BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

PUBLIC SERVICE COMPANY OF NEW MEXICO'S RESPONSE TO EXCEPTIONS

NOVEMBER 30, 2021

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SUMMARY OF ARGUMENT

Several parties take exception to the Hearing Examiner's ("HE") Recommended Decision on PNM's Request for Approval of the Sale and Abandonment of its Interest in the Four Corners Power Plant ("Four Corners or "FCPP") and to Recover Non-Securitized Costs ("Abandonment RD") and Recommended Decision on PNM's Request for Issuance of a Financing Order ("Financing RD").

While Public Service Company of New Mexico ("PNM") does not agree with every aspect of the issued RDs,[1] PNM agrees with the recommendation to approve the proposed abandonment and sale, and the issuance of a final Financing Order. This outcome is supported by substantial evidence and is consistent with the public interest. PNM's abandonment of its interest in FCPP will result in customer savings and reduce PNM's carbon emissions and overall emissions at the plant through seasonal operations agreements made possible by PNM's abandonment. Securitization of PNM's undepreciated investments in FCPP fulfills the purpose of the Energy Transition Act ("ETA") and provides support to affected communities.

By contrast, the parties taking exception to the RDs failed to provide factual support for their positions that would deny customer savings in favor of a hypothetical later exit from FCPP, would undercut the ETA, and would impermissibly write off investments in FCPP that have served PNM's customers. The HE weighed these parties' objections based on a comprehensive review of the extensive record and found against these arguments by a preponderance of the evidence. There is no basis for the Commission to upend those factual determinations.

If the Commission denies abandonment and securitization, New Mexico will lose:

1. Cost savings to customers in the range of $30 million to $300 million;
2. Increased flexibility on PNM's system given the anticipated replacement resources;

[1] Specifically, PNM disagrees with the HE's construction of the ETA.

3. Progress toward reducing PNM's portfolio emissions consistent with the ETA, and reduced overall emissions from FCPP of 20 to 25 percent, equivalent to closing a 400 MW coal plant;
4. Abandonment cost savings by using securitization;
5. A Just Energy Transition consistent with the Navajo Nation's call for proper notification and retention of Navajo Nation jobs and revenues, and preservation of a strong Navajo Nation voice in the future of FCPP by transferring PNM's interest in the plant to Navajo Transitional Energy Company, LLC ("NTEC"), an arm of the Navajo Nation; and
6. Mitigation of adverse impacts to affected communities via funds facilitated by the ETA.[2]

The Abandonment RD determined these benefits far outweigh any speculation raised by the other parties.[3] Nothing argued in the exceptions regarding either RD overcomes the weight of the evidence considered by the HE.

The Abandonment RD notes the sale and abandonment must be judged on a net public benefit test, where there is a balancing of the benefits and costs to the public *of the proposed transaction*.[4] This cost-benefit analysis must result in a net benefit to the public interest "where quantifiable and unquantifiable benefits must outweigh the costs ***of the action***."[5] The Abandonment RD rejects "circumstantial speculation or conjecture"[6] or "fervent guesswork" that there could be an alternative to later closure in determining there are net quantifiable and unquantifiable benefits "of the action."[7]

Several parties also propose new theories for the Commission to deny abandonment or approval of the financing order to facilitate their preferred outcome that no costs associated with FCPP be securitized at this time or recovered in any fashion.[8] Sierra Club ("SC") asserts "it is

[2] Abandonment RD at 35 (citing PNM Opening Br. at 9).
[3] *Id.* at 112.
[4] *Id.* at 27 (emphasis added).
[5] *Id.* at 27 (citation omitted) (emphasis added).
[6] *Id.* at 68.
[7] *Id.* at 112-13.
[8] SC Exceptions to Abandonment RD at 7; NMAG Exceptions at 2 (recommending "that the Commission deny the Financing Order and immediately initiate a separate proceeding to address the limited issue of the deferred prudence, after which PNM may resubmit a revised Financing Order that is free from any uncertainty."); ABCWUA/BernCo Exceptions at 9 ("Because the Hearing Examiner was unable to address

uncontested that if PNM's abandonment application is denied, the Commission can make the imprudence findings it deferred in Case No. 16-00276-UT, and disallow all of the disputed costs from PNM's future rates."[9] Some parties also note there are risks from deferring prudence to a subsequent rate case.[10] However, no party presented a preponderance of evidence in this case that PNM's FCPP investments were or will be imprudent, and no party recommended that the Commission use a quantified "imprudent" amount invested in FCPP that was tied to impacts on customers (if any). Speculation that PNM's investments might be deemed imprudent in a future rate case should not be weighed as a factor in determining if the abandonment and sale satisfies the net public benefit test. Moreover, denying the abandonment and sale and keeping FCPP in PNM's generation portfolio simply to defer a prudence determination as a future rate-making issue is inconsistent with the statutory mandate that the Commission approve the abandonment of a facility if its use is no longer warranted.[11]

Similarly, the parties who advocate that the Commission should deny approval of a financing order until prudence is determined do not explain how such a denial fits into the statutory rubric of the ETA: Section 62-18-4 states that "[t]o obtain a financing order, a qualifying utility shall obtain approval to abandon a qualifying generating facility pursuant to Section 62-9-5 NMSA 1978[,]" and Section 62-18-5 provides that a financing order shall be issued if PNM provides the information and data required in Section 62-18-4. Denial of a financing order would require ignoring the record and upending the HE's finding of net public benefit from abandonment and his finding that the requirements of Section 62-18-4 were met.

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the Prudence Issue in his recommended decision, the Commission should not grant PNM's request for a financing order.").

[9] SC Exceptions to Abandonment RD at 7.

[10] *Id.* at 7; ABCWUA/BernCo Exceptions at 5, 10; NMAG Exceptions at 1.

[11] NMSA 1978, Section 62-9-5.

I. RESPONSE TO EXCEPTIONS CONCERNING ABANDONMENT

The parties' exceptions related to abandonment address a number of issues, discussed below. Nothing raised by parties taking exception warrants overturning the Abandonment RD.

A. Response to Exceptions Regarding Hearing Examiner's Determination that Significant Benefits Accrue to Customers through Quantifiable Cost Savings

SC recapitulates its arguments from post-hearing briefing that claim PNM's quantification of customer savings associated with the abandonment of FCPP is inaccurate.[12] The HE weighed these arguments and found that "PNM's systematic refutation of Sierra Club's unsubstantiated criticisms reinforces the demonstration of customer savings associated with the Company's proposal to abandon Four Corners."[13]

SC also believes PNM should have predicted a disallowance amount and then conducted modeling to calculate customer savings to assume a disallowance was made,[14] even though no specific disallowance dollar amount has been determined by the Commission for FCPP.[15] The Abandonment RD finds there is no record evidence to support a specific disallowance amount that would serve as a basis for PNM to model customer savings.[16] The Commission should similarly reject SC's efforts to introduce speculative facts into the record to support SC's recommended outcomes.

