BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR REVISION OF ITS RETAIL ELECTRIC RATES PURSUANT TO ADVICE NOTICE NO. 595	)	
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	**Case No. 22-00270-UT**
Applicant	)	

MOTION FOR REHEARING ON FINAL ORDER

AND SUPPORTING BRIEF

OF

PUBLIC SERVICE COMPANY OF NEW MEXICO

JANUARY 29, 2024

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I. INTRODUCTION AND POSITIONS OF THE PARTIES

PNM submits this *Application and Supporting Brief for Rehearing* ("Motion") on two holdings of the New Mexico Public Regulation Commission's ("Commission") January 3, 2024 *Final Order*, as modified ("Final Order"). This Motion is filed pursuant to NMSA 1978, Section 62-10-16 (1941) of the Public Utility Act ("PUA"),[1] and Rule 1.2.2.37(F) NMAC of the Commission's Procedural Rules.

PNM sought the position of the parties with respect to this Motion and was advised as follows: Bernalillo County takes no position on the motion and reserves the right to respond. NM AREA, Kroger and Wal-Mart take no position. Staff, ABCWUA, and the Attorney General oppose. NEE opposes and reserves the right to respond.

II. SUMMARY OF GROUNDS FOR REHEARING

The Commission's determinations on two issues significantly depart from established regulatory practice and policy and disrupt fundamental aspects of utility ratemaking. The first issue pertains to PNM's capital structure. The second issue concerns the implementation of a regulatory liability ("PVNGS Regulatory Liability") that represents costs associated with Unit 1 leases of the Palo Verde Nuclear Generating Station ("PVNGS"). PNM respectfully requests rehearing and modification of the Final Order as summarized below:

A. The Commission's Use of an Imputed Capital Structure Departs from Commission Practice in Establishing PNM's Capital Structure.

The Final Order departs from long-standing Commission practice of recognizing and approving PNM's (and other utilities') actual capital structure. The Final Order fails to properly consider the Commission's practices. The Commission's practice in PNM's future test year cases, as well as for other utilities in the majority of rate cases, has been to approve a test period capital

[1] NMSA 1978 §§ 62-1-1 to 62-6-28 and 62-8-1 to 62-13-15 (1909, as amended through 2023).

structure that is based on identifiable adjustments to the actual base period capital structure. The Final Order fails to properly consider that the Commission has followed this precedent of using a utility's actual capital structure in a determining the appropriate capital structure in a future test year. It is important to set reasonable capital structures to ensure utilities can attract needed capital to support significant energy transition investments and accomplish State policy goals.

Instead, the Final Order adopts an imputed capital structure of 49.61% common equity, 50.10% long-term debt and 0.29% preferred stock that is not based on substantial evidence. PNM's actual capital structure since 2020, including at the end of the Base Period, is consistent with the Test Period request of 52% common equity, 0.29% preferred stock and 47.71% long-term debt. PNM's actual capital structure reflects the ongoing level of investment required to transition to a carbon free grid while maintaining reliable and resilient service for customers. Approval of PNM's actual capital structure is also important to support adequate credit ratings that enable PNM to raise capital when needed. The approval of an imputed capital structure departs from established Commission precedent which has utilized actual Base Period capital structures as adjusted for "known and measurable" changes. PNM seeks rehearing on this ruling and respectfully requests that the Commission modify the Final Order to adopt PNM's requested capital structure, which reflects PNM's actual capital structure.

B. The $38.4 Million PVNGS Regulatory Liability and Refund Violates Well-Established Legal and Regulatory Principles and Practices.

PNM seeks rehearing with respect to the implementation of the PVNGS Regulatory Liability and the retroactive refund of $38.4 million in revenues that the Commission authorized PNM to collect through its lawful rates. The refund amount represents annual expenses associated with PVNGS Unit 1 leases that was part of the ongoing expenses the Commission accepted in establishing PNM's annual revenue requirement in the 2016 Rate Case. The Commission sets an

annual revenue requirement that represents the reasonable cost of providing service in a given year, where underlying cost components of providing utility service are constantly changing. While in any given year some costs are no longer incurred, other new ongoing costs are incurred. Ordering PNM to refund a single component of PNM's authorized 2016 annual revenue requirement without proper notice and without considering new costs added since 2016 is both retroactive and piecemeal ratemaking. Furthermore, making this adjustment as part of setting new rates for 2024, with a 2024 Test period, emphasizes the retroactive nature of this refund. This unprecedented departure from long-standing legal and regulatory principles violates due process and creates an unworkable and uncertain regulatory framework. The rationale for ordering this refund articulated in the Final Order is factually and legally flawed. PNM respectfully requests that the Commission modify the Final Order to eliminate the implementation of the PVNGS Regulatory Liability and the refund of $38.4 million in authorized and lawfully collected revenues.

III. PNM'S ARGUMENTS ON REQUEST FOR REHEARING

A. THE IMPUTED CAPITAL STRUCTURE DOES NOT REFLECT PNM'S KNOWN AND MEASURABLE CAPITAL STRUCTURE AND DEPARTS FROM PAST PRACTICES IN PNM'S FUTURE TEST RATE CASES.

