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	)	

EXCEPTIONS TO DECEMBER 8, 2023 RECOMMENDED DECISION

OF

PUBLIC SERVICE COMPANY OF NEW MEXICO

DECEMBER 15, 2023

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SUMMARY OF EXCEPTIONS

PNM takes exception to portions of the Hearing Examiners' Recommended Decision ("RD"). PNM must reliably provide service to its customers and execute on New Mexico's energy transition. The RD puts these goals at risk and imperils PNM's ability to improve its system and attract necessary investments to the state as we transition to a carbon-free grid for our customers.

The RD correctly notes the Commission must balance competing interests to create an environment that along with reasonable rates attracts the capital and investment necessary for construction development and extension of plants and facilities. PNM relies on a forward-looking future test year rate case to define the resources it will have at its disposal to provide reliable service, invest in infrastructure and meet the state's energy transition policy goals. The RD's recommended disallowances adversely impact PNM's ability to serve its customers going forward.

The RD would cut 90.4% of PNM's requested $63.8 million annual revenue increase, to $6.1 million. PNM has not filed a rate case since 2016, in part due to the impact of the pandemic on customers. The RD's revenue requirement fails to reflect the current ongoing annual costs of providing service to customers and improving PNM's aging system. Accordingly, PNM asks that the Commission examine the evidence and modify the RD to set rates that are just and reasonable. Such action will enable PNM to access cost efficient capital so it can make the investments needed to serve customers with a less carbon-intensive mix of resources.

This summary outlines the following limited exceptions that are detailed in the subsequent Argument. PNM excepts to the following points:

I. Imputing a capital structure at 49.61% equity [RD at Subsection 8.4.3 (pp. 268-275)];

II. Limiting a return on equity ("ROE") to 9.26% [RD at Subsection 8.4.1 (pp. 229-267)];

III. Ordering a refund of past revenues through a $38.4 million regulatory liability for a

Palo Verde lease [RD at Subsection 8.2.2 (pp. 212-215)];

IV. Disallowing $84.8 million in Four Corners investments based on an imprudence penalty [RD at Section 8.1 (pp. 18-199)];

V. Certain recommendations relating to construction work in progress ("CWIP"); operations and maintenance ("O&M") expenses, including employee compensation, and recommendations on plant depreciation [RD at Subsection 8.2.1 (pp. 201-12); Subsection 8.6.4 (pp. 293-95); Subsection 8.6.6.5 (pp. 301-04); Subsection 8.6.6.5 (pp. 301-04) and Subsection 8.6.1 (pp. 288-290)]; and

VI. The lack of finality of these proceedings regarding banding of rate impacts and the residential customer charge [RD at Subsections 8.9.2 and 8.9.3 (pp. 331-334)].

SUMMARY EXCEPTION I

A large part of the impact from the recommended revenue reduction is related to the overall cost of capital. The RD departs from the past Commission practice of recognizing and ratifying PNM's (and other utilities') actual capital structure. Instead, this RD adopts an imputed capital structure of 49.61% equity, 50.10% debt and 0.29% preferred stock. By contrast, PNM's actual capital structure since 2020, including at the end of the Base Period, is reflective of the Test Period request of 52% common equity, 0.29% preferred stock and 47.71% long-term debt. This actual equity ratio is supportive of PNM's increased capital investment program and is reflective of the need to ensure high-quality credit ratings that enable PNM to raise capital as needed to support its investments. The RD's departure from the Commission's practice of using the utility's actual capital structure is unwarranted and arbitrary.

SUMMARY EXCEPTION II

The RD's proposed reduction of PNM's allowed ROE from its current 9.575% to 9.26% is a deterrent to investing in the utility and the capital investments needed to meet customer needs

and accomplish the energy transition. A utility's authorized ROE can determine whether investors want to fund the utility with the capital that supports everything from infrastructure to employees. While equity returns for utilities are trending upward across the country, the RD reduces PNM's authorized ROE at a time when the utility needs to increase its capital investments for the energy transition. PNM urges the Commission to accept PNM's evidence that supports an ROE return-on-equity of 10.25% or, at the very least, not drop below the currently authorized ROE of 9.575%. The RD's low ROE hampers PNM's ability to compete for and access the capital needed to fund a reliable system and to serve customers.

SUMMARY EXCEPTION III

PNM also excepts to the RD's imposition of a regulatory liability with respect to the costs associated with the expired Palo Verde Nuclear Generating Station ("PVNGS") leases. The RD proposes a retroactive refund of $38.4 million of revenues that PNM recovered under Commission-approved rates without regard to any other changes to PNM's cost of service. This unprecedented recommendation for the Commission to engage in improper retroactive ratemaking violates long-standing legal and regulatory principles and creates an unworkable standard. The RD would order an improper refund of a material portion of PNM's authorized annual revenue requirement without having properly set new rates for that time period, with inadequate notice; it overturns fundamental regulatory principles and violates due process. Adequate notice to PNM that a portion of a utility's rates are subject to return to customers should have been provided when the Commission approved those rates, not many years after those rates were approved.

SUMMARY EXCEPTION IV

The proposed $84.8 million disallowance for imprudence dating from PNM's 2012-2013 decision to remain a participant in the Four Corners Power Plant ("FCPP") is disproportionate to the harm and unduly impairs PNM financially. PNM's more than 10-year-old decision on power

generation alternatives used to serve customers cannot be the subject of a hindsight review or remedy. PNM maintains that its decision to continue with FCPP was not imprudent; regardless, any remedy must fairly assess whether customers were actually harmed and should recognize that customers have benefited and continue to benefit from the operation of that plant. A more measured and justified disallowance would be the Hearing Examiners' alternative calculation that reduces PNM's total FCPP investments by $63.3 million.

