4(H) to review for purposes of disallowance all FCPP investments, including those the Commission previously included in rates as of January 1, 2019. The Commission took this action in part to avoid establishing the ETA-defined abandonment costs to be securitized in a financing order. This Court can review the Commission's conclusions and refusal to act based on the plain language of the ETA and on *res judicata* principles and the arbitrary nature of the decision.

There is no question that the Commission's erroneous ruling—that it has the authority to review and disallow *actual* capital costs that were already included in rates as of January 1, 2019—is contrary to Section 62-18-2(H)(2)(c). These pre-January 2019 costs were known and quantified in the record below. **[36 RP 15054-15057]** Whether the Commission can review or disallow FCPP investments already included in PNM's rates as of January 1, 2019 is purely a legal question and ripe for determination.

In *CFRE,* NEE challenged the San Juan financing order on the ground the ETA strips the Commission of authority to conduct a review or disallow authorized energy transition costs not yet included in rates as of January 1, 2019. The Court noted that the Commission in issuing its financing order had not yet reviewed or disallowed any of PNM's post-January 2019 energy transition costs and that decisions of administrative agencies are subject to review only when the agency's

decision is final. *CFRE*, 2022-NMSC-010, ¶ 27. Consequently, this Court declined to address NEE's challenge, finding it was not ripe. *Id.* ¶ 26.

A ripeness analysis involves a two-pronged inquiry: (1) the fitness for the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Am. Fed'n of State, County & Mun. Empls. v. Bd. of County Comm'rs of Bernalillo County*, 2016-NMSC-017, ¶ 19 ("*AFSCME*"). The legal issue of whether the Commission can review and disallow PNM's pre-January 2019 FCPP undepreciated investments satisfies both prongs.

In assessing ripeness, the "ultimate question … is whether agency action 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 Court "will not wait for the Commission's final decision if the issue will return to us without alteration." *Id.* The Final Order unequivocally assumes that the Commission has the authority under the ETA to review and disallow recovery of PNM's undepreciated investments being recovered in rates as of January 1, 2019, and can use its deferred prudence review to avoid approving estimated ETA abandonment costs in a financing order that meet securitization criteria under Section 62-18-2(H). **[37 RP 15425-15426 ¶¶ 42-44, Ordering ¶¶ E, G]** No further factual development

with respect to PNM's ETA-defined abandonment costs is required to address the legal question presented.

The Court also assesses whether and to what extent the parties will endure hardship if a decision is withheld. *AFSCME*, 2016-NMSC-017, ¶ 28. The focus is whether the challenged action creates a direct and immediate dilemma for the parties. *Id.* In the absence of a ruling on the scope of the Commission's authority in this appeal, PNM and other parties will suffer hardship and harm by having to expend (for a fourth time) significant resources to re-litigate the prudence of FCPP. To avoid harm to PNM's rights (and another trip to this Court), the Court should resolve the scope of the Commission's authority to disallow these expenses.

2. *The ETA Precludes a Prudence Review and Disallowance of FCPP Investments That Were in Rates Prior to January 1, 2019*

The undepreciated FCPP investments contested by the parties fall squarely within Section 62-18-2(H)(2)(c), which provides that "abandonment costs" to be securitized include investments on the utility's books and records being recovered in rates as of January 1, 2019. It is undisputed that the FCPP investments litigated in the 2016 Rate Case and again contested unsuccessfully as imprudent in this case were being recovered in rates as of January 1, 2019. **[36 RP 15102]** The Commission must follow the instruction in the statute. *Egolf*, 2020-NMSC-018, ¶ 22; *CFRE*, 2022-NMSC-010, ¶ 45. Section 62-18-2(H)(2)(c) plainly requires the

Commission to permit recovery through securitization of abandonment costs in rates as of January 1, 2019. The ETA supersedes the Commission's 2016 postponement of a further prudence review of those pre-2019 investments for ratemaking purposes. Nothing in Section 62-18-4(A), which permits a utility to apply to recover its energy transition costs through the issuance of energy transition bonds, would permit the Commission to disallow any of those investments on prudence grounds in a subsequent abandonment case.

As *CFRE* makes clear, the Commission cannot avoid its duty to implement the ETA even if it may disagree with the ETA's policies. *CFRE*, 2022-NMSC-010, ¶ 42. Thus, the Financing RD's statutory analysis is flawed in concluding that the Commission may proceed to perform a prudence review of PNM's undepreciated investments included in rates prior to January 1, 2019, and to implement any resulting disallowances through the adjustment mechanism under Section 62-18-4(B)(10) of the ETA. **[36 RP 15075-15093]** Section 62-18-4(B)(10) requires a financing order to describe a reconciliation process for differences between estimated energy transition costs that are securitized and the actual, final incurrence of such costs.