1. Background

Since 2020, PNM has maintained a capital structure of approximately 48% debt and 52% equity to support its ongoing capital expenditure program that encompasses system needs and the energy transition. As of the end of the Base Period, which was June 30, 2022, PNM's actual capital structure consisted of 47.62% long-term debt, 0.31% preferred stock, and 52.07% common equity.[2] PNM urges the Commission to adopt the realistic projected capital structure for the end of the Test Period consisting of 47.71% long-term debt, 0.29% preferred stock, and 52.00% common equity.[3] As is evidenced by these figures, the projected capital structure at the end of the Test Period very nearly matches the actual capital structure for the Base Period, with only slight differences in long-term debt, preferred stock, and equity ratios. Whether the Commission looks at PNM's actual capital structure since 2020, at the actual capital structure in the Base Period, or at the projections for the end of the Test Period, the Final Order's capital structure of 49.61% equity, 50.10% debt and 0.29% preferred stock in no way reflects past Commission policy to use the known and measurable capital structure of PNM.

2. The Commission's Standard for Capital Structure is to Adopt an Actual Capital Structure that Reflects Known and Measurable Changes.

The Commission's standard for evaluating a utility's capital structure, as acknowledged in the Final Order, is "known and measurable."[4] In claiming there is no real standard for future test

[2] PNM Ex. 13 (Greinel Dir.) 11:8-10. Percentage for long-term debt rounded to total 100%.
[3] PNM Ex. 13 (Greinel Dir.) 11:8-10; PNM Ex. 14 (Greinel Reb.) 4:19-5:2.
[4] Final Order at 42-43.

year cases like PNM's case, the Final Order states that this known and measurable standard has only been applied in historical test year cases.[5] This is simply not true. Not only does this finding fail to acknowledge the Commission's Future Test Year Rule requirements for cost of capital data,[6] it misrepresents the Commission's own precedent on which PNM reasonably relied. Predictability is a cornerstone of ratemaking and a departure without notice and a change in circumstances is unjustified.

Regardless of whether the test year is historical or forward-looking, the Commission has consistently used the actual, experienced data for each utility to set an appropriate capital structure, applying this standard in both historical and future test year cases. In the 2020 El Paso Electric ("EPE") case referenced in the Recommended Decision, the Commission approved a capital structure based on **"*known and measurable*"** changes to the actual capital structure that existed in the base period.[7] This EPE order cited to the 2010 PNM rate case, where "the Commission included in the test-year period ***known and measurable*** changes to capital structure" based on identified dividend payments after the end of the base period.[8] This same standard was applied in PNM's 2015 rate case, Case No. 15-00261-UT, ***which used a future test year***. Specifically, the Hearing Examiner in the 2015 rate case recommended the Commission approve PNM's proposed

[5] Final Order at 42-43.
[6] *See* 17.1.3.16(D) NMAC, Cost of Capital.
[7] Case No. 20-00104-UT, *Order Adopting Recommended Decision with Modifications*, at 29, ¶ 85 (NMPRC June 23, 2021) (emphasis added). On appeal, while the Court determined that the Commission has discretion to set an imputed capital structure, the Court also recognized the Commission had approved EPE's actual base year equity ratio; the Court further held that it was a violation of due process for the Commission to change its practices on setting capital structure where no party had argued for the Commission do so and notice was not provided. The Court specifically found that the Commission's action was contrary to past practices and not supported by the record. *El Paso Electric Company v. N.M. Public Regulation Commission,* ____-NMSC-___, ⁋⁋ 21-23, 2023 WL 3166936, ___ P.3d ___ (No. S-1-SC-38874, May 1, 2023).
[8] Case No. 20-00104-UT, *Order Adopting Recommended Decision with Modifications*, at 29, ¶ 85 (emphasis added)*; see* Case No. 10-00086-UT, *Final Order Partially Approving Certif. of Stip.,* at 55-56, ¶ 128 (NMPRC July 28, 2011) ("PNM's change in its capital structure as of the end of 2010 was due to PNM's payment of dividends, a matter that was ***known and measurable*** to PNM as of the date it filed the Stipulation") (emphasis added).

capital structure that reflected the projected actual capital structure at the end of its Test Period.[9] In doing so, the Hearing Examiner rejected Staff's challenges to PNM's proposal (based on the test year projection of its actual capital structure in the base period), citing to prior Commission reliance on "the actual percentages of debt and equity for regulatory purposes" and finding "no compelling evidence to recommend the Commission change its policy as to this issue."[10]

Furthermore, the Commission does not explain why it is now distinguishing between a historical test year and a future test year in applying prior Commission precedent regarding capital structure. The Commission did not do so in either of PNM's future test year rate cases filed in 2015 and 2016. SPS' most recent rate case in Case No. 22-00286-UT used a future Test Period as well. Commission precedent is focused on adjusting the actual capital structure for known and measurable changes to set rates, a practice which is reflected in the Commission's filing criteria for cost of capital test year data under both 17.1.3 NMAC and 17.9.530 NMAC. Whether those known and measurable adjustments are made to the Base Period or reflected in the Test Period has been irrelevant to the standard the Commission has applied in determining rates. Moreover, since PNM's Base Period and Test Period capital structure are effectively the same, it is entirely unclear why the Final Order ignored Commission precedent in favor of imputing a capital structure that departs from the base period capital structure. The Commission cannot suddenly change its standards for future test year cases from using a Test Period based on the Base Period actual capital structure as adjusted for known and measurable changes without substantial evidence that supports

[9] Case No. 15-00261-UT, *Corrected Recommended Decision*, at 30-31 (NMPRC Aug. 15, 2016), approved by *Final Order Adopting Corrected Recommended Decision* (NMPRC Sept. 28, 2016). PNM's proposed Future Test Period capital structure was also adopted without discussion in PNM's 2016 Rate Case, Case No. 16-00276-UT.

