IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39138

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

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

Intervenor-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 SIERRA CLUB AND CCAE

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Sierra Club and Coalition for Clean Affordable Energy ("CCAE") hereby jointly file their Answer to Public Service Company of New Mexico's ("PNM") Brief in Chief ("BIC").

I. INTRODUCTION

PNM tries to frame the present appeal as a repeat of *Egolf v. Public Regulation Commission*, 2020-NMSC-018, 476 P.3d 896. In *Egolf*, this Court held that the New Mexico Public Regulation Commission ("PRC" or "Commission") acted unlawfully by failing to apply the newly enacted Energy Transition Act ("ETA") to PNM's planned abandonment of the San Juan Generating Station. PNM's claim that the PRC is again unlawfully trying to avoid applying the ETA to its Four Corners application is incorrect, for many reasons.

The simplest, and legally dispositive, reason that this appeal is distinguishable from *Egolf* is that in the PRC decision at issue in *Egolf*, the PRC misconstrued and misapplied statutes in an attempt to override the Legislature's policy-making prerogatives. 2020-NMSC-018 at ¶¶ 23-26, 31-32. In contrast, in the present case, the PRC made a fact-intensive determination that PNM's application to abandon the Four Corners power plant did not satisfy the public benefit criteria in the abandonment statute. **[37 RP 15414-27]**. In the Four Corners case, the PRC performed the precise function delegated to it by the

Legislature: to use its expertise in regulating electric utilities to evaluate a technically complex matter according to the statutory criteria. Specifically, the PRC, being painfully aware that delays and cancellations of replacement generation are posing serious risks to the reliability of the electricity grid, determined it was too risky to approve PNM's abandonment of Four Corners based on purely hypothetical replacement resources. **[37 RP 15418-22]**. The case that the present appeal most closely resembles is *Public Service Company of New Mexico v. New Mexico Public Service Commission*, 1991-NMSC-083, ¶ 19, 384–85, 815 P.2d 1169, 1174–75, in which the Court upheld the Commission's denial of an abandonment application when PNM failed to meet its factual burden, in part because of concerns about inadequate proposed replacement resources.

The ETA provides that a utility applying for a financing order must first receive approval from the Commission under the Public Utility Act to abandon the generating facility that is the subject of the financing order. NMSA 1978 § 62-18-4(A) ("To obtain a financing order, a qualifying utility shall obtain approval to abandon a qualifying generating facility pursuant to Section 62-9-5 NMSA). The ETA did not alter Section 62-9-5 of the Public Utility Act, by which the Commission must review an abandonment application. Thus, under the ETA, if a utility fails to show that its application meets the abandonment standard in the Public Utility Act, the utility is not eligible to receive a financing order. *See*

NMSA 1978 § 62-18-4(A). Given that the PRC determined that the abandonment portion of PNM's application was not in the public interest and failed to meet the statutory standards, the PRC never reached the phase of the proceeding in which an ETA financing order could be considered.

While not dispositive to this appeal, the factors that influenced the substance and timing of PNM's application are relevant.[1] In the application that was at issue in *Egolf*, PNM filed its abandonment and financing application for the San Juan Generating Station in July 2019, three years before PNM proposed to exit that plant in June 2022. In advance of that filing, PNM issued a Request for Proposals ("RFP") to develop new projects that could replace the San Juan power plant. PNM then used the information from specific bids it received to support its abandonment application. PNM's proposed abandonment of the San Juan Generating Station was widely supported by stakeholders, including Sierra Club and other environmental groups, as it was consistent with the underlying purposes of the ETA to accelerate the retirement of highly polluting coal-fired power plants.

By contrast, in the present case, PNM filed its abandonment and financing application four years in advance of its proposed exit from the Four Corners power

[1] To reiterate, what is dispositive of this appeal is that the PRC, acting within its statutory authority, made a factual determination supported by substantial evidence that PNM's Application to abandon Four Corners did not meet the statutory standards for abandonment.

plant, without having first received any bids for new resources that could replace Four Corners. **[*See* 1 RP 00005, 00006, 00034]** (PNM filed its original application on January 8, 2021, and sought to exit Four Corners on December 31, 2024). In its application to abandon San Juan, PNM included actual replacement resource contracts that PNM proposed for Commission approval, as well as information about alternative projects which were also available. But in its application to abandon Four Corners, PNM relied solely on hypothetical replacement resources that were created by PNM staff by modifying the stale bids it had received in the RFP to replace San Juan. **[30 RP 09897-99]**.

In addition, in the San Juan case, PNM had done everything in its power to ensure that the San Juan power plant would close after PNM relinquished its ownership stake in the plant; among other things, PNM proposed replacement resources at the plant site that would have made it difficult to continue as a coal plant under different ownership. For Four Corners, PNM did the opposite: PNM took affirmative steps to ensure that Four Corners would operate after PNM exited the plant. Specifically, PNM proposed to transfer its interest in Four Corners to the Navajo Transitional Energy Company ("NTEC"), the owner of the coal mine serving the Four Corners Plant. **[28 RP 07199].** Evidence in the proceeding below proved that NTEC's intent in acquiring PNM's share of Four Corners was to continue burning coal at Four Corners as long as possible. **[33 RP 12892-93]**.

PNM then made matters worse by signing additional contracts that would have delayed the earliest date on which Four Corners could close and made it more expensive to close Four Corners. **[28 RP 08665]**.

As PNM witness Sanchez testified, the goal of the ETA is to transition all of New Mexico away from using coal to generate electricity, **[30 RP 09700-01]**, because coal-fired power plants have the highest air pollution rate of any type of power plant. PNM's application to abandon Four Corners was directly contrary to the goal of the ETA because PNM's application would have prolonged the use of coal at Four Corners and increased air pollution. **[33 RP 12892-93; 34 RP 14013]**. For this reason, while environmental groups supported PNM's application to abandon San Juan, environmental organizations in the proceeding below opposed PNM's application to abandon Four Corners.

In isolation, the timing and substance of PNM's application to abandon Four Corners make little sense. But PNM's application did not occur in isolation. Prior to filing the Four Corners application, PNM had been pursuing a merger with a utility holding company called Avangrid. PNM executives had negotiated a deal with Avangrid that would give PNM shareholders a substantial premium over PNM's stock's trading price and provide PNM executives with generous golden parachutes. **[*See* 30 RP 09965]**. Avangrid demanded that PNM get rid of its ownership share in Four Corners no later than 2025, and made execution of the

NTEC purchase agreement, and filing for its approval at the PRC, a condition of the proposed merger. **[33 RP 12662-64]**.