SUMMARY EXCEPTION V

The RD further proposes to deny a return of CWIP that relates to PVNGS leasehold investments and invites PNM to comment on the Staff position on this issue. PNM excepts to the recommended CWIP treatment and addresses Staff's arguments. PNM also urges the Commission to reject certain recommendations on O&M expenses and accelerated depreciation of gas plants as they are inconsistent with Commission practices and determinations. Among the expenses that PNM asks the Commission to reconsider and allow PNM to recover are those that provide competitive benefits to employees.

SUMMARY EXCEPTION VI

Finally, PNM takes exception to the recommendation to defer setting a new banding range for rate impacts and revised monthly residential customer charge to subsequent proceedings in sixty days. This creates uncertainty in the actual rates and bill impacts for customers, unnecessarily imposing two separate rate changes in close proximity and causing potential confusion for customers. It also taxes parties' and the Commission's resources to the extent these rate design issues will be relitigated and re-determined. A full record exists to determine an appropriate rate banding and a revised residential customer charge. PNM urges the Commission to weigh the evidence in the record and adopt PNM's banding and customer charge proposals, or simply ratify as final the banding and customer charge provisions utilized in the RD and reject the

recommendation for further proceedings.

SUMMARY CONCLUSION

PNM does not lightly take exception to the work represented by the RD. However, the record clearly shows that PNM will need to invest significant capital to help accomplish New Mexico's energy transition goals. A Commission order that authorizes sufficient revenue going forward to attract capital at reasonable rates will benefit customers, New Mexico's economy, and the environment. By contrast, the aggregated revenue reduction severely understates PNM's annual revenue requirement and will harm, not help, customers because it does not reflect the reasonable cost to run the utility. PNM believes that adopting these Exceptions on specific limited issues is vital to get it right. The Commission should ensure that its final order does not arbitrarily depart from past practices, does not engage in retroactive ratemaking that violates long-standing legal principles and due process, and does not impose disproportionate penalties that are unrelated to the reasonable cost of serving customers. PNM respectfully requests changes to the RD as set forth below.

In accordance with 1.2.2.36(F) NMAC, PNM has attached a reconciliation statement as Exhibit A to that shows the effect of PNM's Exceptions. In preparing the reconciliation statement, PNM has assumed a 9.575% ROE and a FCPP remedy of $63.3 million. The impact of PNM's Exceptions adds approximately $27.7 million to the RD's revenue requirement result, for a total of approximately $33.8 million. This is in line with Staff's overall revenue requirement increase of approximately $31.1 million.[1]

[1] Staff Ex. 4 (Mauldin Dir.) 12:4-6.

PNM'S ARGUMENT ON EXCEPTIONS

EXCEPTION I. THE RD'S IMPUTED CAPITAL STRUCTURE DOES NOT REFLECT KNOWN AND MEASURABLE CHANGES TO PNM'S ACTUAL CAPITAL STRUCTURE AND IS ENTIRELY INCONSISTENT WITH THE COMMISSION'S PAST PRACTICE.[2]

The RD imputes a capital structure rather than PNM's known and measurable, actual capital structure. This contravenes past Commission practice. Citing to just one prior case, the RD acknowledges that the Commission has relied on a utility's actual capital structure at the end of the Test Year Period to set rates.[3] However, the RD states that because PNM's rate case is based on a future test year, "it is unclear how this pronouncement should guide this present case."[4]

The Commission's past practice for capital structure—in several cases besides the RD's citation to the 2020 El Paso Electric ("EPE") Recommended Decision—is based on using a utility's actual capital structure to set rates. Specifically, the Commission's focus has consistently been to use known and measurable changes to a utility's actual capital structure for rate setting. For example, regarding the cited EPE Recommended Decision, the Commission ultimately approved a different capital structure based on "***known and measurable***" changes to the actual capital structure that existed in the base period.[5] This order cited to the 2010 PNM rate case, where "the Commission included in the test-year period ***known and measurable*** changes to capital structure up to six months after the end of the base period."[6]

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[2] Exception I takes exception to Subsection 8.4.3 (pp. 268-275) of the RD. PNM also incorporates by reference Subsection VII (pp. 18-55) of PNM's Brief in Chief ("PNM BIC") and Subsection III (pp. 5-15) of PNM's Post-Hearing Response Brief in response to Subsection 8.4.3 of the RD.

[3] RD at 272 (citing Case No. 20-00104-UT, El Paso Electric Rate Case, *Recommended Decision*, at 35). PNM notes that the capital structure approved by the Commission was based on EPE's actual capital structure at the end of the base period in that case.

[4] RD at 272.

[5] Case No. 20-00104-UT, *Order Adopting Recommended Decision with Modifications*, at 29, ¶ 85 (NMPRC June 23, 2021) (emphasis added).

[6] 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).

