IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v. **No. S-1-SC-39138**

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

And

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

Intervenors-Appellees.

In The Matter of the Application of Public Service Company of New Mexico for Approval of the Abandonment of the Four Corners Power Plant and Issuance of a Securitized Financing Order, NMPRC Case No. 21-00017-UT

ANSWER BRIEF OF NEW MEXICO PUBLIC REGULATION COMMISSION

Oral Argument Requested

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STATEMENT OF COMPLIANCE

This Answer Brief uses the Times New Roman typeface. The body of this Answer Brief contains 10,877 words, thus complying with Rule 12-318(F)(2) and (3) NMRA. This word count was obtained from the Microsoft Word program, Office 365, Version 2204.

I. INTRODUCTION

The PRC's final order in this case is not, as PNM depicts, "another example of the Commission's efforts to thwart the Legislature's objectives [in the Energy Transition Act]." **[BIC 7].** Rather, the final order is narrowly tailored and invites Public Service Company of New Mexico (PNM) to refile its Application to adequately identify potential replacement resources, as required by the Energy Transition Act (ETA), NMSA 1978, Section 62-18-4(D) (2019), to ensure that PNM complies with its duty to furnish adequate, efficient and reasonable service, *id.* § 62-8-2 (1953). In this case, PNM did not propose actual and identified replacement resources. Rather, PNM provided generic information of the amount of the type of each resource that PNM expects to select based on its hypothetical modeling. The PRC's final order, taking into consideration the potential harm to customers caused by current supply chain problems that have delayed previously approved replacement resources, properly serves the public interest by requiring PNM to refile its abandonment application along with an application for approval of actual and identified potential resources based on actual bids received in response to an already-issued request for proposals (RFP). At the time of the hearing in early September 2011, PNM planned to file that application for approval of replacement resources by the first quarter of 2022. **[30 RP 09737].** PNM's argument that the PRC should have relied on its generic, hypothetical modeling to

ensure the availability of adequate resources would have required speculation on the part of the PRC.

Contrary to PNM's suggestion, the PRC has not repeatedly denied PNM's applications for financing orders under the ETA. In April 2020 and July 2020, the PRC granted PNM's applications for approval of (1) abandonment of its interests in San Juan Generating Station (SJGS) Units 1 and 4, (2) replacement resources; and (3) a financing order under the ETA. *In re PNM's Abandonment of San Juan Generating Station Units 1 and 4*, Case No. 19-00018-UT, Final Order on Request of PNM for Authority to Abandon Its Interests in San Juan Generating Station Units 1 and 4 and to Recover Non-Securitized Costs, 2020 WL 1703725 (N.M.P.R.C. April 1, 2020); *PNM's Consolidated Application for Approvals for the Abandonment, Financing, and Resource Replacement for San Juan Generating Station Pursuant to the Energy Transition Act*, Case No. 19-00195-UT, Order on Recommended Decision on Replacement Resources – Part II, 2020 WL 4443754 (N.M.P.R.C. July 29, 2020).[1] In those cases, however, unlike in this case, PNM

[1] This Court may take judicial notice of PRC final orders and Hearing Examiner recommended decisions and certifications of stipulations. While 1.2.2.35(D) NMAC contemplates taking administrative notice of state commission, state court and federal court decisions, it is actually unnecessary to do so. Such decisions are more appropriately the subject of "judicial notice of law." Judicial notice of law is "the commonsense doctrine that the rules of evidence governing admissibility and proof of documents generally do not make sense to apply to statutes or judicial opinions — which are technically documents — because they are presented to the court as law, not to the jury as evidence. Although we do not do so explicitly,

submitted evidence of actual and identified potential resources based on bids received by PNM in response to an RFP.

Additionally, the final order, by reserving the PRC's ability to review the prudency of PNM's approximately $148 million in undepreciated investments in the Four Corners Power Plant (FCPP), previously found by two PRC hearing examiners to have been imprudently incurred, **[36 RP 15072-15074]**, exercised the PRC's authority to ensure that ratepayers are not charged excessive rates for negligent, wasteful or improvident expenditures or for the cost of management decisions not made in good faith. As discussed below, PNM's assertion that the PRC has considered this prudence issue three times is incorrect. *See* Section E of this brief. And, PNM's argument that the PRC denied PNM's application for abandonment so that it could preserve its ability to disallow PNM's undepreciated investments in the FCPP, **[see BIC at 5-6, 21, 38-39],** is simply not true. As explained below in Section D, even if the PRC granted PNM's request for a financing order, under the unique circumstances of this case, the PRC would still retain the authority to review the prudence of approximately $148 million in

courts take judicial notice of law every time they cite a statute or judicial decision." *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 12, 147 N.M. 693 (citation omitted). In its Brief in Chief, PNM cites to PRC final orders not in the record proper. **[*See, e.g.,* BIC at 10 n.11, at 34 n.19]**

PNM's investments in the FCPP being recovered in PNM's rates as of January 1, 2019.

In short, the PRC appropriately exercised its authority, not taken away by the ETA, to serve the public interest, the interest of consumers and the interests of investors by regulating PNM to ensure that PNM's service is available at just and fair rates. *See* NMSA 1978, § 62-3-1(B) (stating the policy of the Public Utility Act).

II. STANDARD OF REVIEW

On appeal, this Court determines whether a PRC decision is arbitrary and capricious, not supported by substantial evidence, outside the scope of the PRC's authority, or otherwise inconsistent with law. *Attorney General v. New Mexico Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174. Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion. Arbitrary and capricious acts are those that may be considered willful and unreasonable, without consideration, and in disregard of the facts and circumstances. *Public Serv. Co. of New Mexico v. New Mexico Pub. Util. Comm'n*, 1998-NMSC-017, ¶¶ 23-24, 125 N.M. 302. This Court reviews the whole record, including both evidence in favor of and evidence contrary to the PRC's decision, to determine if the decision is supported by substantial evidence. This Court views the evidence in the light most favorable to the decision made by

the PRC. *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 4, 129 N.M. 1. Although the evidence may support inconsistent findings, this Court will not disturb an agency's finding if supported by substantial evidence on the record as a whole. *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 111 N.M. 550.

The burden is on PNM to make this showing in this case. *Id.* As the movant in this case, PNM bore the burden to establish the factual predicate upon which the PRC could base its decision to grant or deny abandonment. *PNM v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 15, 112 N.M. 379.

One issue raised by PNM on appeal presents a question of law. The question of law is interpretation of Section 62-18-4(D) of the ETA. When construing statutes, this Court's guiding principle is to determine and give effect to legislative intent. This Court first looks to the plain language of the statute. In addition, this Court strives to read related statutes in harmony so as to give effect to all provisions. *New Mexico Industrial Energy Consumers v. New Mexico Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533. While statutory interpretation is an issue of law which this Court reviews de novo, *id.* at 10, this Court has long recognized the power of agencies to interpret the statutes that are placed, by legislative mandate, within their province. *Public Service Co. v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 11; *cf. New Mexico Industrial Energy Consumers v. New Mexico Pub. Regulation Comm'n*, 2007-NMSC-053, ¶

19, 142 N.M. 533 ("Where as here an agency is construing the same statutes by which it is governed, we accord some deference to the agency's interpretation."). In addressing the Public Utility Act's (PUA's) abandonment statute, this Court said, "In other words, by delegating abandonment power to the Commission in such broad terms, our legislature expected that the Commission would develop an appropriate test to fit the regulatory climate." *Public Service Co. v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 11. This is because the PRC has expertise to construe a statute to reflect the complex regulatory balance that must be struck between the interests of New Mexico energy consumers and those of the utility. *Id.*, ¶ 12.