The prospect of a lucrative merger with Avangrid was not the only factor driving the timing and substance of PNM's application to abandon Four Corners. In PNM's last rate case, Case No. 16-00276-UT, PNM sought to recover $148.1 million in Four Corners' investments made after PNM decided to renew its ownership interest in the plant after 2014. The PRC Hearing Examiners found that PNM acted imprudently in renewing its participation, and recommended disallowing the entire $148.1 million. Case No. 16-00276-UT, Cert. of Stipulation at 68. In the revised final order, the Commission deferred a final prudence determination until PNM's next rate case, and allowed PNM to temporarily recover its investments in Four Corners at its cost of debt, but denied any return on investment. Case No. 16-00276-UT, Revised Final Order at 23-24 (¶ 67).

The ETA was enacted after the conclusion of Case No. 16-00276-UT. Coincidentally (or not), PNM had still not filed a new rate case by the time it filed its application to abandon Four Corners. Thus, it was (and is) PNM's position that PNM is entitled, upon approval of abandonment, to recover all of the disputed Four Corners investments through an ETA financing order, because those Four Corners costs were included in rates. **[36 RP 15076]**. If PNM's position below had been accepted, and the Commission had approved the abandonment application, PNM

would avoid the prudence review that the Commission had deferred in Case No. 16-00276-UT.

Emails between a PNM executive and another utility indicated that PNM's goal was to file its abandonment application prior to its next rate case **[33 RP 12874]**—presumably because PNM thought that, in doing so, PNM could evade the prudence review that the Commission had stated would occur in the next rate case. Sierra Club's expert witness demonstrated that the cost to ratepayers (and benefit to PNM shareholders) of allowing the Four Corners investments to be recovered via a financing order negated all the financial benefits PNM claimed to flow from abandonment of the Four Corners plant and replacement with lower-cost renewable resources. **[33 RP 12725-27; 34 RP 14013]**.

In sum, PNM's application to abandon Four Corners was materially different than the application to abandon San Juan at issue in *Egolf*. PNM's Four Corners application would have prolonged the use of coal and increased air emissions, whereas its San Juan application did nothing to extend the life of San Juan. According to PNM, the Four Corners application would have forced customers to pay for nearly $150 million in costs without any prudence review, whereas the San Juan application did not include any costs that would escape a PRC prudence review. Evidence suggested that the timing and substance of PNM's Four Corners application was motivated by PNM shareholders' desire to finalize a lucrative

merger and to avoid a prudence review—whereas these ulterior motives were not present in the San Juan proceeding. PNM's Four Corners application was an attempt to abuse the ETA to benefit PNM's shareholders, while causing harm to customers and the environment. Because PNM's application was antithetical to the goals of the ETA, parties that supported passage of the ETA—including Sierra Club and CCAE—opposed PNM's abandonment and financing application for Four Corners.

In its final order, the Commission identified two deficiencies in the Application: (1) PNM's failure to identify actual replacement resources that could potentially replace Four Corners; and (2) PNM's failure to provide the modeling baseline it agreed to and which was incorporated into the final order in Case No. 16-00276-UT. These deficiencies are more than mere technical matters. The first directly relates to the Commission's ability to assess whether PNM would be able to timely replace the capacity it was abandoning without putting the reliability of the electricity grid at risk; the second relates to the determination of the actual financial benefits of the proposed abandonment.

On these grounds, the Commission essentially invited PNM to resubmit an abandonment application including the omitted information. In doing so, the Commission acted within its statutory authority and the final order was supported

by substantial evidence. *Pub. Serv. Co. of New Mexico*, 1991-NMSC-083, at ¶ 19. The final order should be affirmed.

Sierra Club argued below that PNM's application did not satisfy the standards for abandonment for multiple reasons, including that PNM's Application used the wrong baseline in its modeling, that abandonment was not a net public benefit because it was likely to increase air pollution, and because, due to the imprudence adjustment that was supported by the record evidence, there was a negative financial impact (or at best, a zero financial benefit) to ratepayers from approval of abandonment in this proceeding. Sierra Club filed six exceptions to the Recommended Decision, but the Commission did not reach the majority of Sierra Club's and other parties' exceptions. The record on appeal supports affirming the PRC's final order; however, if the Court were to overturn the Commission's order, the PRC would have to rule on remand on these exceptions, which could provide alternative bases for denying PNM's Application.

STANDARD OF REVIEW

A party challenging a final PRC decision bears the burden of showing that the order is "arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." *New Mexico Atty. Gen. v. N. M. Pub. Regul. Comm'n*, 2013-NMSC-042 ¶¶ 8-12, 309

P.3d 89, 93–94 (quoting *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003–NMSC–005 17, 133 N.M. 97, 61 P.3d 806). The Court defers to PRC decisions that are highly technical, so long as the PRC's decision is supported by substantial evidence. *Plains Elec. Generation & Transmission Coop., Inc. v. N.M. Pub. Util. Comm'n*, 1998–NMSC–038 ¶ 7, 967 P.2d 827. In reviewing the PRC's legal interpretation of an ambiguous statute that the PRC administers, the Court defers to reasonable PRC interpretations. *Rodriguez v. Permian Drilling Corp.*, 2011–NMSC–032, ¶ 8, 258 P.3d 443 (quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 1995–NMSC–062, ¶ 11, 904 P.2d 28).

The Court may either affirm or vacate a final Commission decision, but may not issue a new decision for the Commission or modify the Commission's decision. NMSA 1978, § 62–11–5 (1982).

ARGUMENT

FACTUAL BACKGROUND

The Four Corners power plant is located in northwestern New Mexico. **[1 RP 00009-10]**. The plant is jointly owned by PNM and four other companies: Arizona Public Service ("APS"), Salt River Project, Tucson Electric Power, PNM, and the Navajo Transitional Energy Company ("NTEC"). **[28 RP 07193]**. PNM owns a thirteen percent share in Four Corners. **[28 RP 07195]**. The Four Corners

power plant burns coal to generate electricity. Four Corners is the largest single source of air pollution in New Mexico.

A. 2016 Proceedings Concerning Four Corners

In 2016, PNM filed an application with the PRC to revise its general rates. Among other things, PNM sought to place into rate base approximately $148 million in capital costs the Company expected to incur at the Four Corners power plant after deciding, in 2013, to remain an owner of Four Corners.[2] **[33 RP 12693; 36 RP 15054].** The Hearing Examiners recommended that the Commission find that PNM had acted imprudently in its decision-making process that culminated in deciding to install new equipment at Four Corners. Case No. 16-00276-UT, Certification of Stipulation at 30-47. The Recommended Decision stated that the Commission should disallow the entire amount that PNM had spent on the projects at Four Corners: "the appropriate remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the $90.1 million of the SCR investment and the $58 million of the additional life-extending capital improvements is the disallowance of all costs associated with the investment and improvements." *Id.* at 68.