The Commission has repeatedly and consistently applied a "known and measurable" or similar test based on actual, experienced data to set the appropriate capital structure. In PNM's 2015 rate case, Case No. 15-00261-UT, the Hearing Examiner recommended the Commission approve PNM's proposed capital structure that reflects the projected capital structure at the end of its Test Period.[7] In doing so, the Commission rejected Staff's challenges to PNM's proposed, actual capital structure, citing to a 2015 EPE rate case, wherein the Commission also rejected a Staff argument to deviate from the actual capital structure by finding:

> The information that the Commission has previously relied upon has been the **actual percentages of debt and equity for regulatory purposes** at the end of the Test Period. Based upon the record, the Hearing Examiner finds no compelling evidence to recommend the Commission change its policy as to this issue.[8]

The Corrected Recommended Decision for PNM's 2015 rate case, in using PNM's projected actual capital structure, reaches the same conclusion, finding "no compelling evidence that the PRC change its policy."[9]

A line of Southwestern Public Service Company ("SPS") cases also reinforces this Commission's practice. In SPS's 2020 rate case, Case No. 20-00238-UT, SPS sought approval consistent with prior Commission policy of its "***actual capital structure*** at the end of the test year of 52.72% and 45.28% long-term debt."[10] A 2017 SPS rate case that did not approve SPS's actual capital structure was appealed. Ultimately, SPS and the Commission, acting on their request for a partial remand and stipulated dismissal filed with the New Mexico Supreme Court, agreed to adjust

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[7] 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).
[8] 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).
[9] Case No. 15-00261-UT, *Corrected Recommended Decision*, at 31, approved by *Final Order Adopting Corrected Recommended Decision*.
[10] Case No. 20-00238-UT, *Certif. of Stip.,* at 70 (NMPRC Dec. 21, 2021), approved by *Order Adopting Certif. of Stip. in Its Entirety and Granting SPS's Motion for Reconsideration* (Feb. 16, 2022).

the originally approved 51% equity ratio to 53.97% consistent with the Hearing Examiner's *Recommended Decision* that there is substantial evidence in the record to support the finding that an equity ratio of 53.97% more closely reflects SPS's "***actual equity***."[11]

Also, the Commission just approved a Certification of Stipulation for SPS that uses a stipulated capital structure of 54.70% common equity and 45.30% long-term debt, which while somewhat lower that SPS's current actual capital structure is similar to SPS's actual capital structure for the Base Period.[12]

A. Summary of Factual Background and PNM's Request.

Since 2020, PNM has maintained a capital structure of approximately 48% debt and 52% equity.[13] 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.[14] PNM proposes that the Commission adopt the 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.[15] As is evidenced by these figures, the projected actual 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. In other words, whether the Commission looks to the actual capital structure since 2020, at the Base Period, or at the projections for the end of the Test Period, the RD's recommended capital structure of 49.61% equity, 50.10% debt and 0.29% preferred stock in no way reflects past Commission policy to use the actual, known and measurable capital structure of PNM.

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[11] Case No. 17-00255-UT, *New Final Order on Partial Mandate From the New Mexico Supreme Court*, at 3, ¶ 6 (NMPRC Mar. 6, 2019.)
[12] Case No. 22-00286-UT, *Certif. of Stip.,* at 47-48, 52-53 (NMPRC Sept. 6, 2023), approved by *Final Order Adopting Certif. of Stip.* (NMPRC Oct. 19, 2023).
[13] PNM BIC at 22.
[14] PNM Ex. 13 (Greinel Dir.) 11:8-10. Percentage for long-term debt rounded to total 100%.
[15] PNM Ex. 13 (Greinel Dir.) 11:8-10; PNM Ex. 14 (Greinel Reb.) 4:19-5:2.

PNM's analysis of its capital structure demonstrates it is consistent with the proxy group of 21 publicly traded utilities. Specifically, PNM witness McKenzie found 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%.[16] In rebuttal, McKenzie presented updated common equity ratios approved for electric utilities over the past eight quarters, as reported by RRA Regulatory Focus, finding that PNM's requested 52.00% common equity ratio falls within the range of capital structures approved for other electric utilities.[17]

B. The RD's Recommendation to Adopt an Imputed, Outdated Capital Structure is Not Consistent with Prior Commission Practice and Provides No Justification to Support Deviation from this Long-Standing Practice.

The Commission's past practice for determining actual capital structure, leans heavily—and nearly exclusively—on the known and measurable changes to a utility's capital structure.[18] The RD never explains why it is appropriate to deviate from the Commission's policy of using actual, known and measurable changes to capital structure to set rates. Prior orders have weighed explicitly whether it was appropriate to deviate from past Commission practice as to capital structure[19]—an exercise this RD omits. Rather, the RD notes intervenor arguments in favor of maintaining an outdated capital structure and makes conclusory statements about intervenor and PNM evidence.[20] Also, based on the limited discussion of how "[i]ntervenors in this case have persuasively shown that PNM has organized itself to mitigate risk considerably[,]" the RD

[16] PNM Ex. 11 (McKenzie Dir.) 68:3-4.
[17] PNM BIC 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).
[18] *Cf.* Case No. 20-00104-UT, *Order Adopting Recommended Decision with Modifications*, at 30, ¶ 86 (where the Commission notes that the capital structure—still based on known and measurable changes to the actual capital structure—also is a better result for customers in terms of revenue requirement and rates).
[19] *See* Case No. 15-00261-UT, *Corrected Recommended Decision*, at 31, approved by *Final Order Adopting Corrected Recommended Decision* (rejecting Staff's arguments and using PNM's projected actual capital structure, finding "no compelling evidence that the PRC change its policy").
[20] *See, e.g.,* RD at 273 ("To the extent PNM is arguing that three intervenors and their experts have all erred in identifying PNM's most recent equity ratio, this argument is not credible. To the extent PNM is arguing that its data is superior, this claim is rejected.").

summarily concludes that "PNM's risk profile merits a decrease in the equity ratio."[21] This has not been a basis for downward adjustments to PNM's actual capital structure in previous rate cases. While PNM will discuss why the RD is wrong in its conclusory assumption that PNM somehow faces less risk than other utilities in the ROE exception below, the RD's examination of PNM's risk does not address whether PNM's risk profile means it is appropriate for the Commission to deviate from its consistent past practice of using a utility's actual, known and measurable capital structure to set rates.