SC also attempts to re-argue the idea that PNM's costs will increase as a result of the seasonal operations agreements.[17] PNM fully explained in its Response Brief at pages 30 to 34

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[12] SC Exceptions to Abandonment RD at 5.
[13] Abandonment RD at 48-49 ("Having closely evaluated the evidence, the [HE] finds PNM's modeling and analyses sufficiently credible to support a finding that the proposed FCPP abandonment should result in a significant benefit to customers through quantifiable cost savings, on an [net present value] basis over twenty years, in the range of $30 million to $300 million.").
[14] SC Exceptions to Abandonment RD at 5-6.
[15] The proposed disallowance findings in the Certification of Stipulation from Case No. 16-00276-UT were not adopted by the Commission. Abandonment RD at 46.
[16] *Id.*
[17] SC Exceptions to Abandonment RD at 7-10.

why SC's arguments are refuted by the record evidence and why the seasonal operations agreements result in *status quo* utilization of the FCPP for PNM. One of SC's assertions is that PNM must operate its share of FCPP at maximum or full output.[18] This uncited assertion by SC, without any context of the overall effect of the seasonal operations agreements, misconstrues the record.[19] PNM's overall obligation concerning minimum coal take obligations for FCPP has not changed with seasonal operations,[20] meaning that PNM anticipates the same dispatch order for its share of FCPP until exiting in December 2024.[21] Put simply, PNM does not anticipate operating its share of FCPP any differently under seasonal operations than it does now.[22] Also, SC inexplicably inflated PNM's cost for operating the single unit running during the spring and winter seasons, when there are no provisions that provide for any shifting of costs on an incremental production basis that differs from how costs would be incurred today.[23] While the other co-owners will have some increased flexibility from Unit 5 going off-line during the spring and winter

[18] SC Exceptions to Abandonment RD at 8.

[19] SC has changed its wording between its opening brief and its exceptions to misconstrue the record regarding the *status quo* operations of FCPP by PNM under seasonal operations. In its brief, SC claimed that Unit 4, which will be the only unit that operates in the spring and winter, is "not allowed to turn off", and PNM and NTEC will be required to operate Unit 4 ***as if*** the unit was operating at a 100 percent capacity factor. SC Opening Br. at 23. Contrary to SC's assertion, Unit 4 can in fact be layed up (turned off) during the winter and spring seasons. PNM Ex. 6 (Fallgren Reb.) at PNM Rebuttal Ex. TGF-3, pp. 24-25, Secs. 25.6, 25.7. Moreover, given that Unit 4 is a 745-MW unit and the Minimum Net Generation is roughly equivalent to 300 MW (Sierra Club Ex. 1 (Fisher) at 36:11-17), Unit 4 is not required to run at the equivalent of a 100 percent capacity factor. SC's portrayal of seasonal operations paints an inaccurate picture. PNM Resp. Br. at 33 n.128.

[20] Tr. Vol. II (Fallgren) at 362:2-14 (describing minimum coal take requirements).

[21] PNM Resp. Br. at 32.

[22] PNM's "Seasonal Available Capacity Entitlement" in Unit 4 during the winter and spring season is 26% under the seasonal operations agreements. The *status quo* before these agreements is that PNM has a 13% interest in both Units 4 and 5; during the seasonal period when Unit 5 is layed up, PNM has the ***exact same percentage*** in Unit 4 as it normally does in both units. PNM Resp. Br. at 31-32.

[23] PNM Ex. 6 (Fallgren Reb.) at 37-38.

seasons, PNM will be operating its FCPP interests under *status quo*. This *status quo* operation does not translate to increased costs that would reduce the projected customer savings.[24]

SC's final argument to counter the demonstrated customer savings is to question why PNM did not prepare a modeling scenario for a 2028 exit from FCPP that assumed PNM breached its contractual obligations.[25] SC argues that by not modelling a deliberate breach of its contractual obligations, "PNM has deprived the parties and the Commission of a proper baseline against which to compare PNM's proposed abandonment."[26] The Abandonment RD concludes, however, that such a baseline would be meaningless because, among other reasons, PNM would be exposed to significant default payments and penalties but would still remain bound to pay certain costs while the coal plant supplies electricity for the benefit of other utilities' customers, in addition to having to secure replacement resources for its own customers.[27] Given these assumptions, the HE reasonably found "that requiring PNM to conduct a contractual breach option analysis would not be a worthwhile or sensible exercise."[28]

B. Response to Exceptions Regarding Emissions Reductions and the Potential for Prolonged Coal Burning as a Result of Seasonal Operations

Both SC and NEE argue that approving abandonment will prolong the burning of coal at FCPP and increase emissions at the plant.[29] To assume either of these could be true, one must

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[24] SC relies on another uncited assertion that Mr. Fallgren claimed that no other co-owner was willing to be assigned output from the FCPP's unit that would operate seasonally. SC Exceptions to Abandonment RD at 8. SC speculates that the only explanation for the other owners' unwillingness to take capacity during winter and spring months is that costs will increase. However, the other co-owners have agreed to take on additional costs should FCPP be closed early – costs that PNM and its customers will not incur if abandonment is approved. Thus, the other owners bargained for increased flexibility and associated cost savings as part of the seasonal operations agreements.
[25] SC Exceptions to Abandonment RD at 10-11.
[26] *Id.* at 11.
[27] Abandonment RD at 67.
[28] *Id.*
[29] SC Exceptions to Abandonment RD at 11-16; *see also* NEE Exceptions at 8-9 and ABCWUA/BernCo Exceptions at 10.

speculate that denial of abandonment will mean that a different and better deal will emerge to close FCPP early *and* that PNM's Purchase and Sale Agreement ("PSA") with NTEC, as well as the agreements effectuating seasonal operations, are the only things keeping FCPP open past some unspecified date in the future. The HE recognized the problem with these assumptions, stating that while an early closure is possible, "the Commission cannot make decisions in the realm of the possible based on circumstantial speculation or conjecture."[30] The Abandonment RD added that "[r]egarding the intervenors' concerns over the PSA and the agreements effectuating seasonal operations preventing an early closure of Four Corners, there is nothing in the record to indicate any other FCPP co-owner is seeking to exit the plant or advocate for an early closure of the plant."[31] It is, to be sure, counter-intuitive to have environmental advocacy groups like SC and NEE arguing for a utility to be required to *stay* in a coal plant. Hypothetical early closure dates – rejected by the HE – cannot provide a basis to overturn the abandonment recommendation and require PNM to remain as an owner of the plant.

NEE believes it is likely that FCPP will close before 2031 if the Commission denies the abandonment in this case.[32] NEE's principal argument to support this belief seems to be that if owners like PNM or APS have their cost recovery associated with FCPP disallowed in a rate case, accelerated closure of the plant is the means to address unrecovered, burdensome costs.[33] NEE's arguments wrongly assume that cost recovery is the sole reason for any of the owners to continue operating FCPP. From PNM's perspective, keeping FCPP capacity and energy on its system

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[30] Abandonment RD at 68.
[31] *Id.* at 69; *see also id.* at 57 (stating that SC's and WRA's analysis that emissions could increase pursuant to the seasonal operation agreements is conjecture and that "[t]he only credible evidence in the record, founded as it is on the unrebutted expert analysis of PNM Witness Fallgren, is that seasonal operations should reduce emissions between 20 and 25 percent, which equates to closing a 400 MW coal-fired plant.").
[32] NEE Exceptions at 9-10.
[33] *Id.* at 10.

through 2024 is crucial to ensure time for sufficient replacement resources to be available by the summer of 2025.[34] Meanwhile, APS would need 970 MW of firm capacity to replace FCPP. This has led APS to inform the Arizona Corporation Commission that "retiring Four Corners would jeopardize system reliability."[35] Thus, NEE's certainty that FCPP will close prior to 2031 if abandonment is denied is refuted by the record of the owners' operational needs.