[10] Case No. 15-00261-UT, *Corrected Recommended Decision*, at 31 (quoting Case No. 15-00127-UT, EPE 2015 Rate Case, *Recommended Decision*, at 64-70) (emphasis added).

why a different standard is applicable and without explanation of the change in circumstances necessitating that new standard.[11]

The Commission's decision is arbitrary and capricious if it omits consideration of relevant factors or important aspects of the problem at hand.[12] The Final Order omits relevant determinative factors—including why PNM's actual capital structure is not relevant in a future test year case by failing to acknowledge the Commission's past practice and departing without explanation from its use of known and measurable adjustments to the actual capital structure to establish and approve a Test Period capital structure,

3. No Compelling Evidence Exists to Deviate from PNM's Actual Capital Structure.

The Commission's Final Order cites no compelling evidence to deviate from approving debt and equity ratios using PNM's actual capital structure, which it has maintained since 2020. While the Commission is afforded discretion in setting rates and adapting to changes in circumstances to set rates, "the Commission is not free to disregard its own rules and prior ratemaking decisions or 'to change its position without good cause and prior notice to the affected parties.'"[13] Similarly, while the New Mexico Supreme Court has found that the Commission has authority to impute a capital structure, that imputed capital structure cannot be based on a new rule or a standard that is unsupported by record evidence.[14]

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[11] As noted above, the Commission applied the same standard PNM proposed in this case to PNM's 2015 rate case, which was also a future test year case. *PNM Gas Servs.,* 2000-NMSC-012, ¶ 9, 129 N.M. 1 (citing *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, 115 N.M. 678, 681) (noting that "the Commission is not free to disregard its own rules and prior ratemaking decisions or 'to change its position without good cause and prior notice to the affected parties.'").

[12] *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-015, ¶ 8, 450 P.3d 393; *see Resolute Wind 1 LLC v. N.M. Pub. Regul. Comm'n*, 2022-NMSC-011, ¶ 26, 506 P.3d 346.

[13] *PNM Gas Servs.,* 2000-NMSC-012, ¶ 9, 129 N.M. 1 (citing *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, 115 N.M. 678, 681).

[14] *El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n*, ____-NMSC-__, ¶ 22-23, ___ P.3d ___ (No. S-1-SC-38874, No. S-1-SC-38911, May 1, 2023).

Among other reasons, the Final Order justifies its deviation from precedent on the concern that if the Commission always had to apply a utility's actual capital structure, a utility could engage in "unwise business practices that result in a heavily imbalanced debt/equity ratio that would harm ratepayers."[15] There is no factual evidence to support this supposition and no finding of the Commission that it believes PNM's debt/equity ratio would harm customers or is the result of an imbalanced debt/equity ratios or unwise business practices.

The fact remains that the Commission has consistently approved a higher common equity ratio in other cases where the proposed common equity ratio matched known and measurable amounts—meaning that a higher equity to debt ratio has never automatically been translated as a customer harm or utility imbalance by the Commission. For example, the Commission has consistently approved a higher equity ratio of approximately 54% in at least three rate cases for Southwestern Public Service Company ("SPS"), because that common equity ratio closely matched SPS's actual capital structure.[16] Given this precedent from SPS cases, the Commission is not free to speculate on customer harm or imbalance as a potential issue, without actually citing to evidence in the record of this case to justify a change to past practices based on those concerns.

The Final Order also tries to claim that there is evidence that PNM's actual common equity ratio is 49.31% rather than 52%. The facts were clear on this point. The reported ratios cited by various intervenors reflected a calculation at the FERC jurisdictional level or was for Generally Accepted Accounting Principles ("GAAP") accounting purposes—neither of which reflect PNM's actual regulatory capital structure.[17] The effort to substitute those accounting methodologies for

[15] Final Oder at 43, ¶ 83.
[16] Case No. 20-00238-UT, *Certif. of Stip.,* at 70 (NMPRC Dec. 21, 2021), 54.72% equity ratio approved by *Order Adopting Certif. of Stip. in Its Entirety and Granting SPS's Motion for Reconsideration* (Feb. 16, 2022); Case No. 17-00255-UT, 53.97% equity ratio approved by *New Final Order on Partial Mandate From the New Mexico Supreme Court*, at 3, ¶ 6 (NMPRC Mar. 6, 2019.); Case No. 22-00286-UT, *Certif. of Stip.,* at 47-48, 52-53 (NMPRC Sept. 6, 2023), 54.70% equity ratio approved by *Final Order Adopting Certif. of Stip.* (NMPRC Oct. 19, 2023).
[17] PNM Brief-in-Chief at 24.