Nothing in Sections 62-18-2(H)(2)(c) and 62-18-4(B)(10) provides that the Commission may conduct a prudence review of defined energy transition costs for purposes of imposing a disallowance of securitized costs that were actually incurred

and already included in rates. In concluding otherwise, the Financing RD disregards principles of statutory construction, including the guiding principle to determine and give effect to legislative intent. *El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-048, ¶ 7, 149 N.M. 174. The Financing RD also ignores that the "plain language" of the statute is the primary indicator of legislative intent. *Baker*, 2013-NMSC-043, ¶ 11. When language in a statute is clear and unambiguous, courts must give effect to that language and refrain from further statutory interpretation. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583.

The Financing RD attempts to justify departing from the plain language rule to the ETA based on the admonition in *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, that in certain cases caution should be exercised where there is a conflict between the statutory wording and the overall legislative intent. **[36 RP 15084]**

The Financing RD posits that the Legislature could not have intended for the ETA to preclude a prudence review of PNM's pre-January 2019 undepreciated FCPP investments because this would be inconsistent with the policy of Section 62-3-1(B) that rates must be "fair, just and reasonable." **[36 RP 15086-87]** This ignores the fact that that all investments included in rates by definition have met that standard. § 62-8-7(D) (commission shall determine just and reasonable rates

to be charged). The Commission has reiterated the rates resulting from the 2016 Rate Case, which it recognized includes the disputed FCPP investments, are as a matter of law "fair, just and reasonable."[21]

The Financing RD also proposed that any other interpretation of the ETA would usurp the supervisory authority of the Commission under the Public Utility Act and cause a risk of injustice to ratepayers and injure the vested rights of the parties in Case No. 16-00276-UT. These arguments were rejected in *Egolf* and *CFRE* and do not justify ignoring the express language in Section 62-18-2(H)(2)(c). *See, e.g., 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). This Court should reject the Financing RD's faulty rationale.

3. *Re-Litigation of FCPP Prudence is Barred by the Doctrine of Res Judicata.*

The issue of FCPP prudence was addressed in the 2015 Rate Case. Indeed, PNM objected to re-litigation of FCPP prudence in the 2016 Rate Case on the basis that the prudence issue was determined in the 2015 Rate Case, where the Commission approved and the Court upheld, PNM's cost recovery for the FCPP

[21] Case No. 16-00276-UT, *Order on Sierra Club's Motion to Re-Open Docket to Implement the Revised Final Order*, 7, ¶ 22.

CSA in the face of claims of FCPP imprudence. **[32 RP 11716-11717 ¶¶ 61-64]** Although the Commission declined to apply *res judicata* standards in the 2016 Rate Case[22] **[34 RP 14314-14315]**, the Court may do so now.

The doctrine of *res judicata* bars "all claims arising out of the same transaction, regardless of whether they were raised at the earlier opportunity, as long as they could have been raised." *Chaara v. Lander*, 2002-NMCA-053, ¶ 20, 132 N.M. 175. The doctrine applies in cases before the Commission. *See Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 16, 94 N.M. 731. *Res judicata* applies when four elements are met: (1) there was a final judgment in an earlier action, (2) the earlier judgment was on the merits, (3) the parties are the same, and (4) the cause of action is the same in both suits. *Potter v. Pierce*, 2015-NMSC-002, ¶ 10. These requirements are satisfied.

The decisions of an agency have the force and effect of a judgment. *City of Socorro v. Cook*, 1918-NMSC-072, ¶ 11, 24 N.M. 202. Case No. 15-00261-UT reached a final decision on PNM's extension of its CSA for FCPP and rejected unsupported arguments that PNM was imprudent to remain in FCPP as of 2016. **[32 RP12354-12358 ¶¶ 194-202]** Thus, the first and second *res judicata* elements (final judgment on the merits) are satisfied.

[22] **[***See* **32 RP 11716-11717 ¶¶ 61-64]**.

The next two elements (same parties and same action) are interrelated in the administrative context, where a variety of parties may permissively intervene. Claim preclusion does not depend on whether the claims arising out of the same transaction were *actually* asserted in the original action, as long as they could have been asserted. *Moffat v. Branch*, 2005-NMCA-103, ¶ 18, 138 N.M. 224. The same-transaction test considers all issues arising out of a common nucleus of operative facts as a single cause of action. *Potter*, 2015-NMSC-002, ¶ 11.

The facts in the 2015 Rate Case were closely interrelated to the issues in the 2016 Rate Case and in this case. In 2015, NEE argued that PNM's ongoing coal supply costs for FCPP should be disallowed because PNM was imprudent to remain in FCPP. **[32 RP 12360-12632]** CCAE separately argued that "PNM has simply not provided any evidence that its decision to extend its investment in FCPP, including entering into a new coal contract, was prudent." **[32 RP 12361]** In upholding on appeal the conclusion the FCPP coal supply costs were reasonable, the Court noted that in contending PNM was imprudent, the only decision NEE challenged was signing the coal supply agreement, and the Court therefore "decline[d] to recognize NEE's arguments directed at PNM's continued use of Four Corners as a generation resource." *PNM*, 2019-NMSC-012, ¶ 92.