In construing statutes, this Court looks to "'other statutes *in pari materia* under the presumption that the legislature acted with full knowledge of relevant statutory and common law . . . [and] did not intend to enact a law inconsistent with existing law.'" *State v. B & B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 38 (quoting *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4, 115 N.M. 573). When the Legislature enacts a statute, this Court infers that the Legislature enacted that statute with full knowledge of and in harmony with the public policy expressed in previously enacted statutes. *Id.*, ¶ 39l. Particularly relevant to this case, this Court issued opinions stating that it reads the Efficient Use of Energy Act and Renewable Energy Act in harmony with the PUA, all of which are administered by the PRC.

Attorney General v. New Mexico Pub. Regulation Comm'n, 2011-NMSC-034, ¶ 15 (reading Energy Efficiency Act in harmony with PUA); *New Mexico Industrial Energy Consumers v. New Mexico Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 35 (reading Renewable Energy Act in harmony with PUA).

PNM's appeal further implicates the PRC's expertise and discretion in setting utility rates. This Court has long recognized the broad authority of the PRC in setting utility rates. *New Mexico Indus. Energy Consumers v. New Mexico Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 30. As this Court said:

> As a public utility, PNM has a duty to provide adequate service at just and reasonable rates. The Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates[,] . . . service[s,] . . . and securities . . . and to do all things necessary and convenient in the exercise of power and jurisdiction." Furthermore, it is the stated policy of New Mexico that the public interest and the interest of consumers and investors require the regulation of utilities so that service is available at just and fair rates.

Public Serv. Co. of New Mexico v. New Mexico Pub. Util. Comm'n, 1998-NMSC-017, ¶ 13 (citations omitted). This Court should uphold the Final Order in this case based on the PRC's proper application of its long-established authority and discretion in decisions affecting rates.

III. ARGUMENT
The PRC's Decision to Deny PNM's Abandonment Application Is Not Arbitrary or Capricious, Is Supported by Substantial Evidence and Is Consistent with the Law

A. The PRC Properly Denied PNM's Application because of the Paucity of Evidence Provided by PNM of Potential Replacement Resources

The ETA expressly states that a prerequisite to obtaining a financing order under the ETA is PRC approval to abandon a qualifying facility pursuant to Section 62-9-5 of the PUA. NMSA 1978, § 62-18-4(A) NMAC (2019). Under the PUA, the PRC shall grant a request for abandonment "upon finding that the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility[.]" *Id.*, § 62-9-5 (2005). The touchstone of an abandonment proceeding is the public convenience and necessity. *In re Pub. Service of New Mexico*, 119 P.U.R.4th 48 (N.M.P.U.C. 1990). In other words, "'The public interest is to be given paramount consideration; desires of a utility are secondary.'" *Id.* (quoting *Matter of Rule Radiophone Serv., Inc.*, 621 P.2d 241, 246 (Wyo. 1980)). Furthering the public convenience and necessity, *i.e.*, "the public interest," is one of the primary goals contained in the Legislature's declaration of policy concerning public utility regulation. As this Court has held, "the legislature has allowed the Commission great flexibility in the methods to be used in achieving those goals." *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1972-NMSC-072, ¶ 2, 84 N.M. 330. The PRC's acknowledged expertise and discretion must be brought to bear on matters such as abandonment, which are "an integral part of the utility regulatory and ratemaking process." *In re Public Serv. Co. of New Mexico*, 119 P.U.R.4th 48. An applicant for abandonment "'has the burden of

making the factual showing which will assure the Commission, charged with protecting the public interest, that that interest will in no way be disserved . . . .'" *Id.* (quoting *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 283 F.2d 204, 214 (D.C. Cir. 1960).

In a 1990 case in which PNM sought approval to abandon SJGS Unit 4, the PRC noted the absence of a detailed definition in either New Mexico statutory law or case law of the conditions that clearly must be shown for the PRC to permit abandonment by a utility of all or a portion of its facilities or service. After looking elsewhere for guidance, the PRC held that the four factors set out in *Commuters' Committee v. Pennsylvania Public Utility Commission*, 88 A.2d 420, 424 (Pa. Super. 1952) are among those to be considered in determining the existence or nonexistence of public convenience and necessity in abandonment of service or facilities by public utilities. *In re Public Serv. Co. of New Mexico*, 119 P.U.R.4th 48. These factors, referred to as "*the Commuters' Committee* factors," are:

- The extent of the carrier's loss on the particular branch or portion of the service, and the relation of that loss to the carrier's operation as a whole;
- The use of the service by the public and the prospects as to future use;
- A balancing of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of such service; and
- The availability and the adequacy of service to be substituted.

Id. The PRC held that consideration of other factors may be appropriate depending on the totality of the circumstances arising in each abandonment case. *Id.*

In that case, the PRC denied PNM's application for regulatory abandonment and decertification of its interest in SJGS Unit 4. On appeal, this Court affirmed the PRC's ruling. This Court expressly approved the PRC's use of the *Commuters' Committee* factors, explaining that these factors "reflect the complex regulatory balance that must be struck between the interests of New Mexico energy consumers and those of the utility." *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 12.

The ETA allows a utility to file an application for a financing order to recover all of its energy transition costs through the issuance of energy transition bonds. However, it further says that, to obtain a financing order, a qualifying utility shall obtain approval to abandon a qualifying facility "pursuant to Section 62-9-5 NMSA 1978." NMSA 1978, § 62-18-4(A). Section 62-9-5 is a statute in the PUA. NMSA 1978, § 62-3-2(A)(1) (1985). The ETA refers to the PUA in other places as well. NMSA 1978, §§ 62-18-2(Q); 62-18-2(R); 62-18-4(F); 62-18-15. The ETA allows a utility to defer an application for needed approvals for new resources to a separate proceeding. However, consistent with the fourth *Commuters' Committee* factor, the application must identify "adequate potential new resources sufficient to provide reasonable and proper service to retail

customers." *Id.*, § 62-18-4(D) (2019). Therefore, it can be inferred that when the Legislature enacted the ETA, and particularly Section 62-18-4(D), the Legislature acted with full knowledge of the PUA's abandonment statute and the common law, *i.e.,* the *Commuters' Committee* factors used by the PRC in considering an application for abandonment. Even more particularly, it can be inferred that the Legislature knew that the fourth *Commuters' Committee* factor that the PRC considers in reviewing an abandonment application is the availability and the adequacy of service to be substituted. Under this Court's precedent, it should be concluded that the evidence required to meet Section 62-18-4(D) should be substantially the same as the evidence required to meet the fourth *Commuters' Committee* factor — the adequacy and availability of substitute service.

In *Public Service Company of New Mexico v. New Mexico Public Service Commission*, this Court affirmed the PRC's application of the *Commuters' Committee* factors to deny PNM's application for abandonment of SJGS Unit 4. In its opinion, this Court relied on the PRC's finding that the fourth *Commuters' Committee* factor was not met because PNM's proffered alternative energy sources were inadequate. The PRC found that PNM failed to demonstrate how construction of oil or gas-fired peak-load facilities would match the proven affordability of SJGS Unit 4. Additionally, the PRC found that PNM's suggestion that it could rely on purchased power for replacement capacity was unwise because

the market for such power would probably tighten in the near term. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 19.