The Commission's action would be arbitrary and capricious if it omits consideration of relevant factors or important aspects of the problem at hand.[22] By failing to acknowledge the Commission's past practice of using known and measurable amounts to determine the actual capital structure, the RD omits relevant factors that require consideration, resulting in an arbitrary and capricious result.

Also, 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.'"[23] In fact, the RD seems to acknowledge this express limitation from the Court in its determination regarding the ROE. For example, the RD rejects Staff's recommendations regarding the proxy group by stating it is "inconsistent with Commission practice."[24]

Contrast the RD's treatment of capital structure with its treatment of ROE. As to ROE, the RD insists it must use only the constant growth Discounted Cash Flow ("DCF") method to

[21] RD at 273.
[22] *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.
[23] *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).
[24] RD at 258.

determine ROE—even though multiple other intervenors including Staff used other methodologies and have also done so in previous cases—stating that "to change practice would raise due process problems."[25] In reference to constant growth DCF, the RD proffers that "[t]he Commission is without authority to pull the proverbial 'rug' from under their feet."[26] It is unclear why in the context of its consistent past practice of looking at the actual, known and measurable capital structure to determine rates why deviating from past practice without explanation or reason is appropriate in this case.

C. The RD's Recommendation Does Not Align with State Policy, As PNM's Equity Ratio is Higher Given the Efforts to Transition its System to Carbon Free.

PNM's actual equity ratio—which it has maintained since 2020—directly reflects its current and future efforts to significantly increase its capital investment program to accomplish the energy transition. As the evidence shows, PNM is in a period of elevated capital investment to continue the transition to a clean energy portfolio, increase grid resilience, and maintain and improve its distribution infrastructure and customer satisfaction.[27] In fact, even the intervenors in this case acknowledge that PNM will require increased investment as it continues its energy transition.[28] The RD's conclusory determination to reduce PNM's capital structure essentially ignores the facts as to why PNM's equity ratio is appropriately higher than the RD recommends and in particular does not address how the recommendation is consistent with state policy goals that require an energy transition.

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[25] RD at 256.
[26] RD at 257.
[27] PNM Ex. 13 (Greinel Dir.) 11:16-18. *See also* PNM BIC at 1, 21-22.
[28] *See* Tr. Vol. 11 (Walters) 3647:23-3648:9 (agreeing that it is important for PNM to be able to access necessary capital in order to make the investments to affect the energy transition, and PNM's ability to be able to access capital is dependent on its financial strength); Tr. Vol. 11 (Dunn) 3742:6-10 ("As I understand things, it will be necessary for PNM to access capital in order to reach the goals that are accompanying that energy transition."); Tr. Vol. 10 (Gegax) 3307-3308 (agreeing that the utility needs a strong financial footing to make the energy transition); Tr. Vol. 10 (Wooldridge) 3354:10-3355:9 (agreeing that PNM is undergoing an energy transition and that such transitions are necessarily capital intensive, stating that a rate case is where those issues are addressed).

EXCEPTION II. THE RD'S ROE DETERMINATION IS FINANCIALLY DETRIMENTAL, INCONSISTENT WITH CURRENT UTILITY TRENDS, INCONSISTENT WITH RECORD EVIDENCE, AND NOT SUPPORTIVE OF PNM'S REQUIREMENT TO TRANSITION ITS SYSTEM TO CARBON-FREE.[29]

The financial health of a regulated utility is a function of many factors: its capital structure, ROE, cash flow, and regulatory environment.[30] Both the RD's deviation from PNM's actual capital structure, as well as the proposed reduction of PNM's allowed ROE from the current 9.575% to 9.26%, serves to seriously undermine PNM's ability to garner the necessary capital at favorable terms to build and maintain infrastructure to meet customer needs during the energy transition.[31] When these negative outcomes are coupled with the RD's proposed reduction of PNM's requested $63.8 million annual revenue increase to $6.1 million—a 90.4% reduction from PNM's filed case—the record of this case indicates that PNM's credit rating will likely suffer, and its ability to access needed capital on favorable terms will be hampered.[32] This poses the potential to not only financially harm PNM, but also to be detrimental to customers and state policy goals that require PNM to accomplish the energy transition. PNM urges the Commission to, at the very least, not drop below the currently authorized return-on-equity of 9.575%, which falls well within the range of the RD's cited DCF results provided by PNM witness McKenzie.[33] This is particularly true given that PNM witness McKenzie discussed the unreliable nature of the 8.5% result from the "br+sv" methodology, finding that this approach is based on theoretical assumptions that do not hold in the real world.[34]

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[29] Exception II takes exception to Subsection 8.4.1 (pp. 229-267) of the RD. PNM also incorporates by reference Subsection VII.A, B, and E (pp. 18-22, 28-55) of PNM's BIC and Subsection III (pp.5-15) of PNM's Post-Hearing Response Brief in response to Subsection 8.4.1 of the RD.
[30] PNM BIC at 18.
[31] *See* PNM BIC at 18-21.
[32] PNM Ex. 13 (Greinel Dir.) 4:4-5:3, 6:3-6, 10:13-15. *See Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1982-NMSC-127, ¶ 28, 99 N.M. 1 (The return on investments should be reasonably sufficient to assure confidence in a utility's financial soundness and sufficiently adequate to maintain and support its credit and ability to raise necessary moneys).
[33] RD at 267.
[34] *See* PNM Ex. 11 (McKenzie Dir.) 38:1-41:8.