Ultimately, the Commission did not adopt this aspect of the Recommended

[2] The actual amount that PNM spent at Four Corners between July 2016 and the end of 2018 was $131 million. **[33 RP 12693; 36 RP 15054-56]**.

Decision. Instead, the Commission's revised final order in PNM's 2016 rate case held that the prudence of PNM's expenditures at Four Corners would be resolved in PNM's next rate case, and in the interim PNM would be allowed to recover those costs in rates at PNM's cost of debt. Case No. 16-00276-UT, Revised Order Partially Adopting Certification of Stipulation at 23, 25 (Jan. 11, 2018).

In addition, the Commission's revised final order approved a provision of the stipulation requiring PNM to:

> 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.

No. 16-00276-UT, Modified Revised Stipulation at p. 9, section A(10).

B. PNM'S Proposed Merger with Avangrid

In 2019 and 2020, PNM explored merging with a larger company. **[28 RP 08684]**. PNM ultimately entered into negotiations with Avangrid, an electric utility holding company. As part of the merger negotiations, Avangrid insisted that the merger agreement include Clause 6.19, which required PNM to do two things regarding Four Corners: (1) execute a definitive agreement for PNM to relinquish its ownership interest in Four Corners; and (2) take all reasonable steps to secure Commission approval of the agreement for PNM to exit its ownership stake in

Four Corners as promptly as practicable, but no later than December 31, 2024. **[33 RP 12663**]. PNM and Avangrid executed the merger agreement on October 20, 2020. *Id.* Eight days later, PNM and NTEC executed the Purchase and Sale Agreement, which was PNM's proposed mechanism for abandoning its ownership interest in Four Corners. *Id.*

The Commission ultimately rejected PNM's application to merge with Avangrid, finding that Avangrid's ownership would be detrimental to the public interest. Case No. 20-00222-UT, Order on Certification of Stipulation (Dec. 8, 2021).

C. Negotiations Between PNM and NTEC Concerning Transferring PNM's Interest in Four Corners to NTEC

PNM witness Thomas Fallgren stated that PNM began discussions with various parties in mid-2018 regarding how PNM might abandon its ownership interest in Four Corners. After negotiations with two potential purchasers failed, PNM focused on reaching an agreement for NTEC to acquire PNM's 13% interest in Four Corners on a temporary basis, with the intention that NTEC would re-sell the interest before the transfer date to a "suitable 3rd party." [**33 RP 12885**]. The NTEC contract satisfied PNM's need to have a definitive plan in place to enable the merger with Avangrid (which has a corporate policy against owning coal assets, and insisted that PNM have a contract in place for exiting Four Corners as a

condition of the merger). [**33 RP 12662-64; *see also* 33 RP 12740**] ("Avangrid's internal policies precluded Avangrid from pursuing this transaction with PNMR in the absence of a clear and achievable path for PNM to exit out of its ownership and operation of coal-fired generation."). It also, conveniently, set the stage for an abandonment filing prior to a new rate case, thus preserving PNM's position that it could push the disputed Four Corners' expenses into an ETA financing order without a prudence review.

PNM denies that either the merger with Avangrid or the desire to avoid the prudence review required by the Commission's order in Case No. 16-00276-UT were motivating factors in making the NTEC agreement. However, PNM has not provided an alternative explanation for PNM's urgency to complete a deal in 2020 having an effective date four years hence and that required PNM's *shareholders* to pay to "sell" the Company's interest to NTEC. In fact, an email from APS' Daniel Froetscher to Mr. Fallgren states "what I understood from you" is "You have an abandonment filing on 4C you'd like to make, preferably before a general rate case" and "Abandonment filing may help preserve securitization for post-2016 capital investment at 4C." [**33 RP 12874**]. When asked on the stand about how Mr. Froetscher could come to believe these very specific points about PNM's position, Mr. Fallgren could not provide a plausible explanation. [**29 RP 08783-87**].

NTEC's primary goal for acquiring PNM's interest in Four Corners was to "to minimize the **existing** risk that the other owners pursue an early closure for FCPP." [**33 RP 12892**] (quoting an NTEC presentation) (emphasis in original). NTEC further stated that "[f]undamentally, the objective is to try to preserve the status quo and keep the FCPP operational through its current expected lifespan—2031." [**33 RP 12893**]. In the Purchase and Sale Agreement, PNM agreed to two main provisions to achieve NTEC's goal of keeping Four Corners open until 2031.

First, PNM agreed that, for the remainder of PNM's ownership, i.e., until December 31, 2024, PNM would not vote to close Four Corners unless NTEC consented to the closure. [**28 RP 07263**]. Second, PNM and NTEC agreed that ownership would not transfer from PNM to NTEC until December 31, 2024. The Purchase and Sale Agreement's closing date of December 31, 2024 was selected so that PNM and NTEC would have time to continue to search for a third party that could take ultimate ownership of PNM's interest after 2024, and would be bound by the same voting restriction as PNM. [**33 RP 12905-06**]. Thus, NTEC would ensure that until the end of 2024, PNM would block early retirement of Four Corners; and then after 2024, the third party that became the ultimate owner of PNM's share would block early retirement of Four Corners.[3]

[3] Under the contracts governing the operation of Four Corners, NTEC is prohibited from voting on whether and when to close Four Corners, because NTEC has a

PNM understood that NTEC's goal was to keep Four Corners burning coal until 2031, and that the Purchase and Sale Agreement would help NTEC achieve that goal. Thomas Fallgren, PNM's primary negotiator with NTEC, wrote in an email to NTEC concerning the Purchase and Sale Agreement:

> [The] Current [Purchase and Sale] Agreement provides some assurance on continued plant operation.
> a. PNM agrees that it will not vote for an early shutdown prior to the asset transfer in December 2024.
> b. Plant owners must provide a 24-month advance notice for early shutdown.
> c. Therefore, as part of the agreement no plant shutdown can occur prior to January 2027.
> d. PNM agrees to work with NTEC on any potential seasonal operation. PNM will not support any reduced coal mine production prior to the asset transfer.

[**33 RP 12906**].