In the first case decided under the ETA, PNM filed an application seeking PRC approval of (1) abandonment of its interests in SJGS Units 1 and 4; (2) approval of specific replacement resources for SJGS Units 1 and 4 (resulting from an RFP) including executed purchased power agreements and certificates of public convenience and necessity (CCNs) for specifically described PNM plants; and (3) approval of a financing order under the ETA. *In re PNM's Abandonment of San Juan Generating Station Units 1 and 4*, No. 19-00018-UT, Recommended Decision on PNM's Request for Authority to Abandon Its Interests in San Juan Units 1 and 4 and to Recover Non-Securitized Costs, 2020 WL 1667396, at *3-4 (N.M.P.R.C. Feb. 21, 2020). The PRC bifurcated PNM's Application into two separate proceedings: (1) Case No. 19-00018-UT to address abandonment and securitization issues; and (2) Case No. 19-00195-UT to address PNM's requested replacement resources. *Id.* at *4. While PNM's requests for approval of abandonment and replacement resources were bifurcated, evidence of both the specific replacement resources proposed by PNM as its preferred replacement resource portfolio, as well as the alternative replacement resources considered through the Request for Proposals (RFP) process, was in the record in the abandonment case. *Id.* at *18-19. Based on the evidence demonstrating specific,

adequate substitute resources, the Hearing Examiners found that "a variety of generating resources can be acquired to replace the San Juan Capacity by the date of the proposed abandonment," and recommended that PNM's request for abandonment be approved. *Id.* at *18-19.

Additionally, Decretal Paragraph B of the Recommended Decision on Abandonment and Securitized Costs stated: "PNM's request for approval to abandon San Juan Units 2 and 4 is hereby approved, *subject to the Commission's approval of sufficient replacement resources in Case No. 19-00195-UT*." *Id.* at *24 (emphasis added). The PRC adopted and approved the Hearing Examiners' recommendations. *Id.*, Final Order on Request of PNM for Authority to Abandon Its Interests in San Juan Generating Station Units 1 and 4 and to Recover Non-Securitized Costs, 2020 WL 1703725 (N.M.P.R.C. April 1, 2020).

Subsequently, the PRC issued an order in Case No. 19-00195-UT that approved the portfolio of specific replacement resources proposed by the Coalition for Clean Affordable Energy (CCAE), referred to as CCAE-1, rather than PNM's proposed portfolio of replacement resources. *PNM's Consolidated Application for Approvals for the Abandonment, Financing, and Resource Replacement for San Juan Generating Station Pursuant to the Energy Transition Act*, No. 19-00195-UT, Order on Recommended Decision on Replacement Resources – Part II, 2020 WL

4443754 (N.M.P.R.C. July 29, 2020). The approved replacement resources in CCAE-1 were demonstrable:

1. A purchased power agreement (PPA) for the output from a 300 megawatt (MW) solar facility located in McKinley County combined with a 40 MW battery storage agreement (energy storage agreement or ESA) (Arroyo Project);
2. A PPA for the output from a 50 MW solar facility located on Jicarilla Apache tribal lands combined with a 20 MW battery ESA (Jicarilla I Project);
3. A PPA for the output from a 200 MW solar facility located in the Central Consolidated School District (CCSD) combined with a 100 MW battery ESA (SJS Project);
4. A PPA for the output from a 100 MW solar facility located in CCSD combined with a 30 MW battery ESA (Rockmont Project); and
5. 24 MW of Demand Response.

Case No. 19-00195-UT, Recommended Decision on Replacement Resources, Part II, at 2, 48 (June 24, 2020).[2] Throughout the proceedings in Case Nos. 19-00018-

[2] This Recommended Decision does not appear in Westlaw, but can be viewed on the Internet by (1) going to https://www.nm-prc.org/case-lookup-e-docket/; (2) clicking the arrow to the right of "Case Lookup E-Docket"); (3) entering the username "webguest" and entering the password "webguest#1" and then clicking on the "Login" button; (4) on the left side of the page, clicking on "Search"; (5)

UT and 19-00195-UT, PNM asserted that its proposed abandonment of SJGS Units 1 and 4 would take place "on or around July 1, 2002." *In re PNM's Abandonment of San Juan Generating Station Units 1 and 4*, Case No. 19-00018-UT, Order on PNM Notice and Request for Modification to or Variance from Abandonment Date of San Juan Generating Station Unit 4, 2022 WL 705302, at *5, ¶ 25 (N.M.P.R.C. Feb. 23, 2022).

In this case, unlike in Case Nos. 19-00018-UT and 19-00195-UT, PNM selected speculative generic proposed replacement resources in a "proxy replacement portfolio."[3] PNM did not identify the actual proposed resources resulting from bids received in response to an already-issued RFP, which it plans to use in a later application seeking approval of resources to replace in its interests in the FCPP that it sought approval to abandon in this case. **[30 RP 09744].** PNM instead proposes generic types of resources arising from proxy modeling conducted by PNM. rather than on actual identified and proposed replacement resources. PNM witness Phillips acknowledged, "The exact replacement portfolio for Four Corners has not been determined yet." **[30 RP 09743].**

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under "Search," clicking on "Documents Search"; and (6) to the right of "Document ID," entering 1189534 as the Document ID.

[3] PNM used the EnCompass software to model potential resources. EnCompass is a power supply optimization software by Anchor Power Solutions that uses Mixed Integer Programming to simultaneously optimize multiple objectives and constraints. **[1 RP 00669-00670].**

Consistent with this Court's whole record review, this Response Brief sets forth the evidence (and lack of evidence) of specific, adequate replacement resources. The only evidence that PNM presented regarding replacement resources is on eight pages of the Direct Testimony of Nicholas Phillips. **[***See* **1 RP 00681-00688].** Mr. Phillips is the Director of PNM's Integrated Resource Planning team, which is responsible for performing planning analyses to support abandonments and replacement resources. **[1 RP 00657]**. PNM did not identify any actual proposed replacement resources. PNM will decide which actual replacement resources for which to seek PRC approval based on the evaluation of the results of an RFP that PNM issued on March 8, 2021. PNM received bids in response to that RFP on June 7, 2021. As of September 2, 2021 (one of hearing days in this case), PNM had completed the Phase I and Phase II evaluations of the bids and was in the Phase III evaluation process. **[30 RP 09744-45, 09760, 09765].** The RFP requested that resources proposed in the bids come online by January 1, 2025. **[30 RP 09745-46].** Had the PRC approved PNM's Application in this case, PNM intended to file an application requesting approval of actual and identified replacement resources for the FCPP, based on the responses to its March 8, 2021 RFP, in the first quarter of 2022. **[30 RP 09737].**

To support its required showing of "adequate potential new resources sufficient to provide reasonable and proper service to retail customers," NMSA

1978, Section 62-18-4(D), PNM presented its proxy replacement portfolios, which were the result of its resource modeling. This resource modeling compared the costs of PNM abandoning its interests in the FCPP in 2024 versus 2031. **[30 RP 09789].** Mr. Phillips acknowledged that "the proxy resources used in the abandonment analysis may not reflect what may actually be developed through the competitive bid process for replacement resources." **[1 RP 00673].**

The sources of the proxy resource cost information used in PNM's modeling are: (1) bids received about four years ago in response to an RFP issued by PNM in 2017[4]; (2) the National Renewable Energy Laboratory (NREL); (3) the Energy Information Administration (EIA); and (4) bids received in response to an RFP issued by PNM in 2020. The record does not indicate the date of the cost data obtained from NREL or the EIA. **[30 RP 09779-09780].** The load and commodities forecasts were prepared around June 2020. **[30 RP 09811]**. "These data sources were incorporated in PNM's database of *generic replacement resources utilized in this analysis*." **[1 RP 00672** (Phillips)**]**. Because of the requirements of the Renewable Energy Act, PNM limited the replacement alternatives to resources that may viably contribute to a carbon emissions-free portfolio, including solar, wind, energy storage and flexible combustion turbines under an expectation that new natural gas units would be converted to burn a non-