SC argues that the HE ignored the connection between the PSA and the coal supply amendment that was part of the package of changes effectuating seasonal operations, stating that the HE "considered one of the June 2021 agreements – the seasonal operations agreement – but then completely ignored the June 2021 amendment to the coal supply agreement."[36] SC is wrong. As summarized in the Abandonment RD, "[t]he finalized agreements facilitating seasonal operations are incorporated as amendments to the Four Corners operating, co-tenancy, and coal supply agreements."[37] There is no one "seasonal operations agreement" as SC claims; instead there are multiple agreements as reviewed by the HE, which includes the coal supply agreement.

The Abandonment RD considered the effect that the seasonal operations agreements, including the coal supply agreement, would have on early closure of FCPP.[38] At page 70 of the Abandonment RD, the HE notes that agreements effectuating seasonal operations contemplate an

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[34] Abandonment RD at 112 n.381 (citing Tr. Vol. III (Phillips) 778-79; PNM Ex. 6 (Fallgren Reb.) at 45, 46.

[35] *Id.* at 70 (citing PNM Ex. 5 (Fallgren Supp.) at 5).

[36] SC Exceptions to Abandonment RD at 11.

[37] Abandonment RD at 19 (citing PNM Ex. 6 (Fallgren Reb.) at PNM Reb. Exhs. TGF-2, TGF-3, TGF-4, TGF-5, TGF-6, and TGF-7).

[38] *See, e.g.,* Abandonment RD at 68-70. Noting that "the seasonal operation agreements amend Section 20 of the ***Four Corners CSA***[,]" the Abandonment RD states that the four-year notice for closure of FCPP contemplated in the seasonal operations agreements tracks the Navajo Nation request for adequate notice. Abandonment RD at 70 n.232 (citing Fallgren Supp. at 31) (emphasis added). Thus, SC's claim that "[t]he RD does not devote a single sentence to analyzing the June 2021 amendment to the coal supply agreement and the relationship between the PSA and the June 2021 coal supply amendment" is incorrect. *See* SC Exceptions at 13.

early closure that "align[s] with the Navajo Nation's Just Energy Transition." In other words, the Abandonment RD anticipates that the seasonal operations agreements may keep the FCPP open until 2027 (or later), but it was also important to consider that the additional notice and payment provisions for early closure in these agreements will ensure a Just Transition.[39]

SC also re-argues purported "contrary evidence" that indicates FCPP could close early by stating that e-mail communications or presentations by NTEC or PNM during the course of negotiations on the PSA indicate a desire for early closure on the part of the other co-owners.[40] SC's "contrary evidence" is a presentation from NTEC that notes its objective in acquiring PNM's interest was to maintain the "*status quo*" for FCPP.[41] NTEC's efforts to maintain the *status quo* should not be seen as some sort of secret pact to keep the plant open longer than it otherwise would. The record reflects that the other co-owners have explained to their regulators why FCPP needs to stay open to 2031 for reliability reasons.[42] NTEC's PSA with PNM is not the reason that the FCPP is staying open. Second, the record also reflects why both NTEC and the Navajo Nation benefit from the *status quo* now and a potentially better defined closure path for FCPP that considers the important economic impact that FCPP has on the Navajo Nation, while still allowing for early closure of the plant with notice and payment.[43]

As to the ongoing operation of FCPP, NEE argues that because the sale to NTEC of PNM's interest in FCPP does not accelerate the removal of coal generation from the State, the purpose of

[39] Pages 7-9 of PNM's Opening Brief describe the agreements effectuating seasonal operations.
[40] SC Exceptions to Abandonment RD at 14-15. SC also argues that PNM and Mr. Fallgren's attempts to convince the other co-owners to consider an early closure before the PSA was signed are an indication that the other co-owners wanted an early plant closure. PNM's Response Brief at pages 27-28 provides context to PNM's conversations with other co-owners to get them to negotiate with PNM as to an early closure of the plant and the PSA.
[41] SC Exceptions to Abandonment RD at 15.
[42] Abandonment RD at 69 (citation omitted); *see also id.* at 69-70 (citing PNM Ex. 5 (Fallgren Supp.) at 4, 6-7).
[43] *Id.* at 20 and n.53 (citing PNM Ex. 5 (Fallgren Supp.) at 31).

the ETA is defeated and the public interest is not served.[44] NEE is incorrect. Abandonment serves the exact purpose of the ETA – a New Mexico public utility getting out of coal for good, will decrease the emissions in the State equivalent to a 400 MW coal plant shutdown as of 2023; will increase the supply of electricity from renewable generation; and will provide for a Just Transition for affected communities.[45] Certainly accomplishing these goals through PNM's early exit in 2024 is in keeping with the applicability of the ETA, so long as a coal plant in which a utility is a participant is closed before 2032.[46]

The preponderance of the evidence, as found by the HE, supports abandonment because it brings benefits to customers, emissions reductions and supports the Navajo Nation. There is no good basis for the Commission to reverse these evidentiary conclusions based on alternate hypotheticals unsupported by actual facts.

C. Response to Exceptions Regarding Hearing Examiner's Consideration of the Effect of the Amended Application on NTEC and the Navajo Nation

SC's and ABCWUA's exceptions argue that the RD did not properly account for the benefits and detriments of the transaction on the Navajo Nation and NTEC.[47] SC argues that the Abandonment RD findings of benefits to the Navajo Nation, including promoting Navajo self-determination, transition assistance from ETA funds, and approval of a transaction which the Navajo Nation leadership has supported, are not rooted in the evidence.[48]

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[44] NEE Exceptions at 6-7.
[45] Abandonment RD at 99-100 (citing PNM Opening Br. at 115). This is also consistent with the San Juan Generating Station ("SJGS") abandonment, which recognized the potential for sequestration operations at SJGS by a new owner.
[46] NMSA 1978, Section 62-18-2(S)(4).
[47] SC Exceptions to Abandonment RD at 16 (discussing Exception #3); ABCWUA/BernCo Exceptions at 9-10 (discussing Exception #2).
[48] SC Exceptions to Abandonment RD at 16. SC continues to argue against quantifiable benefits by introducing speculation to cloud the record. SC states that denying this abandonment application does not prevent PNM from coming forward with a new abandonment application under the ETA in the future; in other words, ETA funds can or will be disbursed when PNM seeks to abandon FCPP prior to 2031 under

SC believes that Navajo Nation self-determination concerns only the Navajo Nation's transition to clean energy.[49] The Abandonment RD's findings as to Navajo Nation self-determination are not so one dimensional and take into consideration "that [since] Four Corners represents nearly a quarter of Navajo Nation general fund revenue, NTEC's 20% interest in Four Corners will provide the Navajo Nation, through NTEC, a stronger voice in a plant that is indisputably an important economic driver for the Navajo Nation."[50]

SC also tries to undermine the evidence by questioning the motive and intent of NTEC, which is owned by the Navajo Nation.[51] While SC "recognizes that Four Corners is located on Navajo Nation lands," SC states that "NTEC is a separate entity from the Navajo Nation government …" and "[a]pproving abandonment and the PSA also means transferring PNM's interest to the third-largest coal mining company in the country …."[52] SC believes that harms from transferring PNM's share of FCPP to NTEC outweigh any benefits.[53] ABCWUA and Bernalillo County's second exception, which states that the "public benefit of the transfer to NTEC was not sufficiently considered[,]" takes a similar approach by pointing out that NTEC intends to continue operating the FCPP.[54]

While SC would seemingly like the Commission to characterize NTEC as not serving the interests of the Navajo Nation, the factual record does not support this view. The Abandonment

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some other hypothetical sale or early closure. *Id.* at 16-17. The Abandonment RD dismissed these speculative arguments with good reason, as the Commission should.