The Commission explicitly found the parties could have litigated the question of PNM's prudence in continuing to use FCPP, and based its decision rejecting

challenges to the CSA and questions of FCPP prudence on the *lack of proof* entered by intervenors on the issue, not on the conclusion that such issues could not have been properly raised. **[32 RP 12354-12356 ¶¶ 195-98]** This Court affirmed that conclusion. *See PNM*, 2019-NMSC-012, ¶¶ 90-95 (noting lack of proof but not lack of opportunity to challenge FCPP). The facts concerning PNM's decision-making process in extending its participation at FCPP were known when the 2015 Rate Case was litigated, demonstrating that the issue of FCPP prudence could have been (and was) raised and would have formed "a convenient trial unit" in that case. *See Potter*, 2015-NMSC-002, ¶ 11. The parties' failure to bring such challenges should have put the issue of continuation at FCPP to rest because "[c]laim preclusion bars litigation of claims that were *or could have been advanced in an earlier proceeding*." *State ex rel. Martinez v. Kerr-McGee Corp.*, 1995-NMCA-041, ¶ 11, 120 N.M. 118 (emphasis added).

With respect to the identity of the parties, in this case NEE and CCAE again challenge FCPP as a resource choice in 2013, just like they did in the 2015 Rate Case and NEE did in the 2016 Rate Case. **[32 RP 12354-12356 ¶¶ 195-98]** One-to-one overlap of the parties should not necessarily apply to administrative litigation before the Commission, where a variety of parties typically intervene and parties that shared common interests could strategically opt out of litigation in hopes they will be permitted to take additional bites at the apple later. *See Myers v. Olson*,

1984-NMSC-015, ¶ 8, 100 N.M. 745 (noting *res judicata* protects against the burden of re-litigation, promotes judicial economy, and promotes reliance on final judgments).

Because the elements for the application of the doctrine of *res judicata* have been met, the Commission should be precluded from ordering PNM to re-litigate for a fourth time the issue of PNM's decision in 2013 to continue its ownership and operation of FCPP.

4. *Alternatively, This Court Should Direct That Any Subsequent Prudence Review Must be Limited to the Record Developed Below*

PNM respectfully urges the Court to at a minimum direct that no additional evidence may be taken on the question of PNM's prudence regarding FCPP. Allowing additional evidence to be taken would be arbitrary and capricious or an abuse of discretion or a violation of PNM's due process rights. *See Resolute Wind*, 2022-NMSC-___, ¶¶ 24-26 (holding that NMPRC's irregular fact-finding process violated due process or was arbitrary and capricious or an abuse of discretion). Re-litigating prudence will subject PNM and other parties to hardship and unnecessary and costly resource expenditures. Limiting a prudence decision to the factual record below furthers the same interests that the doctrine of *res judicata* is meant to serve. *See Myers*, 1984-NMSC-015, ¶ 8.

Precluding further evidentiary attempts by other parties to prove PNM was imprudent also "comport[s] with traditional notions of fairness[.]" *See Resolute Wind*, 2022-NMSC-___, ¶ 27. PNM put on a substantial case for prudence at the direction of the Commission, and no party raised a challenge that was sufficient to "withstand appellate review." **[36 RP 15095 & n.246]** The Financing RD detailed the other parties' failed efforts. **[*Id.*]** Allowing additional chances to correct their failings undermines the adversarial system where each party is expected to put on its best case the first time. The Commission's decision to perpetuate litigation rather than make a decision is particularly egregious given opportunities to litigate FCPP prudence in the 2015 and 2016 rate cases, as well as the Commission's directive in this case that it is important "to serve the public interest by rendering a final decision on the merits of the [FCPP] prudence issues." **[37 RP 15425 ¶ 42]**

It is fundamentally unfair to PNM for the Commission to continuously defer or require re-litigation of the 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-___, ¶ 26 (citing *Attorney Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 10).

VI. PRAYER FOR RELIEF

PNM respectfully requests that the Final Order be vacated and that the Court remand with instructions on how to properly apply Sections 62-18-2(H)(2)(c) and 62-18-4(D).

VII. STATEMENT REGARDING REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument in this important appeal to address questions of the Court not resolved by the briefs.

Respectfully submitted this 24th day of March 2022

PUBLIC SERVICE COMPANY OF NEW MEXICO

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Intervener-Appellee Public Service Company of New Mexico states that the body of the foregoing Brief-in-Chief is 50 pages and contains 10,978 words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Microsoft Word Version 2108, and is therefore within the limits permitted under Rule 12-318(F)(3).

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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 March 24, 2022.

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