PNM and NTEC signed the Purchase and Sale Agreement on November 1, 2020. [**28 RP 07219**]. It included the previously-mentioned prohibition on PNM voting to close Four Corners, which was intended to further NTEC's interest in prolonging the use of NTEC's coal mine that serves Four Corners. **[28 RP 07263]**

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financial interest in selling coal to the plant, regardless of whether it is not economic for the utility owners to operate Four Corners. **[33 RP 12674 n. 36, 12887]**. NTEC stated that its strategy to temporarily acquire PNM's interest in Four Corners and then transfer that interest to a third party was designed to be an end-run around the restriction on NTEC voting on closing the plant. NTEC wanted to transfer PNM's interest to a third party so that it could require the third party to vote against closing Four Corners: "we do not recommend that NTEC permanently acquire PNM's interest due to our limitations in voting rights." **[33 RP 12884; *see also* 33 RP 12677, 12885]**.

D. PNM'S Applications in Case No. 21-00017-UT and the Amended Four Corners Contracts

On January 8, 2021, PNM filed an application to abandon its interest in the Four Corners power plant and for the Commission to authorize PNM to issue a financing order to recover PNM's undepreciated costs associated with Four Corners. [**1 RP 00003-04**]. The mechanism by which PNM sought to abandon its ownership interest in Four Corners was by transferring its interest to NTEC pursuant to the Purchase and Sale Agreement. [**28 RP 07023, 07026-27**].

After PNM filed its original Application, environmental groups criticized the Purchase and Sale Agreement for prolonging the life of Four Corners. [**28 RP 07405, 07408**]. In addition, the Hearing Examiner ruled that PNM's original application was deficient because it failed to specifically request approval of the Purchase and Sale Agreement ("PSA"), and because PNM's original testimony did not sufficiently explain the PSA. [**3 RP 01358**].

PNM filed an amended Application and supplemental direct testimony on March 15, 2021, and also announced an agreement in principle to revise the agreements governing operation of Four Corners. On June 25, 2021, PNM and the other owners of Four Corners finalized amendments to the suite of agreements governing Four Corners: the co-tenancy, coal supply, and operating agreements. [**28 RP 08334, 08511, 08654**]. Through these new agreements, PNM made it

impossible for there to be a vote before 2025 to close Four Corners.

Under the coal contract that was in effect prior to June 25, 2021, the owners could vote to close Four Corners *at any time*, so long as they provided NTEC with appropriate notice of the ultimate closure date and paid approximately $50-60 million to NTEC. [**28 RP 08584**]. By contrast, the June 25, 2021 amendments specified that:

- Four Corners cannot close prior to January 1, 2027;
- The owners may vote to close Four Corners in 2027, but only if they provide two years' notice and pay NTEC $200 million;
- The owners may vote to close Four Corners in 2028, but only if they provide three years' notice and pay NTEC $100 million.
- The owners may vote to close Four Corners after January 1, 2029, and pay NTEC $43 million if they provide four years' notice prior to closure.

[**28 RP 08665**]. The coal supply agreement therefore provided an economic incentive to the non-NTEC owners to operate Four Corners until at least 2029.

The June 25 amendments include changes to the operating agreement providing that starting in 2023, one of the two units at Four Corners would operate for only half of the year. The output of the unit that operates seasonally would be assigned to the three Arizona utilities (APS, TEP, and SRP). [**28 RP 08342-43; 33**

RP 12689]. NTEC and PNM would be assigned the output of the other unit that would operate year-round, and must be operated every hour regardless of economic merit. [**33 RP 12689**]. The minimum output of that unit would be assigned to PNM and NTEC, such that PNM and NTEC would effectively operate their share of the unit at a 100% capacity factor. [**33 RP 12689-90**].

Finally, the June 25 amendments specify that if the Purchase and Sale Agreement is no longer in effect, then the June 25 amendments automatically terminate, and the co-tenancy, coal supply, and operating agreements revert to the agreements that were in force prior to June 25, 2021. [**28 RP 08336**].

II. THE ETA INSTRUCTS THE COMMISSION TO DENY A FINANCING ORDER APPLICATION IF IT DENIES AN ABANDONMENT APPLICATION, AS THE COMMISSION PROPERLY DID HERE.

PNM commits the same error in this appeal that it did in the proceeding below: PNM repeatedly suggests that it was entitled to a financing order without having first satisfied the standards for abandonment. This turns the ETA on its head.

Under the ETA, a utility is eligible to receive a financing order only if it first has obtained Commission approval to abandon a qualifying generating facility. NMSA 1978, § 62-18-4(A). ("To obtain a financing order, a qualifying utility shall obtain approval to abandon a qualifying generating facility pursuant to Section 62-

9-5 NMSA 1978."). The ETA did not change the standards for abandonment, which are contained in the Public Utility Act, NMSA 1978 § 62-9-5. If a utility does not first satisfy the abandonment standards in the Public Utility Act, then the ETA provides that a utility is not eligible to receive a financing order. *See id.*

Here, the Commission did exactly what the ETA instructs: apply the Public Utility Act standards in Section 62-9-5 to PNM's application to abandon Four Corners. The Commission properly concluded that PNM's application failed at this step, because PNM had not met its burden to prove it satisfied the abandonment standard. Under the ETA, NMSA 1978, § 62-18-4(A), once the Commission denied the abandonment application, the Commission was required to deny the financing order application, because the ETA makes abandonment approval a precondition of eligibility for a financing order. As explained below in Section III, the Commission's final Order should be upheld because the record showed that PNM's application did not meet the standards for abandonment in Section 62-9-5 of the Public Utility Act.

III. THE COMMISSION PROPERLY DENIED THE ABANDONMENT AND FINANCING APPLICATIONS.

A. The Record Supports the Commission's Conclusion that PNM did not Prove that Adequate New Resources were Available.

To understand PNM's claims and the Commission's order, it is first necessary to understand the difference between the different kinds of data regarding potential new resources: data from bids; and data from industry-wide surveys. A bid refers to a written offer from a project developer that is submitted in response to a Request for Proposals that PNM issues. In a bid, a developer submits detailed information regarding a legally-binding offer to construct a new project at a particular location, at a particular price, to be operational by a specific date. In contrast, industry-wide surveys are conducted by various government agencies and private firms that make predictions about future prices to build different kinds of new resources based on extrapolating from historical data.

In PNM's application to abandon the San Juan power plant, PNM provided the results of financial and system reliability computer models created with actual bids for projects intended to replace San Juan. [**37 RP 15419-20, ¶¶ 22, 24)**]. By contrast, in PNM's application to abandon the Four Corners power plant, PNM did not use data from bids that could have replaced Four Corners. Instead, PNM took expired bids from the San Juan case and adjusted them based on nationwide surveys, to estimate what bids to replace Four Corners *might* look like. **[30 RP 09897-98]**.