retail ratemaking purposes again represents a stark and abrupt departure from Commission practice and does not result in a apples-to-apples comparison to PNM's equity ratio for its regulatory capital structure. Moreover, basing PNM's actual capital structure off a different regulatory standard or rule would be a violation of PNM's due process rights, in that PNM had no way of knowing that the Commission would impute a regulatory capital structure based on GAAP accounting or FERC jurisdictional calculations.[18]

By way of example, the calculations for both regulatory and GAAP-based capital structures exclude short-term debt, but the definition of short-term debt differs between the two calculations. For GAAP purposes, short-term debt is defined as debt with a maturity of 12 months or shorter. For regulatory purposes, short-term debt is defined as debt with a maturity of 18 months or shorter.[19] Using a GAAP-based capital structure instead of using the Commission's long-standing regulatory standard results in an equity ratio of 48.7% as of December 31, 2022, and 49.4% as of March 31, 2023.[20] The Commission decision to impute a capital structure that departs from its regulatory practices is arbitrary under the circumstances.

The Commission also rejects PNM's argument that its actual capital structure should be approved because it falls within the proxy group's reasonable range, stating that the Recommended Decision's imputed capital structure also falls within the same reasonable range.[21] This argument from the Commission does not explain a change in circumstances for PNM that creates good cause for deviating from the Commission's prior precedent of approving PNM's and other utilities' actual capital structure as adjusted for known and measurable changes. If PNM's actual capital

[18] *El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n*, ____-NMSC-__, ¶ 22-23, ___ P.3d ___ (No. S-1-SC-38874, No. S-1-SC-38911, May 1, 2023).
[19] *See* NMSA 1978, §§ 62-6-6(B) and 62-6-8(A).
[20] PNM Brief-in-Chief at 24.
[21] Final Order at 43, ¶ 84.

structure was above the proxy group range, this might have been a reason for the Commission to reject PNM's proposed capital structure. However, these are not the facts in this case.[22]

4. Conclusion

Without good cause and prior notice, the Commission has no grounds to deviate from its past precedent of using a utility's actual capital structure in the base period, as adjusted for known and measurable changes in the test period, for rate setting purposes. The Commission has previously applied this same standard in future test year cases, including PNM's 2015 and 2016 rate cases. PNM had no way of knowing that the Commission would deviate from its prior practice without good cause. Based on the substantial evidence, the Commission should follow its long-standing regulatory practices and adopt PNM's actual capital structure as adjusted for Test Period changes in this case.

B. THE $38.4 MILLION PVNGS REGULATORY LIABILITY REFUND VIOLATES LEGAL AND REGULATORY PRINCIPLES AGAINST RETROACTIVE AND PIECEMEAL RATES.

1. Background

Shortly before PNM filed this rate case, the Commission authorized the establishment of the PVNGS Regulatory Liability as a "pure accounting order" (without ratemaking prejudgment) in response to the request of certain parties in Case No. 21-00083-UT[23] that PNM track the costs of the PVNGS Unit 1 leases, which expired in January 2023, so these costs potentially could be retroactively refunded in the context of this rate case.[24] The Recommended Decision characterizes the proposed refund of $38.4 million as monies collected for a non-existent lease, and

[22] PNM Ex. 11 (McKenzie Dir.) 68:3-4 (finding that common equity ratios for the group of operating utilities owned by the proxy group firms ranged from 39.7% to 60.5%, averaging 51.0%). *See also Public Service Company of New Mexico' Post-Hearing Brief-in-Chief* ("PNM Brief-in-Chief") at 23; PNM Ex. 11 (McKenzie Dir.) 69:12-13; PNM Ex. 12 (McKenzie Reb.) 164:1-165:2 and PNM Table AMM-7 (Rebuttal).
[23] Case No. 21-00083-UT, *Order on Joint Motion for Accounting Order*, 6, ¶ 18 and 7, ¶ C (NMPRC Nov. 18, 2022) ("Accounting Order").
[24] PNM Ex. 10 (Sanders Dir.) 130:10-132:2.

recommended that PNM refund its approved revenues collected through Commission-approved rates as part of the new rates in this case.[25] In its Final Order, the Commission adopted the Recommended Decision's proposed refund of $38.4 million of authorized revenues to be accounted for through the PVNGS Regulatory Liability, with the modification that the $38.4 million be refunded through a rate rider over two years, rather than amortized in PNM's new rates over five years.[26]

Imposing a retroactive refund of the lawfully collected $38.4 million violates statutory and constitutional law against retroactive ratemaking and upends well-established legal and ratemaking principles. If allowed to stand, the Commission could at any time arbitrarily notify a utility that an element in the utility's previously approved cost-of-service is being clawed back through a retroactive refund in the utility's next rate case. PNM strongly opposes the implementation of the PVNGS Regulatory Liability and seeks reconsideration of the Final Order on this point.