[49] SC Exceptions to Abandonment RD at 16-17.

[50] Abandonment RD at 102; *see also id.* at 101 (citing PNM Ex. 6 (Fallgren Reb.) at 61) ("Among other benefits of the bargain, the sale and transfer 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.").

[51] SC Exceptions to Abandonment RD at 18.

[52] *Id.*

[53] *Id.*

[54] ABCWUA/BernCo Exceptions at 9-10.

RD found that "[w]hile NTEC, as a private corporation, does not speak for the Navajo Nation leadership or its people, it is an arm of the Navajo Nation charged with managing the Nation's energy production, whose obligations to and relationship with the Navajo Nation are defined in the NTEC Operating Agreement."[55] The NTEC Operating Agreement imposes a fiduciary duty to the Navajo Nation upon NTEC.[56] NTEC currently provides approximately 1,300 jobs, over 600 of which are held by Navajo Nation members.[57] NTEC's motivations in this transaction are to preserve jobs, economic activity, and revenue for the Navajo Nation.[58] Furthermore, the Navajo Nation leadership directly expressed support for the sale of PNM's interest to NTEC, noting this as consistent with their Just Transition plans.[59] The HE's Abandonment RD considered what is at stake for the Navajo Nation and found that the abandonment and sale of PNM's 13% in FCPP provides a net public benefit.[60]

D. Response to Exceptions Regarding Hearing Examiner's Consideration of Replacement Resources

NEE and Staff argue that approving abandonment without specific replacement resources fails to meet the statutory standard for abandonment or the *Commuters' Committee* factors. For example, Staff argues that PNM fails *the Commuters' Committee* test because it did not identify sufficient generation resources to replace the facility it seeks to abandon.[61] While Staff fully acknowledges that the ETA permits PNM to propose replacement resources in a subsequent case,

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[55] Abandonment RD at 101; PNM Exh. 39.
[56] Abandonment RD at 90 (citing PNM Resp. Br. at 40).
[57] *Id.* at 91 (citing PNM Ex. 4 (Fallgren Dir.) at 12-13; PNM Ex. 5 (Fallgren Supp.) at 20; PNM Ex. 6 (Fallgren Reb.) at 19-20).
[58] *Id.* at 91 (citing Vol. II (Fallgren) 369, 499-501; PNM Exh. 39).
[59] *Id.* at 103 (citing PNM Ex. 6 (Fallgren Reb.) at PNM Reb. Exh. TGF-13 and 60-61).
[60] *Id.* at 112 ("[W]hen benefits of the transfer like strengthening the Navajo Nation's position in matters intrinsic to vital interests and the significant economic development assistance for tribal and other locally impacted communities afforded under the ETA are factored into the abandonment equation, the preponderance of the evidence supports a positive finding that the proposed sale and transfer is in the public interest.").
[61] Staff Exceptions at 2.

Staff maintains that the lack of known replacement facilities should prevent the Commission from approving abandonment.[62] NEE makes a similar argument, stating PNM cannot satisfy the fourth factor of *Commuters' Committee* given that replacement resources are unknown. NEE also notes that this is the first case for abandonment where PNM has not simultaneously filed for replacement resources and contends that PNM has argued to the New Mexico Supreme Court that without specific replacement portfolio options for the Commission review, it could not adequately meet its burden of proof for abandonment.[63]

The Abandonment RD rejected these arguments. After weighing the evidence presented, the HE found that "PNM has reasonably demonstrated that replacement resources can be deployed prior to its abandonment of Four Corners."[64] The ETA explicitly permits the utility to "defer applications for needed approvals of new resources to a separate proceeding; provided that the applicant identifies adequate potential new resources sufficient to provide reasonable and proper service to retail customers."[65] PNM has already conducted an RFP for FCPP replacement resources, which yielded robust results,[66] and PNM intends to file a replacement resource case in the first quarter of 2022 based on this RFP.[67] All of the evidence indicates that PNM has demonstrated that adequate potential replacement resources are available to provide reliable service to customers. This is consistent with PNM's prior positions.[68] Further, the Commission

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[62] Staff Exceptions at 2-3.
[63] NEE Exceptions at 11-13.
[64] Abandonment RD at 74-76.
[65] NMSA 1978, § 62-18-4(D).
[66] Tr. Vol. III (Phillips) at 828:19-830:4.
[67] Abandonment RD at 76 (citing Tr. Vol. III (Phillips) at 779).
[68] *See, e.g.,* NEE Exceptions at 13-14 (citing PNM's Emergency Writ to the New Mexico Supreme Court, No. S-1-SC-37552, filed on Feb. 27, 2019, quoting PNM stating that NMPRC has previously denied abandonment of generation facility where, as here, a utility could not demonstrate the availability of adequate replacement resources).

has taken the position that it is important to resolve the question of abandonment prior to considering replacement resources.[69]

A denial of abandonment at this stage will only delay a proceeding to obtain Commission approval for replacement resources, which will have the cascading effect of delaying replacement resource deployment. The advantage of addressing abandonment now and moving on to a replacement resources case is that a Commission order on a replacement resources case can be expected by the end of 2023 if the case is filed in early 2022, giving developers the better part of two years to bring resources online before the summer peak of 2025.[70] As such, any projects chosen from PNM's RFP for FCPP will have a longer lead time to complete construction as compared to the developers of replacement resources for the San Juan Generating Station.[71]

E. Response to Exceptions Regarding Modifications to the PSA and the Seasonal Operations Agreements

In its Exception #5, SC states that the Commission must clarify that approval of PNM's abandonment application is contingent upon PNM modifying the PSA with an amendment to Article 6.1(d)(i) that affirms the principle that if the FCPP co-owners besides NTEC unanimously desire to reduce the production from the plant or cease its operation before the closing date of the PSA, PNM shall not have the power to block or veto the ability of the other facility co-owners to take such action.[72] SC also argues in its Exception #6 that if the Commission approves abandonment, it should require PNM to amend the PSA and the seasonal operations agreements

[69] *See, e.g.,* Case No. 21-00215-UT, Order Vacating Hearing, at 1 (Oct. 12, 2021) (emphasis added) (quoting Case No. 21-00083-UT, Initial Order Assigning Hearing Examiner, ¶ 7 (05/21/21)).s
[70] PNM Resp. Br. at 56 (citing Tr. Vol. III (Phillips) at 779:2-7).
[71] *Id.* (citing Tr. Vol. III (Phillips) at 778:9-780:3).
[72] SC Exceptions to Abandonment RD at 21; Abandonment Order at 116, Decretal Paragraph C.

to remove any provision that prohibits voting on retirement prior to 2025, that prohibits retiring FCPP prior to 2027, and that increases the financial penalty for retiring FCPP in 2027 and 2028.[73]

Regarding Exception #5, PNM has reached an agreement in principle with NTEC that the PSA will be amended consistent with the Abandonment RD's proposed ordering paragraph. PNM anticipates filing the necessary PSA amendment upon issuance of a final order. The amendment would follow the proposed Decretal Paragraph C that if the FCPP co-owners besides NTEC unanimously desire to reduce the production from the plant or cease its operation before the closing date of the PSA, PNM shall not have the power to block or veto the ability of the other facility co-owners to take such action. As such, the clarification that SC seeks is not necessary.