The ETA provides that an applicant for a financing order can defer applying for approval for new resources to replace the facility that is being abandoned only

if the applicant "identifies adequate potential new resources sufficient to provide reasonable and proper service." NMSA 1978 § 62-18-4(D). Here, PNM's applications for abandonment and a financing order did not include a request for approval of new resources. Thus, PNM had the burden of identifying "adequate potential new resources sufficient to provide reasonable and proper service" if PNM's abandonment application were granted and PNM no longer owned a stake in the Four Corners power plant. NMSA 1978 § 62-18-4(D). The Commission properly concluded that PNM had not met its burden under Section 62-18-4(D), for the reasons explained below.

1. Based on the Specific Facts in the Record, the Commission Concluded that PNM Had Not Identified Potential New Resources that Would be Adequate to Replace Four Corners.

First, contrary to PNM's claims, the final Order does not interpret the ETA to mean that it is never appropriate to approve an abandonment application based on hypothetical, rather than actual, bids. *See* BIC at 24-25. Instead, the final order is grounded in the specific facts of this case, in which PNM had said that it was in the process of soliciting actual bids for potential resources to replace Four Corners, [**37 RP 15419 ¶ 23**], yet had not provided the actual bid information to the Commission, [**37 RP 15419 ¶ 21**] (noting that PNM had not "identif[ied] the actual

resources already under consideration, especially when PNM concedes it is possession of such information."); [***see also* 37 RP 15419-21 ¶¶ 21-27, 32**].

The Commission concluded that because of the particular facts present here, it was critical for the Commission to have information from actual bids that had not expired. In Cases 19-00018-UT and 19-00195-UT, the Commission approved PNM's applications to abandon the San Juan power plant and acquire new resources to replace the plant. However, PNM has encountered significant problems in building the new resources that the Commission approved to replace the San Juan power plant after it is abandoned. [**37 RP 15420 ¶ 27)**]. All four of the resources to replace the San Juan power plant are significantly behind schedule, and as a result, PNM has delayed abandoning one of the San Juan units. The final order notes that under these circumstances, in which COVID-19 and supply-chain issues have caused significant delays in building new power plants, it is important for the Commission to have information on actual bids that have not expired to ensure accurate pricing and availability of replacement resources. *Id.* There is no basis for this Court to disturb these factual findings by the Commission.

Contrary to PNM's misrepresentations of the record, BIC at 26-27, PNM did not present an economic analysis of abandoning Four Corners that used data from actual bids designed to replace Four Corners. PNM witness Nicholas Phillips conducted the computer modeling of the economics of abandoning Four Corners.

Mr. Phillips testified that:

> PNM used information [sic] publicly available data sources such as National Renewable Energy Laboratory's ("NREL") Annual Technology Baseline, the U.S. Energy Information Administration ("EIA") Annual Energy Outlook (review of utility Integrated Resource Plans), and as well as non-public data from the San Juan RFPs and the Technology Request for Information that PNM issued in November of 2019. These data sources were incorporated in PNM's database of generic replacement resources utilized in this analysis.

[30 RP 09897-98].

To develop cost estimates for new resources that might replace Four Corners, Mr. Phillips started with bids that were submitted to replace a different power plant, the San Juan Generating Station, and the bids were for projects that were expected to be online in 2022. **[30 RP 09897-98]**. By the time that PNM conducted its economic analysis for the Four Corners abandonment case, those bids had long since expired. In addition, PNM's Application was for approval to abandon Four Corners at the end of 2024, such that replacement resources would need to be online in 2025. **[28 RP 07410; 30 RP 09745-46, 09775-76]**. PNM did not present the Commission with information on any actual bids for potential projects that could come online in 2025. Instead, Mr. Philips used bids that had been submitted for potential projects that could come online in 2022 to speculate about what projects that would come online in 2025 might cost. As Mr. Phillips testified:

> The SJGS RFP requested bids for resources to be deployed by 2022. When adjusted by the forward technology curves developed by NREL and EIA, those potential alternatives serve as a reasonable proxy for expected prices of resources to be deployed in 2025.

[30 RP 09899].

This stands in marked contrast to how PNM analyzed abandoning the San Juan Generating Station in Commission proceeding 19-00018-UT. In the San Juan abandonment case, PNM presented the Commission with an economic analysis based on actual bids for potential new resources that were intended to be operational in time to replace San Juan. [**37 RP 15419-20 ¶¶ 22, 24**]. PNM deviated from that process in its application to abandon Four Corners.

Thus, the Commission reached a different conclusion in the Four Corners abandonment case than it did in the San Juan abandonment in part because PNM used a completely different approach to its economic analysis in the Four Corners proceeding. PNM's approach in this case did not allow the Commission to assess and verify what replacement resources would be available in 2025, and thus PNM's application presented material risks to the reliability of the electricity grid.

2. The Commission's Interpretation of the ETA Gives Effect to the Entire ETA and is Reasonable.

Second, even if the Order is construed as interpreting the ETA to *always* require actual bids that have not expired rather than other sources of information

on replacement resources (which is not what the Order says), the Commission's statutory interpretation should be upheld. The ETA provides that an application for abandonment can be filed before an application for replacement resources only if the application "identifies adequate potential new resources sufficient to provide reasonable and proper service to retail customers." NMSA 1978 § 62-18-4. The ETA does not define the phrase "potential replacement resources," and does not specify whether "potential replacement resources" can be hypothetical, generic resources rather than actual bids that have not expired.

Given the ambiguity in the statute, it would be reasonable for the Commission to interpret the statute as requiring the identification of actual potential projects (i.e., unexpired bids that project developers have submitted to PNM in response to a Request for Proposals to replace the facility that would be abandoned) rather than purely hypothetical projects. In the final order, the Commission concluded that actual bids for potential projects would provide more certainty about pricing and availability than the hypothetical, generic projects that PNM used in the analysis supporting its abandonment application. [**37 RP 15420 ¶ 27**]. The Commission's interpretation makes common sense, particularly given the facts present in the case below, in which the Commission faced a pandemic that has strained supply chains around the globe.

PNM makes the meritless claim that interpreting ETA Section 62-18-4(D) as requiring an applicant to identify actual bids for potential replacement resources somehow conflicts with ETA Section 62-18-4(C), which allows an applicant for a financing order to defer filing an application for approval of replacement resources. [**BIC 25**]. But there is no conflict at all. The Commission interpreted ETA Section 62-18-4(D) as saying that, to identify adequate potential resources would be available after a facility is abandoned, PNM should have identified actual bids to construct potential new resources. The Commission did not require PNM to have selected among those bids and identified a preferred portfolio for the Commission to approve.