[4] **[30 RP 09819]**.

carbon emitting fuel such as hydrogen. **[1 RP 00672]**. The levels of each type of replacement resource resulting from the modeling depend on assumptions used by PNM regarding technology restrictions and replacement resources proposed by PNM in a pending case in which it seeks approval to abandon 114 MW of leased interests in the Palo Verde Nuclear Generating Station. **[1 RP 00681].**

Mr. Phillips said that the pricing of the bids that PNM had received from the RFP issued in March 2021 was "very much in line with the last two RFPs we issued." **[30 RP 09782].** When asked why PNM did not file an application for approval of replacement resources concurrently with its application for approval of abandonment of its interests the FCPP, Mr. Phillips said, "I'm not in charge of case filing strategy. I don't know . . . I am not aware of any reason. That's not my department's purview." When asked whether PNM could still file an application for approval of replacement resources in the first quarter of 2022 if the PRC denied its abandonment application in this case, Mr. Phillips said that he did not know. **[30 RP 09782-83].**

PNM Table NLP-1, shown below, contains the most specific evidence presented by PNM on its proposed alternative replacement portfolios. Scenario 1 assumes no technological restrictions placed on the proxy replacement resources. Scenario 2 assumes that technological restrictions are placed on proxy replacement

resources, such as the exclusion of hydrogen resources, so that replacement resources are only renewable and energy storage resources. **[1 RP 00682].**

PNM Table NLP-1

Line	Years	Resource Type	Technology Neutral (Scenario 1) Exit FCPP 2024 Incremental Capacity (MW)	Technology Neutral (Scenario 1) Exit FCPP 2031 Incremental Capacity (MW)	No New Combustion (Scenario 2) Exit FCPP 2024 Incremental Capacity (MW)	No New Combustion (Scenario 2) Exit FCPP 2031 Incremental Capacity (MW)	Line
1	2023-2024	Combustion Turbine	280	240	0	0	1
2		Storage	24	53	305	311	2
3		Solar	(1)	9	125	53	3
4		Wind	0	0	0	0	4
5		Nuclear	(114)	(114)	(114)	(114)	5
6		Coal	(497)	(497)	(497)	(497)	6
7	2025	Combustion Turbine	80	0	0	0	7
8		Storage	57	0	156	0	8
9		Solar	57	0	95	0	9
10		Wind	0	0	0	0	10
11		Nuclear	0	0	0	0	11
12		Coal	(200)	0	(200)	0	12
13	NPV (2021$)($M)		$6,933	$7,105	$7,240	$7,335	13
14	Total 2040 Capacity (MW)		5,941	5,869	6,401	6,401	14
15	CO2 (Tons)(M)		28.4	32.9	26.1	31.7	15

[1 RP 00682].[5] Both of these scenarios assume, in calculating the claimed benefit to customers, that the PRC will not deny PNM recovery of any of its undepreciated investments in the FPCC. **[30 RP 09764].**

Thus, the most specificity provided by PNM on replacement resources is the amount of *the type of each resource* that PNM expects to select based on its modeling, not actual identified replacement resources. Mr. Phillips said, "PNM reiterates that the information contained in the PNM Table NLP-1 is only a proxy

[5] PNM filed an Errata to Mr. Phillips's Direct Testimony which states, "Line 13 of Table NLP-1, om page 27 of Mr. Phillips's testimony, Line 13 should increase by approximately $1.7 million in the "Exit FCPP 2031 columns." **[18 RP 04420].** This change is not reflected in Table NLP-1 on this page.

used to show the net customer benefits; however, *it is indicative of what replacement portfolios might be."* **[1 RP 27 (emphasis added)].**

When PNM filed its Application and Direct Testimony in this case in January 2021 with its modeling results, PNM still expected that the replacement resources for SJGS Units 1 and 4, approved by the PRC in July 2020, to come online as expected in June 2022. **[1 RP 7** (Nicholas Phillips stating that "[o]nce the San Juan replacement resources are brought online in June 2022 . . . "**].** However, on May 24, 2021, after PNM filed its Application in this case, PNM notified the PRC that the developer of the Rockmont Project (one of the replacement resources approved in Case No. 19-00195-UT) determined that it could not meet its contracted commercial operation date (COD) of June 2022.[6] On July 22, 2021, PNM notified the PRC that the developers of the SJS and Arroyo Projects (other replacement resources approved in Case No. 19-00195-UT) also could not meet their contracted COD dates of June 2022. Both developers said the

[6] The PRC took administrative notice of PNM's May 24, 2021 filing in its Order on PNM Notice and Request for Modification to or Variance from Abandonment Date of San Juan Generating Station Unit 4 issued in Case No. 19-00018-UT. *In re PNM's Abandonment of San Juan Generating Station Units 1 and 4*, Case No. 19-00018-UT, 2002 WL 705302, *8, ¶ 38 (N.M.P.R.C. Feb. 23, 2022) (Paragraph 38 states: "For purposes of this matter, the Commission takes administrative notice of [PNM's] May 24, 2021, July 22, 2021, November 23, 2021 and January 26, 2022 Compliance Filings in Cases 19-00195-UT and 20-00182-UT and the responses filed thereto."). PNM's May 24, 2021 filing can be viewed by following the instructions in footnote 2 and entering 1202239 as the Document ID.

delays were caused by supply chain issues.[7] On November 23, 2021, PNM notified the PRC that the developer of the Jicarilla Project (another replacement resource approved in Case No. 19-00195-UT) could not meet its contracted COD date of April 30, 2022. In its Notice, PNM said:

> Worldwide supply chain disruption and other project delays over the last several months are the result of the COVID-19 and Delta variant pandemic, which caused well-published manufacturing, shipping and distribution impacts. Reports from the SJGS replacement resource vendors to PNM indicate these supply chain disruptions and delays are anticipated to extend through much of 2022 but should begin to be relieved by late 2022 to early 2023.[8]

On January 26, 2022, PNM informed the PRC that, because of the delays in getting the replacement resources online, it anticipated a capacity shortfall in the summer of 2022.[9]

On February 17, 2022, PNM filed a request for permission, to the extent necessary, to temporarily extend the closure date of SJGS Unit 4 for three months to meet demand during the summer of 2022. In response, the PRC issued an order ruling that its final orders in Case Nos. 19-00018-UT and 19-00195-UT did not mandate abandonment of SJGS Unit 4 by a certain date, thereby allowing PNM to

[7] PNM's July 22, 2021 filing can be viewed by following the instructions in footnote No. 2 and entering 1204356 as the Document ID.
[8] PNM's November 23, 2021 filing can be viewed by following the instructions in footnote No. 2 and entering 1207287 as the Document ID.
[9] PNM's January 26, 2022 filing can be viewed by following the instructions in footnote No. 2 and entering 1208434 as the Document ID.

continue using SJGS Unit 4 to meet summer 2022 demand. *In re PNM's Abandonment of San Juan Generating Station Units 1 and 4*, Case No. 19-00018-UT, Order on PNM Notice and Request for Modification to or Variance from Abandonment Date of San Juan Generating Station Unit 4, 2022 WL 705302, *5, ¶ 24 (N.M.P.R.C. Feb. 23, 2022).