Regarding Exception #6, SC is essentially asking that this Commission impose FCPP closure mandates and limitations over non-jurisdictional utilities.[74] After PNM abandons and sells its portion of FCPP in late-2024, the payment mandates and early closure notifications will not apply to PNM. The Commission does not regulate the other owners and cannot compel other co-owners to enter into agreements that, after abandonment, will not apply to PNM. Moreover, it is highly unlikely that PNM has leverage over the remaining owners to force their hands to make changes to the early closure limitations and mandates that would bind them independently of PNM. On practicality alone, the Commission should decline SC's request to affect an agreement that largely applies to Arizona-based utilities and NTEC. The Abandonment RD's recommended amendment to Article 6.1(d)(i) adequately addresses any reasonable concern that PNM could unilaterally prevent a change in operations while it retains its interest in FCPP.

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[73] SC Exceptions to Abandonment RD at 22.

[74] The Abandonment RD acknowledges the HE's decision to not impose a mandate on the seasonal operations agreements. Abandonment RD at 100 ("As noted above, the Hearing Examiner's assessment of this issue focuses strictly on Article 6.1(d)(i) of the PSA; it does not cover the seasonal operations agreements that raise a host of intricate interrelated issues, comprise a condition subsequent to the PSA, and for the most part relate temporally to post-abandonment obligations among the other plant owners.").

F. Other Issues Raised in Exceptions Regarding Abandonment

A variety of other arguments have been raised in exceptions regarding abandonment, the most significant of which are briefly addressed below.

NEE argues that PNM is prohibited by statute from selling FCPP because it is a CO_2 emitting resource.[75] The Abandonment RD rejects this argument.[76] PNM's abandonment and sale of FCPP is a not a means to comply with the RPS; therefore, NEE's arguments are irrelevant.

NEE argues that the availability of less expensive replacement resources, resulting in customer savings of $30 million to $300 million, means that the FCPP is uneconomic and it should be removed from rates.[77] Future cost savings are by no means a reflection of past or current economic viability, and are not a basis for removing from rates the reasonable cost of a plant used to serve customers.

SC states that the Abandonment RD ignores inconsistencies between the filed testimony of PNM's primary witness, Thomas Fallgren, and his private statements. In making this argument, SC repeats a table from its post-hearing opening brief.[78] There is no merit to SC's claims. PNM fully addressed this chart at pages 22 to 28 of its Response Brief, rebutting each claimed inconsistency with an explanation from record evidence. While SC presents this table in a veiled attempt to cast doubt on Mr. Fallgren's credibility, the evidence, when read as a whole, demonstrates that: PNM acted in good faith in working with co-owners and NTEC in finding a solution for PNM's customers; in turn, the other owners were willing to investigate opportunities and solutions that were consistent with their own long-term resource needs; and none of the other owners were willing to commit to an early closure of the plant.

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[75] NEE Exceptions at 6.
[76] Abandonment RD at 52 n.169.
[77] NEE Exceptions at 23-24.
[78] SC Exceptions to Abandonment RD at 19.

SC also argues that PNM staged the timing of the abandonment application to avoid a prudence determination.[79] PNM has stated on the record that it had a rate case planned for the middle of 2020, and but for the pandemic, that rate case would have been filed.[80] There was no purposeful action on PNM's part to evade a planned 2020 rate case, which was the earliest PNM would have been permitted to file for an adjustment to its base rates.

The Board of County Commissioners for San Juan County ("SJC") argues that the Abandonment RD relied on an improper construction of the plain meaning rule to support a finding that NMSA 1978, Section 62-18-3(F) does not apply to PNM's replacement resources for the abandonment of PNM's interest FCPP.[81] SJC states that PNM must identify replacement resources for FCPP in accordance with Section 62-18-3(F), or its abandonment application should be denied.[82] SJC's arguments in exceptions are unsupported in that no additional words must be added or implied to understand that Section 62-18-3(F) plainly applies only to abandonments that will occur prior to January 1, 2023. The language in Section 62-18-3(F) defines replacement resources only for that section of the statute, which, as written, does not apply to an abandonment that will occur after January 1, 2023.[83]

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[79] SC Exceptions to Abandonment RD at 6. The purported source of SC's evidence is an e-mail between Mr. Fallgren and APS, but PNM explained in its Response Brief that the context of this e-mail does not give SC the story it wants to tell. PNM Resp. Br. at 24.
[80] PNM Resp. Br. at 24 (citing Tr. Vol. I (Fenton) at 110:5-12).
[81] SJC Exceptions at 2-3.
[82] *Id.* at 4. SJC ignores the provision in Section 62-18-3(A) that replacement resources need not be applied for until up to a year after abandonment is approved.
[83] PNM Resp. Br. at 57-59.

II. RESPONSE TO EXCEPTIONS CONCERNING PRUDENCE

A. Response to Exceptions Regarding Hearing Examiner's Determination that Prudence Should Be Decided in PNM's Next Rate Case

PNM takes the position in this case that since this case is governed by the ETA, the plain meaning of the statute does not permit the Commission to perform a prudence review of the undepreciated investments made in FCPP that were being recovered in rates as of January 1, 2019.[84] Subject to its preserved legal position regarding the ETA's meaning, once the Commission decided that prudence would be addressed in this case,[85] PNM put forth evidence of the prudence of the at-issue FCPP investments by properly designating portions of the record from Case No. 16-00276-UT pursuant to the Procedural Order of March 19, 2021, that supported a finding of prudence,[86] presenting further evidence of the reasonableness of ongoing investments, and introducing Mr. Frank Graves's quantitative analysis and expert opinion on prudence.[87]

No party besides PNM put forth evidence sufficient to demonstrate that PNM was not prudent in its actions that its FCPP investments are unreasonable. In fact, the HE found that the attempts by parties to "make a case alleging PNM's imprudence relied … almost entirely[] on citations to the *Certification of Stipulation*" as "evidence" and therefore resulted in an insufficient record in this case that PNM's investments have been imprudent.[88] NEE was the only intervenor that sought to designate portions of the record from Case No. 16-00276-UT as required. Although

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[84] *See* PNM Opening Br. at 80-82.
[85] Case No. 16-00276-UT, Order on Sierra Club's Motion to Re-Open Docket to Implement the Revised Final Order, at 7, ¶ 24; *see also* Case No. 21-00017-UT, Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding, at 17, 22 -23, Ordering ¶ C (Feb. 26, 2021).
[86] *See* Procedural Order at 7 & n.10 (Mar. 19, 2021) (providing that parties should designate "particular portions" of the record with pinpoint page and line numbers).
[87] As discussed in the next subsection, parties contend that Mr. Graves's testimony showed that PNM was imprudent. This position is mistaken. Mr. Graves's testimony rebutted other parties' claims that PNM's analysis could be improved. His testimony showed that making such adjustments would still lead to the conclusion that staying with Four Corners was more cost effective than the alternative. *See* PNM Opening Br. at 68.
[88] *See* Financing RD at 86.