By holding that PNM should have identified actual bids for potential new resources, the Commission did not require PNM to have applied for Commission approval of a subset of bids. Indeed, the Commission's final order noted that in the San Juan abandonment case, PNM had identified actual bids in its abandonment application even though the approval of new resources was deferred to a separate proceeding. **[37 RP 15419-20 ¶¶ 22, 24]**. Thus, the Court can affirm interpreting the ETA to require an applicant to submit information based on actual bids for potential new resources as in harmony with allowing the applicant to wait to seek Commission approval of a subset of actual bids.

3. PNM's Arguments Regarding Alleged Inconsistencies with the Hearing Examiner's February 2021 Order on Motions is Unavailing.

PNM argues that the Commission's final order is inconsistent with the Hearing Examiner's February 26, 2021 order ruling on motions to dismiss PNM's original application. **[BIC 16-17]**. PNM's argument lacks merit.

As a preliminary matter, a Hearing Examiner's ruling on a motion to dismiss is of no legal significance (other than as it affects the procedural path of the case) unless and until the ruling is adopted by the Commission. To the extent that the Commission's final order could be construed as inconsistent with the Hearing Examiner's ruling on motions to dismiss, the Commission's final order operates to automatically preempt *by implication* any contrary holdings of the Hearing Examiner. *Albuquerque Cab Co., Inc. v. New Mexico Pub. Regul. Comm'n*, 2017-NMSC-028, ¶¶ 32-33, 404 P.3d 1, 9 (holding that the Commission need not explain its reasons for declining to follow a hearing examiner's recommendations, so long as the record supports the Commission's final order). The Court tests the sufficiency of the Commission's fact-finding with respect to its support in the record evidence and gives no weight to findings of a hearing examiner not adopted by the Commission. *Id.*

Moreover, the Commission's final order is fully consistent with the Hearing Examiner's February 26, 2021 order on motions to dismiss. Two parties had

moved to dismiss PNM's original application on the ground that PNM had not proposed actual replacement resources, *i.e.*, that PNM had not proposed a specific portfolio of resources for which it requested Commission approval. The Hearing Examiner rejected this argument at the motion-to-dismiss stage:

> [T]he Hearing Examiner agrees with PNM that the interpretation by ABCWUA and the County that Section 62-18-4(D) requires a utility to have the exact proposed replacement resource identified at the time an abandonment filing is made pursuant to the ETA misapprehends this section of the ETA and would effectively nullify it if applied as ABCWUA and the County advocate. For purposes of pleading, at this nascent stage of the proceeding PNM's Application and supporting testimony appear to sufficiently address the requirement under Section 62-18-4(D) that adequate potential new resources be identified. For purposes of ultimate proof, however, whether this requirement has been satisfied awaits a ruling based on the evidence adduced at hearing.

[3 RP 01358].

PNM misrepresents the final order as adopting the same argument that the Hearing Examiner had rejected at the motion to dismiss stage. Contrary to PNM's mischaracterization, the final order did not require PNM to have identified "the exact proposed replacement resources" at the time of an abandonment filing." **[BIC 17].** Instead, the final order held that PNM had failed to use the approach that PNM followed in the San Juan abandonment case, of presenting data from actual bids for projects designed to replace the facility that was proposed to be abandoned. [**37 RP 15419-20 ¶¶ 22, 24**].

Moreover, the Hearing Examiner was careful to note that "[f]or purposes of ultimate proof, however, whether this requirement [to identify adequate replacement resources] has been satisfied awaits a ruling based on the evidence adduced at hearing." **[3 RP 01358]**. The Commission was well within its authority to find that, based on the evidence presented, PNM had failed to identify adequate potential resources to replace Four Corners.

B. The Commission Properly Concluded that PNM Did Not Provide an Accurate Baseline in its Analysis of Abandonment.

The Commission provided an alternate and independent ground for concluding that PNM had not met its burden to prove it satisfied the abandonment standards in the Public Utility Act: PNM had not provided a proper baseline in its economic modeling, because it had failed to comply with the Commission's final order in Case No. 16-00276-UT to model exiting Four Corners in 2024 or 2028 by breaching its contracts. **[37 RP 15423-24 ¶¶ 36-38]**. Contrary to PNM's assertions, this is a technical finding regarding the sufficiency of PNM's computer modeling, and the Commission's factual findings within its technical expertise are entitled to deference. *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 50, 229 P.3d 494 ("The [Commission's] decisions requiring expertise in highly technical areas, such as utility rate

determinations, are accorded considerable deference." (internal quotation marks and citation omitted)).

To understand this part of the final order, it is necessary to understand how PNM conducted computer modeling in the proceeding below. Under the Public Utility Act, NMSA 1978 Section 62-9-5, and consistent Commission precedent, an applicant must prove that abandonment will produce a net public benefit, and no net detriment to the public interest. *E.g.*, Case No. 19-00018-UT, Recommended Decision at 26 (Feb. 21, 2020); Case No. 13-00395-UT, Final Order, ¶ 21 (Feb. 26, 2014).

To attempt to meet this burden, PNM presented computer modeling that compared two scenarios: a baseline case, in which PNM would own Four Corners until 2031; and the abandonment scenario, in which PNM would exit Four Corners at the end of 2024. **[30 RP 09892-93]**. PNM's primary argument in favor of abandonment was that its computer modeling allegedly showed that abandonment would save customers money compared to the baseline case, and would also reduce air emissions. **[*E.g.*, 28 RP 07399-40, 08135]**.

One of the flaws in PNM's computer modeling is that PNM used an inappropriate baseline, which skewed the comparison in favor of abandonment. Specifically, PNM inappropriately assumed that, if this particular abandonment application were denied, that PNM would be forced to own Four Corners until

2031. Yet in PNM's 2016 rate case, PNM had agreed in a settlement to model two scenarios for exiting Four Corners prior to 2031 by breaching its current contracts in 2024 or 2028. Case No. 16-00276-UT, Modified Revised Stipulation at p. 9, section A(10). The Commission's final order in PNM's 2016 rate case approved this aspect of the settlement. Case No. 16-00276-UT, Revised Final Order.

PNM tries to shoehorn the Commission proceeding below to fit the facts of *Egolf*. **[*See* BIC 35-37]**. But PNM misconstrues what Sierra Club argued in the Exception the Commission granted. Sierra Club did not argue that PNM's violation of the Commission's final order in Case No. 16-00276-UT automatically required the Commission to deny PNM's application to abandon Four Corners. Instead, Sierra Club's Exception 1.3 argued that the *consequence* of PNM having violated the Commission's 2016 rate case order was that PNM had presented a misleading and inaccurate baseline in its Four Corners abandonment application.