Mr. Phillips said at the hearing that he was aware of the recent delays in getting the SJGS replacement resources online due to these supply chain issues. Nevertheless, Mr. Phillips said that he was confident that adequate replacement resources would be available if PNM abandons its interests in the FCPP on December 31, 2024, about three years in the future. One reason for his confidence was that there would be a greater lead time in this case than in the SJGS abandonment case between when the PRC approves replacement resources and the COD for the replacement resources. **[30 RP 09774-09776]**. Mr. Phillips said, "We have a lot longer of a lead for this procurement, so we expect the supply chain issues to be mitigated by then." **[30 RP 09826]**. However, this is not correct because in both of these cases the COD lead time for the procurements is three years. In the SGJS abandonment case, PNM filed its application for approvals of abandonment and replacement resources on July 1, 2019, with expected CODs of the replacement resources in June 2022, about three years later. *PNM's Consolidated Application for Approvals for the Abandonment, Financing, and*

Resource Replacement for San Juan Generating Station Pursuant to the Energy Transition Act, No. 19-00195-UT, Recommended Decision on Replacement Resources, Part II, at 1 (N.M.P.R.C. June 24, 2020).[10] In this case, assuming PRC approval of PNM's Application, PNM expected to file its application for approval of replacement resources in the first quarter of 2022 with expected CODs of replacement resources in the summer of 2025, **[30 RP 09776],** which is, as in the SJGS abandonment case, about three years later. Another reason for Mr. Phillips' confidence was his discussions with developers, who he said anticipated the supply chain issues to be "a short-term blip, and not a long-term effect." **[30 RP 09776].** This latter testimony was properly not given much weight by the Commissioners because it is hearsay and because of the persistence of supply chain issues.

The Hearing Examiner, in finding that PNM provided sufficient evidence to defer filing an application for approval of replacement resources under Section 62-18-4(D), relied heavily on Mr. Phillips' testimony about the lead time between PNM's anticipated filing of its application for approval of replacement resources and a PRC order approving replacement resources. Significantly, the Hearing Examiner said, "[Mr. Phillips] also noted that any projects chosen from this RFP will have a much longer lead time to complete construction as compared to the

[10]This Recommended Decision can be viewed by following the instructions in footnote No. 2 and entering 1189534 as the Document ID.

developers of the replacement resources for the SJGS." **[35 RP 14956-14957]**. Because the Hearing Examiner relied on incorrect information, his recommendation that the PRC find that PNM satisfied the requirements of Section 62-18-4(D) was appropriately disregarded by the PRC.

Paragraph 27 of the PRC's decision shows that the PRC had in mind the failure of the SJGS replacement resources to come online as promised when it issued its decision in this case. Paragraph 27 says:

> Notably, Mr. Phillips statement above seeks to address concerns about the supply chain issues that have recently affected PNM's efforts to bring the SJGS replacement resources online in a timely manner in order to meet peak demand following the retirement of SJGS. While the PPAs for those projects provide some insulation to ratepayers and the utility from the cost increases associated with those supply chain issues, these issues have led to the default of [at] least one developer under the PPA approved by the Commission. *Review of the actual results of PNM's RFP and the resulting bids will provide the Commission up-to-date information on the effects such supply chain issues may have on pricing of actual proposed replacement resources.*

[37 RP 15420 (emphasis added)**].**

Construing Section 62-18-4(D) in harmony with Section 62-9-5 of the PUA and the *Commuters' Committee* factors, PNM's generic evidence on potential replacement resources is insufficient to satisfy the fourth *Commuters' Committee* factor or Section 62-18-4(D) in this case. In fact, as New Energy Economy pointed out in its Exceptions to the Hearing Examiner's Recommended Decisions in this case, PNM previously acknowledged in a filing with this Court that it

cannot meet its burden of proof for authorization of abandonment "unless adequate replacement resources are identified and available." **[37 RP 15347-15348** (quoting from PNM's Emergency Writ to the Supreme Court filed in Case No. S-1-SC-37552 on February 27, 2019)**].**

This is not to say that Section 62-18-4(D) requires identification of actual proposed replacement resources in every case — and the PRC did not say that in its final order. Rather, the PRC said that proxy modeling alone, based on analysis of generic placeholders, is insufficient in this case to satisfy Section 62-18-4(D) "without identifying the actual resources already under consideration, especially when PNM concedes it is [in] possession of such information." **[37 RP 15419, ¶ 21]**; *see also* **[37 RP 15420, ¶ 24** (stating that PNM's reliance on modeling is insufficient, "especially when PNM's own testimony indicates the actual replacement resources are already under review by PNM as part of its ongoing RFP process")**]**. While the Hearing Examiner declined early on in this case to dismiss PNM's Application because PNM did not identify exact proposed replacement resources, he correctly observed, "For purposes of ultimate proof, however, whether this requirement has been satisfied awaits a ruling based on the evidence adduced at hearing." **[3 RP 01358].**

Given (1) the current supply chain issues and the delays in getting the SJGS replacement resources online; and (2) PNM's plan to file an application for

identified replacement resources in the near future, there is substantial evidence to support the PRC's decision to deny PNM's abandonment application. Additionally, nothing suggests that the PRC acted arbitrarily or capriciously, *i.e.,* unreasonably, without consideration, and in disregard of the facts and circumstances. The PRC's rationale was firmly rooted in the public interest and in its concern that PNM be able to provide service at just and reasonable rates if its interests in the FCPP are abandoned as of December 31, 2024.

Furthermore, the PRC's decision is narrowly tailored to address PNM's failure to adequately identify potential replacement resources. The PRC was circumspect in responding to the paucity of evidence supplied by PNM regarding potential replacement resources. While the PRC's decision denied PNM's Application, it assumed that PNM would file a new abandonment application expeditiously, along with an application for approval of replacement resources (which PNM said it was planning to file in the first quarter of 2022), including the cost-benefit analysis required by the Modified Revised Stipulation approved in Case No. 16-00276-UT. **[37 RP 15422 (¶ 32); 37 RP 15426 (¶ F).** Thus, this Court should defer to the PRC's expertise and its judgment that PNM failed to specifically identify adequate substitute resources. The PRC's decision was reasonable in that it both contemplated and allowed PNM to correct this deficit and

refile its application. Rather than doing so and disclosing actually proposed replacement resources for public scrutiny, PNM chose to file this appeal.

PNM argues that the PRC's decision should be reversed because, while the final order briefly discusses the *Commuters' Committee* factors, it does not evaluate the evidence relating to those factors and does not discuss application of a net-benefit test. **[BIC 31].** The PRC was not required in its final order to discuss each of the *Commuters' Committee* factors. The PRC evaluated the evidence relating to the fourth *Commuters' Committee* factor: the availability and the adequacy of service to be substituted. This factor is a crucial component of the balancing test that the PRC applies to review abandonment applications. *See PNM v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 12 (stating that the PRC's decision that the "public convenience and necessity" requires consideration of the *Commuters' Committee* factors was a reasonable exercise of its broad legislative mandate). It was unnecessary for the PRC to discuss the other three *Commuters' Committee* factors when it found that the paucity of evidence relating to the fourth *Commuters Committee* factor was sufficient to find that PNM did not meet its burden of proof of showing that abandonment of its interests in the FCPP was not in the public interest.

B. The PRC Properly Denied PNM's Application because PNM Did Not Perform a Promised Cost-Benefit Analysis that Would Have Provided a Necessary Baseline Against Which to Compare PNM's Modeled Scenarios[11]

Paragraph 20 of the Modified Revised Stipulation approved and adopted by the PRC in Case No. 16-00276-UT states:

> PNM shall perform a cost-benefit analysis as part of its 2020 Integrated Resource Plan, on the impact of an early exit from Four Corners as a participating owner, as of 1) 2024, and 2) 2028, that includes an analysis of the cost recovery of and return on PNM's undepreciated investments in Four Corners together with full recovery of all existing contractual obligations, including default payments and penalties.