NEE failed to comply with Commission rules and the March 19 Procedural Order, the HE nonetheless admitted four exhibits for NEE.[89] Given that the Commission declined to make a finding of imprudence or craft an appropriate remedy based on the full record presented in the 2016 Rate Case, and given the intervenors' half-hearted attempts to rest on the Certification of Stipulation with only a small portion of the underlying record from the 2016 Rate Case admitted as evidence in this proceeding, the Financing RD could not find that the evidence in this case was "sufficient to base a recommend[ed] finding that PNM acted imprudently or withstand appellate review."[90] In short, the preponderance of the evidence on prudence was presented by PNM and supports a finding that PNM acted prudently. The Commission has no path here but to uphold the Financing RD and determine that an imprudence finding is not supported by substantial evidence in the record.

Because the HE concluded that there was insufficient evidence to determine imprudence, the Commission cannot issue an order that would survive appellate review that finds PNM imprudent on the record in this case.[91] If the Commission makes a prudence determination in this case as requested by some of the parties, the only option based on the record before it is to find that PNM was prudent.[92] Even if the Commission were to make an imprudence finding in this case, the HE also found there was insufficient evidence of the remedies to be applied for a

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[89] *See* Financing RD at 86 & n.243 (noting "the process did not go smoothly"). *See also* Hr. Tr. (Vol. VII) at 1617:7-1618:14 (admitting NEE Exhibits 26, 29, 30, and 31).
[90] *Id.* at 86 n.246.
[91] This conclusion is consistent with the Commission's statements on appeal of the 2016 Rate Case order that there was a limited or incomplete record on imprudence in that docket and that appellee's witness acknowledged the record was insufficient to determine PNM made an imprudent decision to continue participating in FCPP or for a prudence disallowance amount. *See* NM Sup. Ct. Cause No. 36,870, *NEE v. New Mexico Pub. Regulation Comm'n et al.*, Answering Brief of Appellee New Mexico Public Regulation Commission, at 35, 37-38 (filed Oct. 12, 2018).
[92] While the facts support prudence, PNM also maintains its legal position that the ETA does not permit a prudence review (in this case or in the next rate case) for investments in rates as of January 1, 2019. *See, e.g.*, PNM Opening Br. at 81-82.

disallowance.[93] In fact, the only fully supported analysis in the record of a "remedy" as to the customer impact of PNM's decision in 2013 to move forward with FCPP and not choose a combined cycle plant is $0, which would mean that no disallowance is warranted.[94]

Because the other parties did not put forth a sufficient record as to the alleged imprudence of PNM's FCPP investments, the HE saw fit to provide them another opportunity to make their case on imprudence. Although parties had every opportunity to develop evidence – and the Commission ordered that prudence would be at issue in this case – the Financing RD nonetheless offers the Commission an "out" on the issue of imprudence by giving the parties another chance to develop a record "sufficient to . . . withstand appellate review" in PNM's next rate case. Certain parties have cautioned the Commission that there is a legal "risk" with deferring prudence to a subsequent rate case,[95] despite the risk to their position that *this* record is not sufficient to find PNM was imprudent.[96] Rather, the record of this case compels a prudence finding.

Several parties arguing against deferring prudence until PNM's next rate case also take exception to the HE's interpretation of NMSA 1978, Section 62-18-4(B)(10).[97] The Briefing Order asked parties to address how potential disallowances resulting from any imprudence findings might be implemented in a rate case, and noted, "The potential disallowances would likely

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[93] Financing RD at 85 ("[A]ssuming – again without suggesting – that the Commission were inclined to find the disputed investments were imprudently incurred, the remedies proposed in this case were relatively limited in number and blunt in their prescription, consisting primarily of total disallowance and removal of FCPP from rate base.").

[94] PNM Opening Br. at 84 (citing *See* PNM Ex. 35 (Graves Sur-surreb.) at 21 fig.1). SC Witness Fisher critiqued Mr. Graves's analysis but disavowed such an analysis to determine a disallowance. *See* SC Ex. 2 (Fisher Surreb.) at 7:18-9:7, 18:22-19:20.

[95] *See* SC Exceptions to Financing RD at 7; ABCWUA/BernCo Exceptions at 5; NMAG Exceptions at 1.

[96] If the Commission agrees with the HE that the prudence of FCPP investments will be deferred to PNM's next rate case, PNM reserves its right to argue the necessary legal and factual arguments in that next case.

[97] *See, e.g.*, SC Exceptions to Financing RD at 5-7; NMAG Exceptions at 3-4. NMAG argues that the life-extending investments at Four Corners cannot be considered akin to decommissioning costs and that those investments are larger than the $30 million cap on decommissioning costs. NMAG Exceptions at 3-4 (citing Section 62-18-2(H)(2)(a)). PNM agrees the two are not comparable in Section 62-18-2(H)(2).

be implemented in base rates in the reconciliation process *under section 4(B)(10) of the ETA* for PNM's actual vs. estimated costs."[98] PNM specifically responded to this directive and provided its interpretation of Section 62-18-4(B)(10) in its Opening Brief.[99] As explained in PNM's Opening Brief, Section 62-18-4(B)(10) "is not intended to allow for disallowances of substantial portions of the energy transition costs."[100] Because the HE does not recommend that the Commission apply this interpretation of Section 4(B)(10) to make such disallowances or otherwise make ratemaking determinations in this case, PNM did not take exception to it. Parties taking exception to this finding argue the language of Section 4(B)(10) does not contemplate inclusion of disallowances of actual costs. PNM maintains its legal position, and given the exceptions on this point, also believes that the Commission can decline to include this recommended finding in its final Financing Order.

B. Response to Exceptions Arguing that PNM Was Imprudent in Extending its Participation in Four Corners

If the Commission decides to address the prudence of the life-extending Four Corners investments in this case, then it can only find that PNM was prudent in continuing its participation in FCPP. Although SC, NEE, ABCWUA, Bernalillo County, and NMAG all oppose deferring prudence to the next rate case, only SC and NEE argued prudence at any length in their exceptions. For this reason, PNM addresses the arguments raised by SC and NEE in this response.