2. The Retroactive Refund of the PVNGS Regulatory Liability Violates Applicable Legal and Regulatory Principles

There is no requirement under standard utility accounting or ratemaking principles that the costs of the PVNGS Unit 1 leases be immediately removed from PNM's rates upon their expiration or abandonment. To the contrary, utility plant investments are constantly being retired and new investments are made to maintain the electric system. There is nothing unusual about this treatment because utility plant is continually added and removed from plant in-service between rate cases without any simultaneous adjustment to rates. Rates are not designed to precisely recover any one specific set of costs, but rather a utility's cost of service is developed to determine

[25] RD at 214.
[26] Final Order, at 30, ¶53 and 30 at ¶55.

an annual revenue requirement that represents the reasonable ongoing costs to provide electric service. The result of the ratemaking process is to set just and reasonable rates that are designed to produce the authorized annual revenue requirement determined to be necessary for the utility to provide utility services to customers.[27]

The facts in this case show that PNM was specifically allowed to recover the costs of the PVNGS leases in rates in Case No. 15-00261-UT, and there was nothing in the approval of these costs that indicated they were subject to refund upon expiration of the leases or otherwise.[28] PNM's base rates were last set in Case No. 16-00276-UT and were phased in 2018 and 2019, with that authorized revenue requirement also encompassing costs of the PVNGS leases.[29] The record shows that PNM has properly charged and collected the rates approved in Case No. 16-00276-UT, based on the annual revenue requirement the Commission found was necessary to operate PNM's utility business.[30]

In ordering the $38.4 million refund, the Final Order disregards the undisputed evidence that many significant changes to PNM's cost-of-service occurred after the rates set in Case No. 16-00276-UT took effect. Since 2016, PNM made numerous investments to serve customers, and there have been changes to operating expenses, none of which were specifically reflected in PNM's authorized revenue requirement or base rates.[31] Between December 31, 2022 and December 21, 2023, alone, PNM's net plant in service increased by $435 million, with cumulative investments since the last rate case far exceeding the $38.4 million PVNGS Regulatory Liability.[32] By focusing

[27] NMSA 1978, § 62-8-7(D).
[28] Case No. 15-00261-UT, *Final Order Partially Adopting Corrected Recommended Decision*, ¶¶ 110, 116 and 117 (NMPRC Sept. 28, 2016).
[29] Case No. 16-00276-UT, *Revised Order Partially Adopting Certif. of Stip.* at 36, ¶ I (NMPRC Jan. 10, 2018).
[30] PNM Ex. 10 (Sanders Dir.) 133:1-134:6.
[31] PNM Ex. 10 (Sanders Dir.) 132:4-18.
[32] PNM Ex. 6 (Monroy Reb.) 32:5-17.

solely on the costs of the PVNGS Unit 1 leases and failing to acknowledge the significant investments that PNM made since its last rate case and other cost increases, the Final Order is inconsistent with the Commission's policy against piecemeal ratemaking. By definition, piecemeal ratemaking consists of changing rates for one item and ignoring all the other cost of service elements.[33] The Final Order also fails to balance the interests of PNM and its customers as required for the implementation of an accounting order.[34]

PNM provided citations to extensive legal and regulatory authorities in its post-hearing briefing and in the PNM Exceptions which confirm that the implementation of the $38.4 million refund and PVNGS Regulatory Liability violates controlling legal precedent and long-standing regulatory policy.[35] In summary, the holdings of the New Mexico Supreme Court with respect to the filed rate doctrine and prohibition against retroactive ratemaking are controlling and preclude the Final Order's implementation of a refund of properly collected rates through the PVNGS Regulatory Liability. Under the PUA, a utility must strictly adhere to the rate schedules approved by the Commission.[36] This was confirmed by the New Mexico Supreme Court which held that "the filed rate is the only legal rate."[37] Accordingly, PNM was legally bound to charge the approved rates set in the 2016 Rate Case which were based in part on the costs associated with the Unit 1 PVNGS leases, and those amounts were lawfully collected by PNM.

[33] Case No. 15-00166-UT, *Final Order* at 43 (NMPRC Nov. 18, 2015).
[34] Case No. 18-00261-UT, *Recommended Decision* at 9 (NMPRC Mar. 18, 2018), approved Case No. 18-00261-UT, *Final Order* (NMPRC Mar. 27, 2018) (Holding that in determining whether to grant a regulatory asset, consideration should be given to, among other factors, the balancing of the interests of investors and ratepayers, including the impact on rates.)
[35] *See* PNM Brief-in-Chief at 266-280; *Public Service Company of New Mexico' Post-Hearing Brief-in-Chief* at 134-142; and *Exceptions to December 8, 2023 Recommended Decision of Public Service Company of New Mexico* ("PNM Exceptions") at 18-26.
[36] NMSA 1978, § 62-8-5 (1953).
[37] *Valdez v. State*, 2002-NMSC-028, ¶ 5, 132 N.M. 667.

The New Mexico Supreme Court has firmly rejected retroactive ratemaking by ruling that "there is no better established rule with regard to the prescription of rates for a public utility than the one that holds that rate fixing may not be accomplished retroactively, unless some specific statutory or constitutional authority permits."[38] This is because "rate-making is legislative in its nature" and "it is axiomatic that legislative action operates prospectively, not retroactively."[39] The Final Order adopted the Recommended Decision which expressly acknowledges that "rate setting is ultimately a legislative act."[40] In the absence of a statutory or other applicable exception, ratemaking can only operate prospectively. The fact that the ordered refund will occur over the next two years does not make the ratemaking itself prospective, nor does it negate the retroactive nature of the claw back by the Commission of properly collected annual revenues under rates that were in effective in 2023. The law is clear that the PUA "does not confer on [the Commission] authority to order [a utility] …. who collected only previously approved rates, to divest itself of monies lawfully and unconditionally coming into its possession."[41] As discussed below, the justifications cited in the Final Order for circumventing the prohibition against retroactive ratemaking are neither legally nor factually supported.