Case No. 16-00276-UT, Modified Revised Stipulation in Compliance with and Conforming to Commission's Orders Granting Conditional Approval, ¶ 10 (Jan. 23, 2018).[12]

Contrary to PNM's obligation under Paragraph 10 (which it agreed to), PNM unilaterally decided, without seeking PRC approval, to not model a scenario under which it would exit the FCPP in 2024 or 2028 by breaching its contract, in either its pending Integrated Resource Planning case or in this case. [**30 RP 09796].** Instead, PNM chose to perform modeling that only compared the costs of PNM abandoning its interests in the FCPP in 2024 (in combination with a sale of

[11]It is unnecessary for the Court to consider this issue if it affirms the PRC's rejection of PNM's Application based on PNM's failure to meet its burden of proof on replacement resources.

[12] The Modified Revised Stipulation can be viewed by following the instructions in footnote No. 2 and entering 11653416 as the Document ID.

its interests to the Navajo Transitional Energy Company, LLC) versus 2031 (when it is assumed that the FCPP will be shut down). **[30 RP 09789].** Neither scenario incorporates a potential PRC decision that denies PNM recovery of undepreciated FCPP costs based on imprudence. **[30 RP 09790-09791].** Mr. Phillips said that his understanding is that if PNM exited the FCPP in 2024 without, in combination, transferring its interests to NTEC, PNM would remain on the hook for the vast majority of the costs. **[30 RP 09796].** If the abandonment and sale to NTEC were approved, NTEC would assume the obligations under the Coal Supply and Operating Agreement. **[30 RP 09800]**.

Paragraph 32 of the Modified Revised Stipulation states:

> The Signatories agree that the substantive terms and conditions set out in this Modified Revised Stipulation are interdependent and that the various provisions of the Modified Revised Stipulation are not severable. *Modification of the substantive terms and conditions of this Modified Revised Stipulation would deprive all of the Signatories of the benefit of the overall bargain achieved through compromise and accommodation among the Signatories*. It is the Signatories' intent that none of the provisions of this Modified Revised Stipulation shall become fully operative unless the Commission enters an order approving the Modified Revised Stipulation in full.

Case No. 16-00276-UT, Modified Revised Stipulation in Compliance with and Conforming to Commission's Orders Granting Conditional Approval, ¶ 32 (emphasis added).

Once the Modified Revised Stipulation in Case No. 16-00276-UT was approved and adopted by the PRC, it became a PRC final order, which can only be

amended by the PRC when justified by substantial evidence. Case No. 10-00086-UT, Certification of Stipulation at 133 (June 21, 2011).[13] PNM breached its agreement and deprived the Signatories to the Modified Revised Stipulation of the benefit of the bargain and violated a PRC Final Order by its unilateral decision to not comply with Paragraph 20 of the Modified Revised Stipulation. That is why the Hearing Examiner's finding that PNM's Amended Application and evidentiary showing "substantially satisfied its obligation under Paragraph 10," **[35 RP 14948],** lacks both a legal and evidentiary basis. Legally, the Hearing Examiner had no authority to amend the PRC's final order, deprive the Signatories to the Modified Revised Stipulation of the benefit of the bargain and not require PNM to comply with Paragraph 10 of the Modified Revised Stipulation. In fact, the Hearing Examiner's decision could produce a chilling effect on settlement negotiations. If signatories find that bargains struck in stipulations are later revised to their detriment, they will hesitate, if not refuse, to negotiate settlements, thus undermining the whole process. The Hearing Examiner's ruling lacks an evidentiary basis because PNM did not perform the required analysis, so the Hearing Examiner had no basis to conclude that doing the analysis "would not be a worthwhile or sensible exercise." The purpose of the requirement in Paragraph 10

[13] The Certification of Stipulation can be viewed by following the instructions in footnote No. 2 and entering 1096676 as the Document ID.

of the Modified Revised Stipulation was to determine if, in fact, PNM exited the FCPP early by breaching its existing contracts, there would be a benefit to customers — clearly a worthwhile and sensible exercise. **[35 RP 14948].**

PNM argues that the PRC acted "outside its authority in denying abandonment based on the purported lack of . . . modeling scenarios in a completely separate case." **[BIC 34].** PNM misconstrues the PRC's decision. The PRC did not say that PNM's breach of its obligation in the Modified Revised Stipulation automatically meant that PNM's Application had to be denied. Rather, as the PRC explained, PNM's failure to perform the cost-benefit analysis that it agreed to do as part of the Modified Revised Stipulation, denied access to information to allow the parties and the PRC to compare PNM's proposed scenarios for existing the FCPP in 2024 (in combination with the sale to NTEC) versus 2031 with a scenario in which PNM exits the FCPP by breaching its existing contracts. The required cost-benefit analysis would have provided a baseline against which the PRC could have compared PNM's proxy modeling. **[37 RP 15423-15423 (¶ 37).**

Moreover, while the Modified Revised Stipulation required PNM to do the modeling in its next Integrated Resource Plan, the PRC's authority to enforce the requirement arises from a final order, not 17.7.3.12 NMAC (the PRC's Integrated Resource Plan Rule).

C. The Issue of Whether the PRC Retains Authority Post-ETA to Review the Prudence of and Reasonableness of PNM's Expenditures on SCR Controls and Other FCPP Life-Extending Investments — and Issue Deferred for Consideration before Enactment of the ETA — Is Not Ripe for Review

This Court's recent opinion in *Citizens for Fair Rates and the Environment v. New Mexico Public Regulation Commission* (*CFRE*), 2022-NMSC-010, makes clear that the PRC's authority to review the prudence of certain of PNM's investments in the FCPP is not yet ripe for review by this Court.

In *CFRE*, PNM filed an application to abandon its interests in SJCS Units 2 and 3. The PRC's final order granted PNM's application, but indicated that the PRC intended to review and potentially disallow PNM's finally incurred energy transition costs in a future rate case. On appeal, NEE argued that the ETA strips the PRC of authority to review and disallow PNM's actual energy transition costs incurred after January 1, 2019. This Court found that NEE's argument was not ripe for review and stated, "We do not believe that the Court can effectively consider the lawfulness of a *potential* disallowance in the absence of a relevant record." *CFRE,* 2022-NMSC-010, ¶ 27 (emphasis in original). In making this declaration, this Court relied on *New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission*, in which this Court declined to review a PRC order because "'the Commission has not yet determined if and to what extent investment in any plant is imprudent, or how imprudence would effect [sic] its rate treatment'" and because the Commission '"has not, by its actions in this case,

determined that ratepayers must pay for imprudent investment.'" *Id.* (citing 1991-NMSC-018, ¶¶ 24, 41). This Court emphasized that ripeness is a prudential as well as jurisdictional concern. *Id.*, ¶ 28. In this context, "prudential" means whether an actual controversy is presented. Thus, even if this Court is presented with a purely legal question, it is not justiciable unless it is ripe; the mere possibility or even probability that a person may be adversely affected fails to satisfy the actual controversy requirement. *New Energy Economy v. Shoobridge*, 2010-NMSC-049, ¶¶ 16-18, 149 N.M. 42.