The RD also is not grounded in the broader economic reality like current bond yields that signal an increase in the cost of equity—not a decrease. Finally, the RD's sole reliance on the constant growth DCF is flawed.

A. The RD's Recommended 9.26% ROE is Financially Harmful to PNM.

The Supreme Court's findings in *Hope*[35] and *Bluefield*[36] established that a just and reasonable ROE must be sufficient to: 1) fairly compensate the utility's investors, 2) enable the utility to offer a return adequate to attract new capital on reasonable terms, and 3) maintain the utility's financial integrity. *Hope* also reinforced the findings in *Bluefield* that require a comparative analysis of investments made at the same time in other business undertakings that have corresponding risks and uncertainties. The *Hope* decision also emphasized that the cost of capital "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital."[37] The New Mexico Supreme Court has adopted the *Bluefield* and *Hope* standards for utility ratemaking purposes.[38] The court has also recognized that investor expectations are a significant consideration in setting an ROE because "[i]t is the expectation of a certain return which itself largely determines the real, current value of the stock."[39]

The RD's recommended 9.26% ROE is less than PNM's currently authorized ROE of 9.575% and falls well below the national average authorized ROEs for utilities.[40] The recommended 9.26% ROE also falls below the 9.35% ROE approved for SPS in Case No. 20-00238-UT (since increased in Case No.22-00286-UT to 9.5%), despite the fact that bond yields

[35] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).
[36] *Bluefield Waterworks and Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923).
[37] *Hope*, 320 U.S. at 603; *See also*, *In re Permian Basin Area Rate Cases*, 390 U.S. 749, 790-91 (1968) and *Duquesne Light Co., v. Barasch*, 488 U.S. 299, 312 (1989).
[38] *Mountain States*, 1982-NMSC-127, ¶¶ 27, 28, 99 NM. 1.
[39] *In re Zia Natural Gas Co.*, 2000-NMSC-011, ¶ 18, 128 N.M. 728 (March 1, 2000).
[40] As shown in PNM Ex. 12 (McKenzie Reb.) at PNM Ex. AMM-1 (Rebuttal), allowed ROEs for electric utilities averaged 9.69% in 2022 and 9.72% for Q1 2023.

are over 200 basis points higher than they were in 2020.[41] While many of the parties acknowledge that ROEs are trending upward in today's capital environment,[42] the RD opines only that utility-authorized ROEs did not decline as quickly as interest rates in prior years and there is only a slight uptick in authorized ROEs now.[43] Intervenor witnesses clearly recognize the relevance of Treasury and utility bond yields, for example,[44] and Staff witness Dunn correctly concludes that "observable yields on long-term bonds and the cost of equity would be expected to move in the same direction."[45] The RD sidesteps these fundamental financial principles by noting that inflation has been recent and sudden and is expected to decrease with interest rates.[46]

Key capital cost indicators have uniformly increased since the Commission approved PNM's existing ROE of 9.575%.[47] Interest rate benchmarks cited by the opposing witnesses indicate that investors' required return on debt securities has increased on the order of 110 to 160 basis points, while the midpoint of the Federal Reserve's target range for the federal funds rate has increased by over 400 basis points. The expected long-term inflation rate has increased 29 basis points.[48] The evidence also indicates that utility ROEs exhibit a strong positive correlation with bond yields. When bond yields go up as they have, and since bonds are less risky than common stock, the cost of capital has necessarily moved higher for everyone.[49] Despite this evidence, the RD recommends lowering PNM's ROE. Simply put, if 9.575% was a fair ROE for PNM in

[41] PNM Ex. AMM-2 (Rebuttal).
[42] Tr. Vol. 11 (Walters) 3652:15-20, 3653:14-3654:11 (noting that in 2023, the average ROE has increased as compared to 2022 and there been approved ROEs above 10% in 2023); Tr. Vol. 10 (Wooldridge) 3345:19-3346:6 (agreeing based on graph in his testimony that authorized ROEs are ticking up with an average of 9.72% for 2023 thus far).
[43] RD at 263.
[44] *See, e.g.*, Staff Ex. 5 (Dunn Dir.) CED-Figure 1; BernCo Ex. 1 (Reno Dir.) 8:4-13:2; NMAG Ex. 3 (Wooldridge Dir.) 12:6-15:16, Appendix B, Exhibit JRW-5; NM AREA Ex. 5 (Walters Dir.) Figure CCW-3, Table CCW-4, Table CCW-5, Exhibit CCW-10, Exhibit CCW-11, Exhibit CCW-12 and Exhibit CCW-13.
[45] PNM Ex. 12 (McKenzie Reb.) 12:22-13:1, citing Staff witness Dunn Response to Interrogatory PNM 2-1.
[46] RD at 263.
[47] PNM Ex. 12 (McKenzie Reb.) 9:10-11.
[48] PNM Ex. 12 (McKenzie Reb.) 10:1-5.
[49] Tr. Vol. 4 (McKenzie) 1270:20-1271:15.

December 2017, the just and reasonable ROE under current conditions is now higher—not lower.

B. A Decline in Credit Ratings As A Result of the RD's Recommended 9.26% ROE Would Be Detrimental to Customers and Does Not Support State Policy Goals.