Specifically, Sierra Club argued that the intent of section A(10) of the stipulation in Case No. 16-00276-UT was to provide a baseline analysis of PNM exiting Four Corners in 2024 and 2028 by breaching its contracts, with the understanding that this would serve as the baseline for comparing alternate courses of action. **[36 RP 15253-54]**.[4] By failing to present the analysis required by the

[4] **[*See also* 34 RP 14039]** ("PNM's violation of the Commission's final order in Case No. 16-00276-UT is directly relevant here. Had PNM complied with the

2016 rate case order, PNM deprived the Commission of an accurate baseline against which the Commission could compare PNM's proposal to abandon Four Corners. Sierra Club argued that by failing to present an accurate baseline in its economic analysis of abandonment, PNM had failed to present reliable evidence upon which the Commission could find that PNM had met its burden under Section 62-9-5 to prove that abandonment would produce a net public benefit.[5] **[36 RP 15253-54]**.

In sum, the Commission properly determined that PNM had not provided reliable economic evidence upon which the Commission could conclude that PNM had satisfied its burden of proof under Section 62-9-5 of the Public Utility Act. This Court should not disturb the Commission's technical judgment as to the appropriate baseline that PNM should have used in its computer modeling.

Commission's final order in Case No. 16-00276-UT, the Commission and parties would have had two other base cases against which it could measure PNM's proposed abandonment application. PNM's violation of the Commission's order in Case No. 16-00276-UT has enabled PNM to present a worst-case, and unrealistic, baseline scenario in which PNM remains in Four Corners until 2031.").

[5] Tellingly, PNM does not dispute in its brief that it violated the Commission's order in the 2016 rate case. PNM's witnesses acknowledged agreed that PNM had not conducted the analysis required by the Commission's final order in Case No. 16-00276-UT in the intervening IRP or for the abandonment case. **[*E.g.*, 30 RP 09795-96]**.

C. The Commission Did Not Reach Numerous Other Grounds for Denying the Abandonment Applications; the Commission's Decision Can be Upheld on Any of those Alternative Grounds.

Nine parties filed 22 exceptions to the Recommended Decision. In its final order, the Commissions ruled on only two of those exceptions. The Commission stated that because two of the exceptions supported denying PNM's application in its entirety, it was unnecessary to reach the other twenty exceptions to the Recommended Decision. **[37 RP 15425 ¶ 44]**.

Many of the exceptions that the Commission did not rule upon support the conclusion the Commission reached in its final order, which is that PNM had not met its burden to prove that abandoning Four Corners would provide a net public benefit. The exceptions that the Commission did not rule on provide independent bases for the Court to uphold the Commission's finding that PNM's proposed abandonment of Four Corners was not in the public interest.[6] *Albuquerque Cab Co., Inc.*, ¶ 33 ("An agency need not expressly articulate reasoning for a decision as long as the record contains sufficient support for it.").

Though other parties filed exceptions that also support the denial of PNM's abandonment request, this brief focuses on Sierra Club's exceptions. For example, Sierra Club submitted testimony from Dr. Jeremy Fisher demonstrating that

[6] Other parties, including CCAE with Western Resource Advocates, filed exceptions to the financing order Recommended Decision, which were also never reached and considered.

PNM's application would prolong the life of the Four Corners power plant and cause a net increase in air pollution. **[33 RP 12668-75]**. PNM's application proposed to transfer its ownership interest in Four Corners to NTEC, which is the third-largest coal mining company in the United States, and owns the mine that supplies the Four Corners power plant with coal. **[27 RP 06888-89]**. NTEC's primary objectives in negotiating the Purchase and Sale Agreement were "to minimize the existing risk that the other owners pursue an early closure for FCPP" and "keep the FCPP operational through its current expected lifespan—2031." **[33 RP 12892-93]**.

To achieve that goal, NTEC required PNM to pledge that it would not vote to close Four Corners for the remainder of PNM's ownership of the plant. **[33 RP 07263].** PNM then went further and, as part of its proposed exit from Four Corners, signed other contracts that would have prohibited Four Corners from closing before 2027 and made it significantly more expensive to close Four Corners before 2029. **[33 RP 08665].** Thus, had the Commission granted PNM's abandonment application and approved the Purchase and Sale Agreement, Four Corners would have burned coal for many more years than it otherwise would, thereby increasing air pollution.

Relying upon this evidence, Sierra Club witness Dr. Jeremy Fisher testified that PNM's application did not provide a net public benefit because it would

prolong burning coal at the Four Corners power plant and thereby lead to a net increase in air pollution. **[33 RP 12663-12687]**. WRA witness Baatz express similar concerns, testifying that the proposed abandonment "could delay early closure of FCPP [the Four Corners power plant], which would eliminate or significantly reduce the possible environmental benefits associated with the seasonal operations agreement." **[31 RP 11109]**.

The discussion above is one of the twenty exceptions that parties filed to the Recommended Decision, and which support the Commission's final Order denying PNM's application to abandon Four Corners and for a financing order, but are not articulated in the final Commission order.

D. Even if PNM Were to Prevail, the Proper Remedy would be to Remand the Case to the Commission to Rule Upon the Many Outstanding Objections to PNM's Abandonment and Financing Applications.

Even if the Court somehow agreed that the final order is unlawful or unsupported (even though it is not), the proper remedy would be to remand to the Commission to rule on the many exceptions that the PRC did not reach and/or to provide PNM the due process it claims it was denied. As noted above, the Commission did not rule on exceptions to the Recommended Decision other than the two exceptions discussed in the final order. **[37 RP 15425 ¶ 44]**. There are thus multiple, alternative grounds upon which the PRC could have reached the

same outcome in the final order and denied PNM's application in its entirety. If the Court were to agree with PNM that the two grounds upon which the Commission denied the abandonment application are unlawful and/or unsupported, the Court should remand the case to the Commission to rule upon the twenty remaining exceptions to the Recommended Decision, because the Court should not rule upon those exceptions in the first instance.

Similarly, on the prudence issue, if the Court somehow determines the PRC should have made a final prudence determination in its Order, the proper remedy is to remand to the Commission to make a prudence determination. This Court should not make a prudence determination *de novo*.

IV. PNM'S CLAIMS REGARDING A FUTURE PRUDENCE REVIEW ARE NOT RIPE AND LACK MERIT.

PNM asks this Court to vacate the Commission's decision that the prudence of PNM's investments in Four Corners will be resolved in a future Commission proceeding. **[BIC 38-49]**. In the alternative, PNM requests that the Court limit the scope of the evidence the Commission can consider in a future prudence determination. **[*Id.* at 48-49]**. PNM's claims are not ripe and border on the frivolous.