The issue of whether the Commission has authority to review PNM's prudence in extending its participation in the FCPP and making associated investments is not ripe for review by this Court for two reasons. The first reason is because the PRC did not issue a financing order. Issuance of a financing order by the PRC is the first step in obtaining securitization. *See* NMSA 1978, §§ 62-18-2(L) (defining "financing order") and 62-18-2(F) (defining "energy transition bond") (2019). The Hearing Examiner aptly described the issue before him as, "[A]re costs on which a determination of prudence and reasonableness has been deferred *eligible for securitization under the ETA*?" (emphasis added). **[36 RP 15068].** This is an issue of first impression resulting from enactment of the ETA. Before enactment of the ETA, the PRC had authority to deny a utility rate recovery of stranded costs upon a utility's abandonment of plant, which may be justified if,

for example, a utility should have foreseen changes that might have called into question the prudency of its investments. In fact, after PNM filed an application in 2013 — before enactment of the ETA — to abandon its interests in SJGS Units 2 and 3, the PRC approved a stipulation entered into by PNM in which PNM agreed that its shareholders would absorb 50% of PNM's stranded costs in those Units, in the amount of approximately $257 million.[14] The ETA introduced securitization into the stranded cost quandary and led to PNM's argument that the PRC now lacks authority to deny PNM recovery of stranded costs, even if those costs were imprudently incurred, if the PRC issues a financing order that authorizes securitization. In this case, the PRC did not issue a financing order, so no controversy exists over whether imprudent costs are eligible for securitization under the ETA.

The second reason that the prudence issue is not ripe for review by this Court is because the PRC did not determine whether PNM acted imprudently in making its FCPP continuation decision. The Hearing Examiner found that the evidence on this issue was inadequate and recommended that the PRC defer

[14]Case No. 16-00276-UT, Certification of Stipulation at 18-19 (Oct. 31, 2017), adopted in relevant part by Revised Final Order Partially Adopting Certification of Stipulation (Jan. 10, 2018), as modified by Order on Notice of Acceptance (Jan. 17, 2018). The Certification of Stipulation can be viewed by following the instructions in footnote No. 2 and entering 1144412 as the Document ID.

making a decision on PNM's prudence. **[36 RP 15095].** The PRC followed this recommendation. **[37 RP 15425, ¶¶ 42-43].** For this reason, in this case, as in *CFRE*, this Court cannot effectively consider the lawfulness of a potential disallowance in the absence of a relevant record.

PNM's assertion that it and other parties will suffer harm from relitigating the prudence issue because of the cost of relitigation should be rejected because, as discussed later in Section D**,** the PRC's ruling in Case No. 16-00276-UT — that in the subsequent proceeding, administrative notice will be taken of the evidence on the issue of prudence admitted in Case No. 16-00276-UT — was not appealed and remains effective and enforceable. PNM's argument should also be rejected because it would not be in the public interest to simply drop from consideration whether hundreds of millions of dollars in coal plant costs on which the PRC's determination of prudence has been expressly deferred, should be paid for by ratepayers. It would not be fair, just or reasonable to recover from ratepayers potentially imprudently incurred costs and hold PNM shareholders harmless from imprudent decisions.

D. Alternatively, if this Court Finds that the Issue of Prudence is Ripe for Review, the ETA Does Not Bar the PRC from Reviewing PNM's Prudence in Extending Its Participation in the FCPP and Making Associated Investments

The Hearing Examiner found that the ETA does not bar the PRC from reviewing the prudence of costs incurred by PNM for the FCPP on which the PRC

deferred a determination of prudence before enactment of the ETA. **[36 RP 15093]**. He recommended that the disputed costs be allowed to be securitized and treated akin to estimated plant decommissioning costs, in which any potential disallowances would be implemented through the ETA's reconciliation process. **[36 RP 15089-15090]**. The Hearing Examiner's excellent analysis of the issue is extensive, and the PRC directs the Court to this analysis and adopts it in this Response Brief. **[36 RP 15082-15093]**. In summary, the Hearing Examiner concluded:

- PNM expressly accepted the deferred review in agreeing to the PRC's modifications to the Revised Stipulation in Case No. 16-00-276-UT and did not appeal the PRC's Revised Final Order and Order on Notice of Acceptance.
- The Legislature is presumed to be aware that the PRC had deferred its prudence review of $148.7 million in costs and that PNM had expressly (i) acquiesced to the PRC's authority to conduct the review in PNM's next general rate case; (ii) borne the burden of proving the prudence and reasonableness of the costs in that case; and (iii) face therein the imposition of any appropriate remedies.
- When the Legislature has seen fit to modify or limit the PRC's authority or discretion in ratemaking, it has inserted language that makes its intent

clearly apparent; in fact, in Section 62-18-11(B) of the ETA, the Legislature made it clear that it was not limiting the PRC's authority (stating that "[r]easonable actions taken by a qualifying utility to comply with the Financing Order *shall be deemed to be just and reasonable for ratemaking purposes*[.]") (emphasis added).

[36 RP 15088-15092].

The Hearing Examiner perhaps summed up his conclusion best when he said:

> Simply put, PNM's position carries an unacceptable and avoidable financial risk to ratepayers and is contrary to the public interest because, reading the ETA in harmony with the PUA so that all related statutes are read to operate effectively, it becomes readily apparent that acceptance of PNM's position would lead to a grave injustice ***if***, i.e., assuming without deciding, well over $100 million in coal plant investments and costs otherwise found, after a full and fair hearing, to have been imprudently incurred were nevertheless improvidently foisted on ratepayers in final, actual abandonment costs.

[36 RP 15089].

Additionally, the Hearing Examiner explained that in Case No. 16-00276-UT, the Commission "authorized the recovery of the contested investments *only temporarily*, until PNM's next rate case when continued recovery would be subject to further review of issues relating to prudence, with PNM bearing the burden of proof, and any appropriate remedies." **[36 RP 15075** (emphasis added)**]**.

The Hearing Examiner's conclusion is consistent with this Court's recent opinion in *CFRE*, in which this Court, while declining to rule on whether the ETA permits a prudence review, 2022-NMSC-010, ¶¶ 27, 48, nevertheless repeatedly recognized ratepayers' right to just and reasonable rates. 2022-NMSC-010, ¶ 35 ("However, we have recognized that NMSA 1978, Section 62-3-1(B) (2008) accords to energy consumers an entitlement to 'reasonable and proper service at fair, just and reasonable rates.'"); ¶ 57 (same). Moreover, this Court suggested that the PRC does retain prudence review authority under the ETA when this Court rejected NEE's challenge to the constitutionality of the ETA because NEE's referenced testimony "does not persuasively show that the ETA will result in charges beyond the 'significant zone of reasonableness in which rates are neither ratepayer extortion nor utility confiscation.'" *Id.*, ¶ 43 (citation omitted). This Court suggested this again when it said:

> We note, without specifically deciding, that it is possible to construe the provisions of the ETA as new legislation that exists either in harmony with or as an alternative to other provisions governing the Commission's authority to regulate a 'public utility in respect to its rates and service regulations and in respect to its securities.'"

Id., ¶ 66 (citation omitted).