PNM's Opening Brief explained why PNM's analysis before deciding to stay with Four Corners demonstrated the prudence of that decision.[101] The Opening Brief also explained the

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[98] Briefing Order at 5 & n.16 (emphasis added) (quoting Case No. 19-00018-UT, Recommended Decision on Financing Order).
[99] PNM Opening Br. at 82.
[100] *Id.*
[101] *Id.* at 62-68. Notably, this section of PNM's argument cited heavily to the record in Case No. 16-00276-UT that PNM *properly* designated for admission in the record of *this* proceeding.

proper prudence standard, which concludes with the two sentences: "Imprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being 'imprudent.'"[102]

The record shows that PNM performed multiple financial and resource planning analyses leading up to the decision to stay with FCPP in December of 2013, including analysis in 2008, 2011, May of 2012, and one in January 2014 that confirmed the decision.[103] Each of those analyses found that FCPP was the cheaper option compared with a combined cycle gas plant ("gas CC").[104] Further, PNM explained that it planned to retire 340 MW of coal baseload at that time at the SJGS, so it simply did not make sense to impose other substantial resource changes on the system at that time – doing otherwise may itself have been imprudent by subjecting customers to operational and other risks by changing the system too quickly without a regulatory or legislative mandate.[105]

The Supplemental Testimony provided by Frank Graves confirmed that PNM's investment in FCPP was prudent. Mr. Graves found that even if the Company had updated its May 2012 analysis by late October 2013, the result would still have shown that FCPP provided savings compared to a gas CC.[106] PNM further explained at length why Dr. Fisher's critiques of Mr. Graves's analysis were not persuasive and explained that Dr. Fisher's "honest differences of opinion" with Mr. Graves cannot show imprudence under the applicable legal standard.[107]

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[102] PNM Opening Br. at 63 (quoting *Public Service Co. of N.M. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶ 29).
[103] *Id.* at 64-66.
[104] *Id.* at 64-65.
[105] *Id.* at 67. In this way, NEE's reliance on PNM's Patrick Apodaca's statement on the San Juan BART filing is misplaced. *See* NEE Exceptions at 3. PNM's choice to transition its generation fleet rationally and incrementally is a factor that supports PNM's prudence.
[106] PNM Opening Br. at 68-75.
[107] *Id.* at 69-75.

In its exceptions regarding prudence, SC relies heavily on the Certification of Stipulation in Case No. 16-00276-UT, even though the HE concluded that doing so raises evidentiary and due process concerns.[108] Moreover, PNM rebutted the findings in the Certification of Stipulation that SC leans on by providing evidence on the different analyses performed from 2008 all the way through January of 2014 regarding Four Corners.[109]

SC next argues that "the new evidence in this proceeding weighs against PNM."[110] SC claims that Mr. Graves's testimony showed that PNM should have considered ongoing capital costs for both of the considered alternatives.[111] But Mr. Graves's testimony refutes this criticism and weighs in favor of the prudence of PNM's decision.[112] Importantly, as demonstrated by *Public Service Co. of N.M*, evidence showing what a different analysis would have yielded is relevant to the prudence inquiry.[113] Perhaps because Mr. Graves's *ex ante* analysis strongly supports prudence, SC appears to skew the record by arguing that he changed position over the course of the case.[114] PNM responded to SC on this issue in its Response Brief,[115] and the HE did not accept SC's arguments. Thus, the record supports a finding that PNM's decision was prudent.

Finally, SC's Exceptions cite SC Witness Dr. Fisher's conclusion that an analysis in 2013 would have showed a range from $14 million of benefit from staying with Four Corners to a

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[108] SC Exceptions to Financing RD at 8-9.
[109] PNM Opening Br. at 62-68, PNM Resp. Br. at 78-80.
[110] SC Exceptions to Financing RD, at 11.
[111] *Id.* at 11.
[112] PNM Resp. Br. at 81 ("Regarding Sierra Club's overblown claims about the omission of ongoing capital costs in the May 2012, analysis, Mr. Graves calculated that making an adjustment for ongoing capital costs would only have made Four Corners look less attractive by $28 million, which is less than the $33 million benefit from keeping Four Corners found by the May 2012 analysis.").
[113] 2019-NMSC-012, ¶ 32 ("[I]mprudence may be mitigated by a demonstration that the decision of the utility nevertheless protected ratepayers from excess cost.").
[114] SC Exceptions to Financing RD, at 12 (purporting to show a difference between use of terms "attractive" and "a close one").
[115] PNM Resp. Br. at 83 n.318 (providing context for each instance where Mr. Graves used the word "attractive" to show they are not inconsistent with the conclusion that the ultimate determination was "a close one").

detriment of $128 million.[116] As PNM explained in post-hearing briefing, Dr. Fisher's conclusion does not demonstrate imprudence: his mere difference of opinion is insufficient to find imprudence under applicable standards.[117] The prudence standard does not allow Dr. Fisher to "substitut[e his] judgment" for PNM's or generate imprudence based on "honest differences of opinion."[118] Dr. Fisher's difference of opinion informed the assumptions in his analysis, and even if one were to accept Dr. Fisher's faulty assumptions, his analysis still showed a range with an upside for remaining in FCPP. Further, Dr. Fisher's assumption on a hypothetical carbon price is responsible for most of any purported cost of FCPP relative to a gas CC; when his (erroneous) difference of opinion on carbon price is stripped away, his range of estimates from staying with FCPP narrows significantly to a range of -$40.7 million to $14.2 million of benefit.[119] This difference is a small part of the modeled lifetime revenue requirement in the billions of dollars.[120]

NEE also relies on the Certification of Stipulation as the primary basis for imprudence, and also cites the few exhibits that it entered into the record in this case. NEE attempts to turn isolated witness testimony about what one decision-maker knew to call into question PNM's decision as an organization.[121] But NEE does not tie this testimony to the prudence standard, so it is unclear what NEE is trying to assert. NEE also cites PNM's filing with the Securities and Exchange Commission ("SEC"), from which NEE purports to show that PNM was adequately weighing risks for investors but not for customers.[122] This argument is meritless. Publicly traded companies' SEC filings are directed specifically to identifying risks for potential investors, and PNM likely

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[116] SC Exceptions to Financing RD, at 12 n.26.
[117] PNM Opening Br. at 69-71; PNM Resp. Br. at 84-85.
[118] *Public Service Co. of N.M.*, 2019-NMSC-012, ¶ 29; *see also* PNM Resp. Br. at 84-85.
[119] PNM Resp. Br. at 84-85.
[120] PNM Opening Br. at 70 (citing Case No. 16-00276-UT, Certification of Stipulation, at 35).
[121] NEE Exceptions at 17.
[122] *Id.* at 18.

would have provided a similar list of risks had it chosen to replace FCPP with a gas CC. An identification of potential risk factors does not show imprudence because all investments necessarily involve some risk. Next, NEE claims that El Paso Electric's ("EPE") decision to exit Four Corners shows PNM was imprudent.[123] The Commission should reject this argument as inconsistent with prudence and policy standards that recognize utilities have differing operational considerations. As PNM explained, EPE was already planning to exit FCPP in 2009, and EPE had other operational reasons for exiting the plant;[124] therefore, EPE's decision cannot be substituted for PNM's decision.

NEE also attempts to discredit Mr. Graves's analysis.[125] NEE's critique displays a fundamental misunderstanding about the purpose of Mr. Graves's analysis[126] and muddles the *ex-ante* analysis Mr. Graves performed in his Supplemental Testimony with the *ex-post* analysis he performed in his Rebuttal Testimony.[127] Not only does NEE appear to misapprehend Mr. Graves's testimony,[128] NEE only cites isolated quotes out of context.[129] NEE's argument that Mr. Graves's analysis constitutes hindsight prudence review is also incorrect.[130] A Commission decision grounded on NEE's Exceptions would not be legally sound.