A. PNM's Claims Regarding a Future Prudence Review are Not Ripe.

In the final order, the Commission did not make a prudence determination, and did not disallow any costs associated with PNM's ownership of the Four Corners power plant. Instead, the Commission deferred the prudence issues to a future proceeding. **[37 RP 15425 ¶¶ 42-43]**. PNM's request to vacate the Commission's postponement of a prudence review to a future proceeding is not ripe. Recognizing this, PNM's brief-in-chief devotes several paragraphs in a futile attempt to avoid the conclusion its claims are not ripe. **[*See* BIC 40-41]**.

"Decisions of administrative entities are fit for review only when the agency's decision is final." *Citizens for Fair Rates & the Env't v. New Mexico Pub. Regul. Comm'n*, 2022-NMSC-010, ¶ 27, 503 P.3d 1138, 1150 ("CFRE"). In *CFRE*, this Court considered and rejected arguments (brought in that case by PNM opponents) that are almost identical to the arguments PNM raises here:

> The Commission's final order indicates that it intends to review and *potentially* disallow PNM's finally incurred energy transition costs in future ratemaking proceedings. However, to our knowledge, this review has not yet occurred. The Commission also has not yet disallowed any of PNM's post-January 1, 2019, energy transition costs. We do not believe that the Court can effectively consider the lawfulness of a potential disallowance in the absence of a relevant record

Id.

Ripeness analysis involves a two-pronged inquiry. This Court evaluates the

fitness for the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* at ¶ 28. The "mere possibility or even probability that a person may be adversely affected in the future by official acts" is insufficient to establish ripeness. *New Energy Econ. v. Shoobridge*, 2010-NMSC-049, ¶ 18, 243 P.3d 746 (quoting *Yount v. Millington*, 1993-NMCA-143, ¶ 36, 117 N.M. 95, 103, 869 P.2d 283, 291).

PNM's claims fail the first prong of the ripeness analysis because the Commission did not issue a ruling on the merits of the prudence issues, including the claims that PNM presents to this Court. In the proceeding below, the Commission did not make any legal conclusions or factual findings on the prudence issue, and instead deferred the prudence issues in their entirety to a future proceeding. **[37 RP 15425 ¶¶ 42-43]**.

Under the second prong of the ripeness analysis, PNM will suffer little to no harm from litigating its positions in the future Commission proceeding concerning prudence. In that future proceeding, PNM will be free to raise all of the arguments that it raises here. It is possible that the Commission, in the future prudence proceeding, could agree with any and all of PNM's legal arguments and find in favor of PNM (*e.g.*, the Commission could agree with PNM that *res judicata* bars a prudence determination). Alternatively, the Commission could make a factual finding that PNM acted prudently, and rule in favor of PNM on the merits. There

is thus little harm from the Court not ruling on these issues now, given the mere possibility that PNM would be injured by a future prudence determination by the Commission.

Moreover, PNM has received, and will continue to receive, significant benefits from the Commission's deferral of the prudence issues. As explained below, the record contained ample evidence that PNM acted imprudently and that the Commission should remove certain costs from rates as a result. Currently, the costs that would be the subject of a prudence review are being paid by customers in rates, at PNM's cost of debt. Case No. 16-00276-UT, Revised Final Order at 23-24 (¶ 67). Thus, the longer that the Commission defers a prudence review of these costs, the greater the percentage of those costs that PNM recovers in rates.

For these reasons, PNM's challenge to the Commission's decision to defer a prudence determination is not ripe for judicial review.

B. Even if Ripe, PNM's Claims Regarding the Deferred Prudence Review Would Lack Merit.

Even if PNM's claims regarding prudence were ripe, PNM's arguments fail on their merits. As a threshold matter, PNM has not cited any legal authority that constrains the Commission's authority to defer a prudence review to a future proceeding, where the Commission concludes that the evidentiary record before it was insufficient. In the case below, the Commission sat as fact-finder, and the

Commission's factual conclusions are entitled to "considerable deference." *Albuquerque Bernalillo Cty. Water Util. Auth.*, 2010-NMSC-013 at ¶ 50; *see also New Energy Econ., Inc. v. N.M. Pub. Regul. Comm'n*, 2018-NMSC-024, ¶ 25, 416 P.3d 277, 285 ("When fact finding is necessarily predicated on matters requiring expertise, our deference is substantial."). The Commission agreed with the Hearing Examiner that the factual record was under-developed, and the Commission sought a more fully developed record before making a final prudence determination. **[37 RP 15425 ¶¶ 42-43]**. PNM has not provided the Court with any basis for overturning the Commission's judgment that a more fully developed record would assist the Commission in resolving the prudence issues.

PNM also argues that this Court, at a minimum, should direct the Commission to consider only the record evidence developed in the proceeding below. **[BIC 48-49]**. But PNM fails to cite any statutory or other legal basis for this Court to preemptively determine the nature and scope of evidence that the Commission can entertain in a future proceeding.

The record below contained evidence that PNM acted imprudently, and that PNM squandered $148.1 million in ratepayer funds on imprudent investments. In the original proceeding in which prudence was litigated, the two Hearing Examiners concluded that PNM had acted imprudently, and recommended that the Commission disallow the entire $148.1 million in capital costs PNM had incurred

after it decided to remain an owner of Four Corners. Case No. 16-00276-UT, Certification of Stipulation at 68. The Arizona Corporation Commission reached a similar conclusion last year, and disallowed Arizona Public Service's investments in Four Corners. Docket No. E-01345A-19-0236, Decision No. 78317 at 116, 429 (Ariz. Corp. Comm'n). Indeed, PNM's own expert admitted that PNM's contemporaneous analysis of continuing to invest in Four Corners was deeply flawed. **[31 RP 10734-35; 33 RP 13144-45]**. Dr. Jeremy Fisher testified that PNM acted imprudently and that the Commission should order a disallowance. **[33 RP 12692- 12727]**.

PNM seeks to misuse this Court's authority to avoid even the possibility that the Commission would conclude that PNM imprudently spent $148.1 million of ratepayer money on Four Corners. But there is no lawful basis for this Court to intervene at this stage, prior to a final prudence determination by the Commission. As a result, the Court should deny all of PNM's claims regarding the Commission's decision to defer ruling on the prudence issues.

CONCLUSION

Sierra Club and CCAE respectfully request that the Court affirm the Public Regulation Commission's final Order and deny PNM's petition for review in its entirety.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Jason Marks, attorney for Sierra Club states that the body of this Answer Brief contains 9402 words in Times New Roman 14-point font, a proportionally-spaced typeface, and is therefore within the limits permitted under Rule 12-318(F)(3).

/s/ Jason Marks
Jason Marks

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on May 9, 2022.

/s/ Jason Marks
Jason Marks