E. The Doctrine of Res Judicata Does Not Bar Relitigation of the Issue of PNM's Prudence in Extending its Participation in the FCPP

PNM's *res judicata* argument fails because it is premised on a false assertion that the PRC has considered three times the prudence of PNM's decision in

October 2013 to extend its participation in the FCPP to July 2041. **[BIC 44-48].** PNM misleads this Court into believing that the PRC has considered this particular prudence issue three times: in Case Nos. 15-00261-UT, 16-00276-UT and this case. **[BIC 44-45]**. To the contrary, in Case No. 15-00261-UT, the PRC did not consider the prudence of PNM's decision to extend its participation in the FCPP. Rather, NEE objected at the hearing to PNM's decision to enter into a new Coal Supply Agreement (CSA) to supply the FCPP and argued that PNM should not be allowed to recover its share of the cost of the CSA through rates. The Hearing Examiner rejected this argument. One party, in its exceptions to the Recommended Decision, argued that PNM should not be allowed to recover its share of the cost of the CSA because PNM's decision to extend its participation in the FCPP was imprudent. In its final order, the PRC rejected this exception, finding that no party in the case challenged PNM's decision to extend its participation in the FCPP; rather, NEE only challenged PNM's decision to enter into the CSA. *In re Application of PNM for Revisions of its Retail Service Rates*, Case No. 15-00261-UT, 2016 WL 5719430, at *37-39, ¶¶ 194-202 (N.M.P.R.C. Sept. 28, 2016), *rev'd on other grounds and remanded by PNM v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012. This Court affirmed the PRC's decision, stating that "we decline to recognize NEE's arguments directed at PNM's

continued use of Four Corners as a generation resource." *PNM v. NMPRC*, 2019-NMSC-012, ¶ 92.

PNM acknowledges that a requirement of *res judicata* is a final judgment on an issue in an earlier case. In fact, PNM does not assert that the Commission ever issued an affirmative final judgment that PNM's decision in October 2013 to extend its participation in the FCPP to July 2041 was prudent. Rather, PNM argues that *res judicata* applies because the parties *could have* raised the issue in Case No. 15-00261-UT. **[BIC 44-48].** The Hearing Examiners and the PRC rejected this identical argument by PNM in Case No. 16-00276-UT. The Hearing Examiners' excellent analysis of the issue at pages 70 to 75 of the Certification of Stipulation in Case No. 16-00276-UT is extensive, and the PRC directs the Court to this analysis and adopts it in this Response Brief.[15] In summary, those Hearing Examiners said that (1) the prudence issue raised in Case No. 16-00276-UT was different than the prudence issue decided in Case No. 15-00261-UT; and (2) PNM never notified the PRC of either its intent to extend its participation in the FCPP or its execution of the agreement to do so. Case No. 16-00276-UT, Certification of Stipulation at 70-75. The PRC agreed and ruled that the parties in Case No. 15-

[15]The Certification of Stipulation may be viewed by following the instructions in footnote 2 and entering 1163846 as the Document ID.

00261-UT did not have a full and fair opportunity to litigate the prudence of PNM's further investments in the FCPP. *Id.*, Revised Final Order Partially Adopting Certification of Stipulation at 22, ¶ 64.[16] Additionally, the Commission sensibly said:

> The Commission rejects those exceptions raising the doctrine of *res judicata* as a bar to the Commission's consideration of the prudence of PNM's decision to continue the operation of FCPP. The Commission agrees with the Certification that the doctrine of *res judicata* needs to be applied cautiously in Commission proceedings, as the Commission acts in a legislative role in setting rates.
>
> It would be contrary to the public interest and manifest injustice would result if the Commission were to preclude litigation of the prudence of PNM's decision to extend participation in the FCPP.

Id. at 21, ¶¶ 61-62 (citation omitted). PNM did not appeal the PRC's Revised Final Order Partially Adopting Certification of Stipulation nor the PRC's Notice of Acceptance.

Therefore, the first time that the PRC considered the prudence of PNM's decision to extend its participation in the FCPP was in Case No. 16-00276-UT, PNM's last general rate case. PNM does not argue that the PRC's judgment in Case No. 16-00276-UT is a basis for *res judicata*. **[*See* BIC at 44-48].**

F. Any Subsequent Prudence Review Cannot be Limited to the Record Developed in this Case

[16]The Revised Final Order Partially Adopting Certification of Stipulation may be viewed by following the instructions in footnote 2 and entering 1165103 as the Document ID.

In Case No. 16-00276-UT, the PRC initially adopted the Hearing Examiners' finding that PNM was imprudent in extending its participation in the FCPP and the Hearing Examiners' proposed remedies for that imprudence.[17] After PNM filed a motion for rehearing, the PRC issued a Revised Final Order Partially Adopting Certification of Stipulation (Revised Final Order) in which the PRC deferred a decision on prudence. The PRC explained that the benefits of the Modified Revised Stipulation were sufficiently significant to justify deferring the decision on prudence until PNM's next general rate case. Significantly, the PRC said, "In the subsequent proceeding, administrative notice will be taken of the evidence on the issue of prudence admitted in the current proceeding." Case No. 16-00276-UT, Revised Final Order Partially Adopting Certification of Stipulation at 22, ¶ 65, and at 23, ¶ 66. "Matters noticed are admitted into evidence to the same extent as other relevant evidence." 1.2.2.35(D)(5) NMAC. While taking administrative notice is subject to appropriate objection, *id.* at 1.2.2.35(D)(4), no party, including PNM, objected to, nor appealed, the PRC's ruling that administrative notice of the evidence admitted in Case No. 16-00276-UT regarding prudence "will be taken" in the subsequent proceeding. Therefore, the PRC's unequivocal declaration that in the subsequent proceeding, administrative notice

[17]Order Partially Adopting Certification of Stipulation at 14-20 (Dec. 20, 2017). This Order may be viewed by following the instructions in footnote 2 and entering 1164794 as the Document ID.

"will be taken" of the evidence on the issue of prudence admitted in Case No. 16-00276-UT, remains effective and enforceable. PNM, in its posthearing brief in this case, acknowledged that the Commission's intent in its Revised Final Order in Case No. 16-00276-UT was to consider the prudence issue in a future case, relying on new evidence along with "*the exact same evidence"* admitted in Case No. 16-00276-UT (emphasis added). **[34 RP 14306].** Thus, while the Commission in this case chose to follow the Hearing Examiner's recommendation and defer the prudence issue, it could have relied on the evidence regarding prudence admitted in Case No. 16-00276-UT.

In retrospect, it perhaps would have proven wiser for the PRC to have made a final decision in Case No. 16-00276-UT on the prudency of PNM's decision to extend its participation in the FCPP. However, at the time, the PRC, in balancing the interests of shareholders and ratepayers, justifiably found that it was in the public interest to approve the Modified Revised Stipulation and defer the prudence issue rather than reject the Modified Revised Stipulation. On January 10, 2018, when the PRC issued its Revised Final Order in Case No. 16-00276-UT and deferred a final decision on PNM's prudence until PNM's next general rate case, it could not have known that (1) the ETA would be enacted effective June 14, 2019; and (2) PNM would argue that the ETA deprives the PRC of authority to exclude imprudently incurred costs from securitization.

CONCLUSION

PNM has not met its burden of proving that the PRC's final order is arbitrary and capricious, not supported by substantial evidence, outside the PRC's authority or otherwise inconsistent with the law. *See New Mexico Indus. Energy Consumers v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-015, ¶ 8 (stating the burden to obtain reversal of a PRC final order). While PNM may point to evidence that contradicts the PRC's findings, the PRC's final order is supported by substantial evidence, and this Court does not reweigh the evidence or determine the credibility of conflicting testimony. *New Mexico Indus. Energy Consumers v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-015, ¶ 13. Because evidence was submitted to the PRC that is sufficient for a reasonable mind to accept the PRC's rulings, this Court should affirm the PRC's final order.

Respectfully submitted this 9 day of May, 2022.

NEW MEXICO PUBLIC REGULATION COMMISSION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 2022, a true and correct copy of the foregoing *Answer Brief of New Mexico Public Regulation Commission* was electronically filed in the Supreme Court's Odyssey filing system, which in turn has caused service upon counsel for all parties of record.

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