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[123] NEE Exceptions at 18.
[124] PNM Opening Br. at 66 & nn.226-27; PNM Resp. Br. at 79.
[125] *See* NEE Exceptions at 19-22.
[126] *See id.* at 21. Mr. Graves performed a quantitative analysis to evaluate what the impact of purported improvements to PNM's quantitative evaluation would have shown and what a reasonable utility would have done with such information. His testimony was not meant to address PNM's actual decision-making process, which PNM's administrative notice designations from Case No. 16-00276-UT address.
[127] *See id.* (commingling response to Mr. Graves's analysis on evaluating the 2013 decision with Mr. Graves's *ex post* evaluation).
[128] *See id.* at 20 (citing supposed statements on cross-examination that are not relevant to the quantitative analysis that Mr. Graves performed).
[129] *See, e.g.*, *id.* at 20-21 (quoting Mr. Graves noting that a decision "would seem inappropriate" without providing the additional context that Mr. Graves provided, including the analyses the organization performed as a whole).
[130] *See* PNM Opening Br. at 100-04.

C. Response to Exceptions on Proper Remedy for (Any) Imprudence

PNM Witness Graves analyzed what harms to customers, if any, have resulted from staying with Four Corners. Mr. Graves found that there was no harm, and therefore no remedy is needed if the Commission were to find imprudence.[131] By contrast, both SC and NEE argue that the proper remedy for imprudence (if the Commission finds it) is a full disallowance of the life-extending investments.[132] This turns regulatory theory upside down. Any disallowance is required to be tethered to the actual impacts to customers, if any.[133] This understanding is supported by the Commission's practice, New Mexico caselaw in *Public Service Co.*, the Public Utility Act, contract damage principles, and regulatory remedies in other states.[134] PNM therefore argued that the Certification of Stipulation's recommended remedy in Case No. 16-00276-UT was inappropriate, and no party provided new evidence in this docket to support such a remedy.[135]

In the face of these arguments, SC can only muster a conclusory argument that the term "disallowance" allows the Commission to impose any level of disallowance (no matter how small the actual impacts to customers).[136] PNM has already responded to this argument.[137] To the extent SC's exceptions rely on the Certification of Stipulation in Case No. 16-00276-UT for the proposition that full disallowance is appropriate,[138] PNM already addressed this in briefing. PNM disagrees with the 2016 Certification of Stipulation's analogy to the balanced draft investment that was disallowed in Case No. 15-00261-UT. The Certification of Stipulation's reasoning that both

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[131] *See* PNM Ex. 17 (Graves Reb.) at 18-19 & fig.1; PNM Ex. 35 (Graves Sur-surreb.) at 21 fig.1.
[132] SC Exceptions to Financing RD at 12-13; NEE Exceptions at 22-23. NEE goes further and argues that all of the Company's investments at FCPP should be removed from rate base, even though NEE does not allege that PNM's investments in FCPP prior to the life-extending investments were imprudent. NEE Exceptions at 23-24.
[133] *See, e.g.*, PNM Opening Br. at 83-89; PNM Resp. Br. at 85-90.
[134] PNM Opening Br. at 83-89.
[135] *Id.* at 88-89.
[136] SC Exceptions to Financing RD at 12-13.
[137] PNM Resp. Br. at 86.
[138] *See* SC Exceptions to Financing RD at 9 & n.15 (quoting Certification of Stipulation at 68).

were "discrete capital improvements"[139] was conclusory and relied on the investments being related to environmental controls.[140] In this case, the HE properly found that no party provided sufficient evidence on which a potential imprudence remedy could be quantified.

NEE argues at greater length for disallowances, but none of the authorities NEE cites support its argument, and its misstatements of the record in past cases call into question NEE's credibility. NEE's reliance on the Recommended Decision in Case No. 15-00261-UT is misplaced because the Commission *overturned* the Recommended Decision's full disallowances of Palo Verde leases.[141] NEE also cites the *In re PacifiCorp* decision, but fails to acknowledge that the disallowance there was only 10 percent.[142] Further, NEE references authorities that it claims support complete disallowance,[143] but PNM has already explained why these do not stand for the proposition that NEE contends.[144] Finally, NEE cites the availability of replacement resources that would benefit customers,[145] but the availability of more cost-effective replacement resources available *now* says nothing about PNM's decision *in 2013*.

D. Other Issues Raised in Exceptions Regarding Securitization and Financing

WRA and CCAE filed exceptions as to the amount to be securitized. WRA and CCAE take exception that the Financing RD permits PNM to securitize the $27.9 million impairment loss, as they believe the impairment loss is not part of PNM's undepreciated investment on its books

[139] Case No. 16-00276-UT, Certification of Stipulation, at 68.
[140] PNM Opening Br. at 88-89.
[141] *See* NEE Exceptions at 23-24 (quoting Recommended Decision at 110-11 in Case No. 15-00261-UT); Case No. 15-00261-UT, Final Order at ¶ 110 (overturning RD and recognizing that the Palo Verde interests were "certified resources and comprise a long-standing, established used and useful generation resource").
[142] *See* PNM Opening Br. at 86 & n.318.
[143] *See* NEE Exceptions at 23.
[144] *See* PNM Resp. Br. at 86-88 (systematically distinguishing each of the authorities that NEE cited and explaining why the cited authorities actually support PNM's position that used and useful investments that are needed to provide service should not receive full disallowances).
[145] NEE Exceptions at 23.

and records.[146] WRA continues to assert its earlier, incorrect arguments that, as a result of the final order in the 2016 Rate Case, $27.9 million was written off PNM's books and records rather than recorded as an impairment to PNM's future ability to earn a return on undepreciated investments.[147] The Financing RD closely evaluated this issue and found persuasive PNM Witness Baker's testimony that the impairment loss of $27.9 million was never written off PNM's books and records and is part of PNM's undepreciated investments being recovered in rates as of January 1, 2019.[148] Furthermore, PNM's customers will continue to receive the benefit of the foregone equity return on the investments when PNM recovers them through securitized financing because PNM will not earn a return on the investments.

WRA and CCAE also argue that the HE erred in permitting PNM to securitize the full $73 million that is requested for ongoing capital expenditures at FCPP, arguing only $25 million is required to operate the FCPP plant safely and reliably.[149] The Financing RD already found the adjustments proposed by WRA and CCAE were not cost-based, as compared to PNM Witness Fallgren's detailed estimated investments that PNM must make to maintain safe and reliable service.[150] The Commission should uphold the findings of the Financing RD and permit PNM to securitize $73 million.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the parties' exceptions to the RDs.

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[146] WRA/CCAE Exceptions at 1-2.
[147] *See id.* at 4-5.
[148] Financing RD at 93-94. PNM explained that recording the impairment did not result in a write-off or write-down to PNM's electric plant in service. PNM Ex. 3 (Fenton Supp.) at 15:14-15:18; PNM Ex. 12 (Baker Reb.) at 6:5-6:19; PNM Ex. 11 (Baker Supp.) at 6:1-7:2, 13:9-13:15.
[149] WRA/CCAE Exceptions at 8.
[150] Financing RD at 98.

Respectfully submitted this 30th day of November 2021.

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Public Service Company of New Mexico's Response to Exceptions** was emailed to the parties listed below on November 30, 2021:

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