Credit ratings are critical to utilities, which must access large amounts of capital to invest in the long-lived assets necessary to meet customer needs and State policy mandates.[50] Credit rating agencies such as Moody's Investors Service ("Moody's") and S&P Global Ratings ("S&P") publish their respective assessments of the risk that a given utility will default on its debts. Then, lenders use credit ratings to measure the risk of default. Companies that are below investment grade may not be able to access capital in capital-constrained market conditions, except possibly under onerous terms and conditions.[51] Lower ratings translate into a higher cost of debt to customers, as well as diminished access to financial and credit markets.[52] As Staff witness Dunn correctly summarized, "Any decrease in credit ratings could lead to higher perceived risk and additional costs in equity financing, in addition to higher costs for debt financing instruments."[53]

At the conclusion of the hearing, Moody's and S&P rated PNM's senior unsecured debt at Baa2 and BBB, respectively. While both are investment grade ratings, the ratings are only two notches above speculative-grade credit ratings.[54] In its September 2022 credit opinion, Moody's warned that "PNM could be downgraded if the New Mexico regulatory environment becomes more contentious such that the company's ability to earn its allowed return becomes more challenging or its business risk profile becomes elevated because of cost recovery disallowance."[55]

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[50] A credit rating is an assessment by a credit rating agency that provides that agency's independent view of a company's creditworthiness, which considers multiple factors. Generally, companies with stronger financial health are considered lower risk and have higher credit ratings. PNM Ex. 13 (Greinel Dir.) 6:3-6.
[51] *See* PNM Ex. 13 (Greinel Dir.) 6:8-16.
[52] PNM Ex. 13 (Greinel Dir.) 8:11-13.
[53] Staff Ex. 5 (Dunn Dir.) 16:1-14.
[54] PNM Ex. 13 (Greinel Dir.) 7:20-8:3; PNM Ex. 14 (Greinel Reb.) 9:5-6. *See also* Tr. Vol. 10 (Woolridge) 3351:12-16 (acknowledging that PNM with a 9.575% ROE as currently authorized has a below average credit rating).
[55] PNM Ex. 13 (Greinel Dir.) 8:15-9-7.

During the period 2023 through 2026, PNM anticipates financing and refinancing requirements of approximately $1.2 billion.[56] A downgraded credit rating puts these financing and refinancing costs at risk, both in terms of access to capital and the cost of that capital for customers.

In this case, the record does not support arguments that ROE outcomes do not influence credit ratings.[57] For instance, NM AREA witness Walters' data demonstrates that when average authorized ROEs for electric utilities declined, S&P ratings assigned to electric utility subsidiaries over the same time period also substantially worsened.[58] S&P reported that since 2020, credit ratings downgrades in the utility sector have outpaced upgrades by more than 3 to 1.[59] In evaluating the credit risks faced by electric utilities, Moody's has cited "increasingly challenging business and financial conditions stemming from higher natural gas prices, inflation and rising interest rates."[60] Fitch Ratings, Inc. also noted that its deteriorating outlook for utilities "reflects mounting cost pressures for electric and gas utilities due to elevated commodity prices, inflationary headwinds and rising interest costs."[61] Value Line echoed these sentiments for electric utilities,[62] The credit quality of electric utilities has worsened in recent years, and PNM witness McKenzie and NM AREA witness Walters' data confirm these facts.[63] The RD's proposed reduction to

[56] PNM Ex. 13 (Greinel Dir.) 8:9-10.
[57] *See* PNM BIC at 18-21.
[58] PNM Ex. 12 (McKenzie Reb.) 99:9-19.
[59] PNM Ex. 12 (McKenzie Reb.) 100:4-9 (S&P Global Ratings, *The Outlook For North American Regulated Utilities Turns Stable*, Ratings Direct (May 18, 2023)).
[60] PNM Ex. 12 (McKenzie Reb.) 100:1-4 (citing Moody's Investors Service, *Regulated Gas Utilities--US*, 2023 outlook negative due to higher natural gas prices, inflation and rising interest rates, Outlook (Nov. 10, 2022)).
[61] PNM Ex. 12 (McKenzie Reb.) 100:9-11 (citing Fitch Ratings, Inc., *North American Utilities, Power & Gas Outlook 2023* (Dec. 7, 2022)).
[62] PNM Ex. 12 (McKenzie Reb.) 100:11-15 (citing Value Line Investment Survey, *Electric Utility (West) Industry* (Apr. 21, 2023), which concludes that this group's "main difficulties are wage inflation, higher interest rates, and high commodity prices for raw materials and purchased power.").
[63] PNM Ex. 12 (McKenzie Reb.) 100:16-17. *See also* PNM Ex. 12 (McKenzie Reb.) 101:1-102:15; Tr. Vol. 4 (McKenzie) 1238:9-23 ("[W]e've gone from an industry that had a solid, single A rating. As S&P observed, it is the first time the industry has fallen into the BBB category, so that certainly is indicative of high risk.").

PNM's authorized ROE in the face of key indicators driving up the costs of debt and equity capital is untenable given the investments PNM must make in its system over the coming years and will likely drive down PNM' credit rating.