3. The Requirement to Refund the $38.4 Million PVNGS Regulatory Liability is Based on the Flawed Premise that PNM Reaped "Windfall Profits" by Recovering PVNGS Unit 1 Lease Costs.

The Final Order states that "the Commission finds that preventing PNM from reaping windfall profits on a lease that no longer exists constitutes good cause, is just and reasonable, and prevents a manifest injustice on PNM's customers."[42] However, the only evidence on this point

[38] *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶ 89, 90 N.M. 325 (internal quotation marks and citations omitted).
[39] *Mountain States Tel. & Tel. Co*., 1977-NMSC-032, ¶ 88, 90 N.M. 325.
[40] RD at 13. *See also*, *N.M. Elec. Serv. Co. v. N.M. Pub. Serv. Comm'n*, 1970-NMSC-097, ¶ 3, 81 N.M. 325. (Holding that New Mexico Public Service Commission lacked authority to order a retroactive refund.
[41] *N.M. Elec. Serv. Co. v. N.M. Pub. Serv. Comm'n*, 1970-NMSC-097, ¶6, 81 N.M. 325.
[42] Final Order 34-53 at ¶ 61.

is completely to the contrary. PNM witness Sanders confirms that there is no danger of PNM over earning, even without capturing past costs in the PVNGS Regulatory Liability, because the Commission has imposed an annual reporting requirement and true up mechanism to prevent PNM from over earning. If PNM earns more than 50 basis points above its Commission authorized allowed return in any given year, those excess revenues are to be returned to customers through PNM's renewable rider. This assures that there was no windfall to PNM when the PVNGS Unit 1 leases expired -- or resulting from any other changes in underlying utility costs, through the collection of PNM's authorized base rates.[43]

Moreover, the Commission's finding that the implementation of the PVNGS Regulatory Liability is necessary to prevent PNM from realizing a windfall profit is completely without factual support. Indeed, the Final Order cites no evidence to support its finding. A Commission order is subject to annulment on appeal where, as here, it is not supported by substantial evidence.[44] Accordingly, the requirement to refund $38.4 million and record the PVNGS Regulatory Liability must be reconsidered because it is based on the entirely incorrect and unsupported conclusion that PNM was unjustly enriched through the collection of the PVNGS Unit 1 lease costs in approved rates.

Finally, even if there was any merit to the Commission's unsupported finding of a windfall profit by PNM, the retroactive refund would still be improper. *Mountain States* clearly holds that retroactive remedies, such as refunds, are beyond the authority of the Commission because they are judicial in nature and are a form of reparations rather than a valid ratemaking activity.[45]

[43] PNM Ex. 7 (Sanders Dir.) 134:10-135:2.
[44] *Zia Natural Gas Co. v. N.M. Pub. Util. Comm'n*, 2000-NMSC-011, ¶ 4, 128 N.M. 728.
[45] *Mountain States Tel. & Tel. Co*., 1977-NMSC-032, ¶ 88, 90 N.M. 325.

4. The Accounting Order is Not a Valid Basis to Disregard the Prohibition Against Retroactive Ratemaking.

The Final Order relies extensively on the Accounting Order as a basis to avoid the legal prohibition against retroactive ratemaking. The Final Order states that the Accounting Order established the PVNGS Regulatory Liability on a "proactive and prospective basis to track revenues before PNM started collecting them to be considered in future rate case"[46] and that PNM was put on prior notice that the PVNGS Unit 1 lease cost could be subject to refund to customers.[47]

As noted in prior Commission decisions, there are exceptions to the rule against retroactive ratemaking where an approved rate is specifically subject to refund at the time of approval, or there is specific statutory authorization for retroactive relief.[48] In order to avoid the prohibition against retroactive ratemaking, however, the regulatory authority must place the utility "on notice *at the outset* that the rates being promulgated are provisional only and subject to later revision."[49] No such notice was provided to PNM in Case No. 15-00261-UT when PNM was authorized to recover the extended PVNGS lease costs in rates, or during PNM's last rate case, Case No. 16-00276-UT when those costs continued to be included in rates.

As discussed in the PNM Exceptions, PNM was never provided notice that its authorized revenue requirement in Case No. 16-00276-UT was provisional, or that recovery of amounts associated with any PVNGS lease costs were subject to potential refund until the Accounting Order was issued on November 18, 2022. This was less than a month before PNM filed its application in this rate case, and only about 60 days before the PVNGS Unit 1 leases were to expire by their terms on January 14, 2023. Regardless of changes in underlying costs such as for the PVNGS

[46] Final Order 33 at ¶ 59.
[47] Final Order 34 at ¶ 61.
[48] Case No. 11-00123-UT, *Recommended Decision*, at 47 (NMPRC Oct. 3, 2011).
[49] *Pub. Util. Comm'n of Cal. v. F.E.R.C.*, 988 F.2d 154, 164 (D.C. Cir. 1993) (emphasis added).

Unit 1 leases, PNM was nonetheless legally bound to, and lawfully continued to charge, its approved rates.[50]

While the Final Order states that PNM was afforded "notice" that the refund of the PVNGS Regulatory Liability was possible, that notice was meaningless. PNM had no opportunity to initiate any rate proceeding that could timely address this potential one-sided change to its annual revenue requirement or to otherwise account for other changes in PNM's cost of service in advance of the lease expiration. Accordingly, there was no opportunity provided for PNM to mitigate the lost revenues resulting from the retroactive refund of the PVNGS Unit 1 lease costs. This lack of meaningful notice violated PNM's due process rights with respect to imposing the $38.4 million rate refund representing the annual PVNGS Unit 1 expenses.[51]

While the Final Order concludes that the notice under the Accounting Order was adequate,[52] the Final Order fails to explain what PNM could have done in response to the notice or how that notice met the requirement that PNM was informed of the provision nature of its rates when they were authorized. Nor does the Commission describe what standard or factors it used to determine the adequacy of the notice. The Commission's finding of the adequacy of the notice is a results-oriented determination without "reasoned decision-making."[53] Accordingly, the Commission cannot rely on the Accounting Order as a valid basis to avoid the prohibition against retroactive ratemaking.

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[50] *Valdez v. State*, 2002-NMSC-028, ¶ 5, 132 N.M. 667.

[51] *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regul. Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12, 16 (*citing Fuentes v. Shevin*, 407 U.S. 67, 80 (1994)) (It is fundamental that the right to "reasonable notice and an opportunity to be heard and present any claim or defense" should be "at a meaningful time and in a meaningful manner."); *see also Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regul. Comm'n,* 2010-NMSC-013, ¶ 21, 148 N.M. 21 (*quoting Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 6, 100 N.M. 434).

[52] Final Order, 35 at 62.

[53] *Resolute Wind 1 LLC v. N.M. Pub. Regul. Comm'n*, 2022-NMSC-011, ¶ 26, (citing *Attorney Gen. v. N.M. Pub. Regul. Comm'n*, 2013-NMSC-042, ¶ 10, 309 P.3d 89).

5. There is No "Good Cause" or Adequate "Prior Notice" that Permits the Commission to Abruptly Depart from Past Practice with Respect to Retroactive Ratemaking.

The Final Order found that the Commission was free to change its position on retroactive ratemaking based on "good cause" and "prior notice" to PNM.[54] The Final Order misapprehends the nature of the prohibition against retroactive ratemaking. This is not a regulatory policy decision that can be changed administratively based on notice and utility's change in circumstances; rather, it is a legal doctrine imposed by the Courts which the Commission is bound to follow. This was confirmed by the New Mexico Supreme Court in *Mountain States* where it held that "[r]etroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant.[55] The exceptions to the prohibition against retroactive ratemaking are only where "specific statutory or constitutional authority permits,"[56] which are absent in this case.

Furthermore, the "good cause" that the Final Order relies on to depart from established ratemaking principles is the unsupported finding that PNM received "windfall profits" as a result of charging approved rates.[57] As discussed above, PNM did not realize any windfall or unpermitted excess earnings. Also as discussed above, the "notice" that PNM received failed to comport with due process. Thus, even if the Commission were free to change an administrative practice, there are no proper grounds for the Final Order to depart from established legal precedent or regulatory principles against retroactive or piecemeal ratemaking.

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[54] Final Order, 34 at ¶ 60.
[55] *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶ 88, 90 N.M. 325 (internal quotation marks and citations omitted).
[56] *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶ 89, 90 N.M. 325 (internal quotation marks and citations omitted).
[57] Final Order 34-35 at ¶ 61.

6. Ordering the $38.4 Million PVNGS Regulatory Liability Refund as Part of This General Rate Proceeding Does Not Negate its Retroactive and Piecemeal Nature.

The Final Order maintains that the implementation of the PVNGS Regulatory Liability to retroactively refund the PVNGS Unit 1 costs recovered in approved rates is neither piecemeal nor retroactive because it is being implemented in the context of PNM's rate case "where all aspects of PNM's cost of service are being concurrently evaluated."[58] This justification is flawed. The refund amount is not part of the cost of service being evaluated in this case. PNM used a future Test Period comprised of the calendar year 2024 and PNM's new rates were determined based on evidence concerning PNM's cost-of-service in the 2024 Test Period.[59] PNM did not seek recovery of any PVNGS lease costs in the Test Period and, therefore, there were no PVNGS lease costs to evaluate in the Test Period. It is undisputed that the $38.4 million of PVNGS Unit 1 lease costs that are subject to the retroactive refund under the PVNGS Regulatory Liability were properly included in and recovered through previously approved rates during the period from January 2023 through December 2023, which preceded and is completely outside the Test Period.[60] Therefore, the PVNGS lease costs were not part of and were not evaluated with respect to the Test Period, which is the relevant timeframe for claiming the new rates do not violate the prohibitions against retroactive and piecemeal ratemaking. A unilateral refund of a single past 2023 expense item is the definition of a retroactive rate.