C. The RD's Sole Reliance on the Constant Growth DCF is Flawed.

The RD claims it would be inconsistent with Commission practice to evaluate PNM's ROE on any basis other than the constant growth DCF method. In particular, the RD states that a change in practice to use other methodologies would raise due process concerns.[64] This approach belies the record, which clearly indicates that every party in this case that did any relevant analysis to determine ROE projections used other methodologies in addition to the constant growth DCF. In addition to the DCF model, Staff witness Dunn uses the Capital Asset Pricing Model ("CAPM").[65] NMAG's recommendations are similarly based on DCF and CAPM results.[66] Bernalillo County conducts DCF, CAPM and ECAPM analyses, relying on the DCF approaches in making the recommendation.[67] NM AREA witness Walters provides DCF, risk premium and CAPM analyses.[68] ABCWUA witness. D. Garrett conducted DCF and CAPM analyses.[69] Neither NEE witness Sandberg nor Walmart witness Chriss presented any specific analyses to arrive at a cost of equity recommendation. Clearly, the record supports an analysis beyond constant growth DCF.

Recognized treatises uniformly support reference to multiple approaches in determining a just and reasonable ROE, as do financial professionals and regulators .[70] This is because no single

[64] RD at 255-56.
[65] Staff Ex. 5 (Dunn Dir.) 26:13-29:14, 42:14-44:9.
[66] NMAG Ex. 3 (Wooldridge Dir.) 70:8-15.
[67] BernCo Ex. 1 (Reno Dir.) 48:16-49:23 and Table 6 ("I rely on my CAPM, and ECAPM results as a reasonableness check.")
[68] NM AREA Ex. 5 (Walters Dir.) 51:1-5 and Table CCW-8, 56:12-57:1 and Table CCW-2, 68:1-8 and Table CCW-11.
[69] PNM Ex. 12 (McKenzie Reb.) 128:8-14 (citing ABCWUA Ex. 2 (D. Garrett Dir.) Figure 1).
[70] PNM Ex. 11 (McKenzie Dir.) 29:1-31:2; PNM Ex. 12 (McKenzie Reb.) 37:1-40:1.

method of evaluating ROE can be regarded as definitive.[71] While the DCF model is a recognized approach to estimating ROE, it is not without shortcomings and does not eliminate the need to ensure the "end result" is fair.[72] Consideration of the results of alternative approaches reduces the potential for error with any single quantitative method.[73] The RD's exclusive reliance on the DCF model is at odds with the evidence in this proceeding.[74] The fact that the RD's DCF-based 9.26% recommendation falls below PNM's existing ROE even though utility bond yields are now over 130 basis points higher demonstrates the infirmity of relying on any single approach. The Commission should take into account other ROE estimation methodologies in arriving at an authorized ROE.

EXCEPTION III. THE RD'S PROPOSED IMPLEMENTATION OF A $38.4 REGULATORY LIABILITY FOR THE PVNGS LEASE COSTS BECAUSE IT VIOLATES APPLICABLE LEGAL AND REGULATORY PRINCIPLES AGAINST RETROACTIVE AND PIECEMEAL RATES.[75]

"[T]here 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

[71] *See, e.g.*, PNM Ex. 11 (McKenzie Dir.) 29:20-22, citing David C. Parcell, *The Cost of Capital – A Practitioner's Guide*, Society of Utility and Regulatory Financial Analysts (2010) that, "no single model is so inherently precise that it can be relied on solely to the exclusion of other theoretically sound models." *See also* PNM Ex. 11 (McKenzie Dir.) 29:3-10 (noting FERC's statement that, "[t]he determination of rate of return on equity starts from the premise that there is no single approach or methodology for determining the correct rate of return.").

[72] *See, e.g.,* PNM Ex. 11 (McKenzie Dir.) at 38:1-14, which highlights the shortcomings of the "br+sv" growth rate as part of the constant growth DCF methodology. As PNM witness McKenzie notes in his direct testimony, the "br+sv" approach is based on theoretical assumptions that do not hold in real world. Accordingly, witness McKenzie gave little weight to these results in evaluating DCF results. Since the RD averages witness McKenzie's results for the constant growth DCF methodology, including the unreliable br+sv approach, the 9.15% average cited in the RD does not provide a meaningful benchmark to evaluate their 9.26% recommendation, falling far below the 9.69% and 9.72% average ROE allowed for other electric utilities across the nation in 2022 and 2023. *See* PNM Exhibit 12 (McKenzie Reb.) at PNM Ex. AMM-1 (Rebuttal).

[73] PNM Ex. 11 (McKenzie Dir.) 30:13-31:2.

[74] *See, e.g.*, ABCWUA Ex. 2 (Garrett Dir.) 20:18-21:2, noting that, "It is preferable to use multiple models because the results of any one model may contain a degree of imprecision, especially depending on the reliability of the inputs used at the time of conducting the model."

[75] Exception II takes exception to Subsection 8.2.2 (pp. 212-215) of the RD. PNM also incorporates by reference Subsection XVI.D (pp. 266-276) of PNM's BIC and Subsection IX.D (pp. 134-138) of PNM's Post-Hearing Response Brief in response to Subsection 8.2.2 of the RD.

specific statutory or constitutional authority permits."[76] This language was adopted by the New Mexico Supreme Court in rejecting retroactive utility ratemaking. Despite this steadfast rule, and clear precedent to the contrary, the RD recommends that the Commission engage in retroactive ratemaking by imposing a $38.4 million refund of revenues that PNM previously collected in Commission-approved rates for costs related to expired PVNGS Unit 1 leases ("PVNGS Regulatory Liability").[77]

The RD's recommendation that the Commission impose a retroactive refund on a utility for costs tied to a specific element of the utility's cost of service represents a wholesale departure from applicable regulatory principles. Rates are set at a point in time to recover a utility's reasonable and necessary cost of service based on test period expenses. As the rates remain in effect over time, the elements of the underlying cost of service will change as expenses vary, plant is retired, and other investments are made. However, no rate adjustments are made to reflect the underlying changes in the elements of the approved cost of service and rates remain in effect so long as they are adequate to cover the utility's cost to serve customers. Any necessary prospective adjustments are made in the context of a general rate case where all the elements of a utility's cost of service are subject to review. By proposing a retroactive refund of a single element of PNM's approved cost of service – in this case the cost of the PVNGS Unit 1 leases - the RD disregards the well-established utility ratemaking process, which should be rejected.