7. PNM Does not Oppose Regulatory Liabilities *Per Se,* But They Should Not be a Tool for Improper Retroactive Ratemaking.

PNM has been accused of being inconsistent by supporting recovery of regulatory assets while opposing the imposition of regulatory liabilities. The Final Order states that "[i]t is not lost

[58] Final Order, 33 at ¶ 58.
[59] *See* NMSA 1978, § 62-6-14(D) (2009).
[60] PNM Ex. 6 (Monroy Reb.) 51:1-17.

on the Commission that PNM consistently seeks to benefit from regulatory assets and simultaneously seeks to block regulatory liabilities."[61] The Final Order also claims that PNM seeks to foreclose the Commissions from considering new and/or exigent circumstances between rate cases that impact whether rates are just and reasonable that warrant the creation of a mechanism to track costs.[62]

These statements by the Commission are not an accurate reflection of PNM's past positions or the evidentiary record in this case. The expiration of the PVNGS leases in the ordinary course of business is neither new nor exigent. As detailed above, there is no evidence that PNM was reaping a windfall or overearning as a result of PNM continuing to recover the costs of the PVNGS Unit 1 leases. Moreover, PNM supported the amortization of several regulatory liabilities in this case including the COVID-19 regulatory liability,[63] the San Juan SO2 Allowance regulatory liability authorized in Case No. 08-00273-UT,[64]and the Excess Deferred Income Tax Regulatory Liability which reflects the excess ADIT as a result of the Tax Cuts and Job Act ("TCJA") enacted in 2017.[65] PNM's claimed aversion to regulatory liabilities is incorrect.

PNM believes that regulatory liabilities and regulatory assets can be useful regulatory and ratemaking tools for the Commission in appropriate circumstances. In his Rebuttal Testimony, PNM witness Henry E. Monroy addressed PNM's stance on regulatory assets and liabilities. He testified that in order to avoid harm from both piecemeal and retroactive ratemaking the Commission should identify and place utilities on notice in advance of specific cost-of-service items that are subject to adjustment outside of a general rate case. This notice must be done at the

[61] Final Order at 35 at ¶63. Where the Commission finds existing rates are not just or reasonable, its authority rests in its legislative power to set new *prospective* rates.
[62] Final Order, 33 at ¶ 58.
[63] PNM Ex. 7 (Sanders Dir.) 47:16-47:20; Case No. 20-00069-UT, *Order Authorizing Creation of a Regulatory Asset by Public Utilities for Costs Associated with Emergency Conditions* (NMPRC June 24, 2020).
[64] PNM Ex. 7 (Sanders Dir.) 47:21-48:4.
[65] PNM Ex. 7 (Sanders Dir.) 48:5-48:8; PNM Ex. 35 (Morris Dir.) 34:23-38:9.

outset when rates are set so utilities can plan accordingly.[66] The regulatory liability established under the Final Order with respect to costs associated with the recently authorized 12 MW battery energy storage system is an example of proper and adequate notice of the establishment of a regulatory liability, including the prospect of a potential future refund of costs included in approved rates.[67] PNM witness Monroy further noted the importance of symmetry in the ratemaking treatment for cost-of-service items subject to adjustment so that both cost reductions and cost increases should be considered equally, which avoids a piecemeal approach to ratemaking.[68] PNM Witness Monroy also explained why the TCJA and COVID-19 regulatory liabilities were not analogous or comparable to the PVNGS Regulatory Liability.[69]

In this instance, ordering a $38.4 million refund is unlawful retroactive ratemaking and the PVNGS Regulatory Liability is an improper use of that regulatory tool.

IV. CONCLUSION

The two issues addressed above require reconsideration by the Commission to correct flawed finding and conclusions in the Final Order. The Final Order should be modified to authorize a capital structure for PNM consisting of 47.71% long-term debt, 0.29% preferred stock, and 52.00% common equity. This capital structure is consistent with the Commission's capital structure policy and practices that have been applied to PNM and other utilities. It is important that utilities be able to attract necessary capital to provide reliable service to customers while investing in the electric grid for the future. Likewise, the Final Order should be modified to eliminate the $38.4 million refund and implementation of the PVNGS Regulatory Liability. This

[66] PNM Ex. 6 (Monroy Reb.) 57:6-58:4.
[67] Final Order, 75 at ¶ 164.
[68] PNM Ex. 6 (Monroy Reb.) 57:1-4, 57:6-58:4 (explaining asymmetrical application of regulatory asset to capture discontinued PVNGS Unit 1 costs while ignoring costs of all of the other off-setting investments in PNM's cost-of-service.
[69] PNM Ex. 6 (Monroy Reb.) 53:20-57:4.

modification is required by applicable law and established regulatory principles that dictate against retroactive ratemaking.

Dated this 29th day of January, 2024.

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR REVISION OF ITS RETAIL ELECTRIC RATES PURSUANT TO ADVICE NOTICE NO. 595	)	**Case No. 22-00270-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	
Applicant	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **Public Service Company of New Mexico's Motion for Rehearing on Final Order and Supporting Brief was** emailed to parties listed below on January 29, 2024.

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