A. Summary Regulatory and Factual Backgrounds.

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

[76] *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) ("*Mountain States*").
[77] RD at 214.

subject to refund upon expiration of the leases or otherwise.[78] PNM's base rates, which included the costs of the PVNGS leases, were last set in Case No. 16-00276-UT and were phased in 2018 and 2019.[79] The record shows that PNM is currently charging and collecting the rates approved in Case No. 16-00266-UT, which were designed to recover an annual revenue requirement necessary to operate PNM's utility business.[80]

It is undisputed that there have been many changes to PNM's cost of service that have occurred since the rates from Case No. 16-00276-UT took effect; however, the PVNGS Regulatory Liability isolates only the costs of the PVNGS Unit 1 leases for purposes of retroactively adjusting the Commission-approved rates. Since 2016, PNM has made numerous investments to serve customers, and there have been changes to operating expenses, none of which have been reflected in base rates.[81] In the period between December 31, 2022, and December 21, 2023, alone, PNM's net plant in service increased by $435 million, which far exceeds the amount of the $38.4 million PVNGS Regulatory Liability.[82] The RD summarily dismisses these facts as "unpersuasive."[83] By ignoring the significant investments that PNM has made since its last rate case, and focusing solely on the costs of the PVNGS Unit 1 leases, the RD fails to balance the interests of PNM and its customers as required for the implementation of an accounting order.[84]

The Commission authorized the PVNGS Regulatory Liability in Case No. 21-00083-UT ("Accounting Order") as a "pure accounting order" that does not prejudge the ultimate ratemaking

[78] Case No. 15-00261-UT, *Final Order Partially Adopting Corrected Recommended Decision*, ¶¶ 110, 116 and 117 (NMPRC Sept. 28, 2016).
[79] Case No. 16-00276-UT, *Revised Order Partially Adopting Certif. of Stip.* at 36, ¶ I (NMPRC Jan. 10, 2018).
[80] PNM Ex. 10 (Sanders Dir.) 133:1-134:6.
[81] PNM Ex. 10 (Sanders Dir.) 132:4-18.
[82] PNM Ex. 6 (Monroy Reb.) 32:5-17.
[83] RD at 216.
[84] 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.)

treatment of the accounting order.[85] While the premise of the PVNGS Accounting Order was that PNM should not collect expenses which is it no longer incurring to serve customers, the legal means to address changes in expenses is a prospective removal of the expense when setting new rates, not a refund of the previously collected revenues. Further, the Commission has imposed an annual earnings reporting requirement and true up mechanism, so that if PNM were to earn more than 50 basis points above its authorized return, any excess revenues are returned to customers through PNM's renewable rider.[86]

B. The RD's Recommendation to Implement the PVNGS Regulatory Liability Constitutes Improper Retroactive Ratemaking.

The RD's implementation of PVNGS Regulatory Liability consists of costs associated with the PVNGS Unit 1 Leases in PNM's currently approved rates so that PNM's authorized annual revenues will be offset or refunded in the context of the new rates in this case.[87] However, the prohibition against retroactive ratemaking prevents any refund, as proposed in the RD, of revenues collected in PNM's previously approved rates.

The Public Utility Act ("PUA") provides that rates established by the Commission are just and reasonable and must be observed by the utility until changed as provided in the PUA.[88] Thus, under the filed rate doctrine, the rates established by the Commission in Case No. 16-00276-UT were the only legal rates and PNM was required to charge those rates.[89] The filed rate doctrine is incorporated into the PUA.[90] Given the requirements of the filed rate doctrine, any changes to rates by the Commission must be made on a prospective basis only in order to avoid violation of the

[85] Case No. 21-00083-UT, *Order on Joint Motion for Accounting Order* at 6, ¶ 18 and 7, ¶ C (NMPRC Nov. 18, 2022).
[86] PNM Ex. 7 (Sanders Dir.) 134:10-135:2.
[87] PNM Ex. 10 (Sanders Dir.) 133:1-134:6.
[88] NMSA 1978, § 62-8-1 (1978) and NMSA 1978, § 62-8-7(D) (2011).
[89] *See Valdez v. State,* 2002-NMSC-028, ¶ 5, 132 N.M. 667 (describing and approving application of filed rate doctrine).
[90] NMSA 1978, § 62-8-5 (1941).

retroactive ratemaking doctrine.

In *Mountain States*, the New Mexico Supreme Court addressed the contention of a telephone company that its revenue deficiency should be remedied by the Court ordering the State Corporation Commission, a predecessor of the Commission, to make rates retroactive to the end of the constitutional suspension period.[91] The Court rejected the contention, ruling that the fixing of rates cannot be accomplished retroactively, unless some specific statutory or constitutional authority permits.[92] This is because "rate-making is legislative in its nature" and "it is axiomatic that legislative action operates prospectively, not retroactively."[93] The RD itself acknowledges that "rate setting is ultimately a legislative act"[94] but ignores that absent a statutory or other applicable exception, ratemaking can only operate prospectively. *Mountain States* further held that retroactive remedies are in the nature of reparations rather than ratemaking and are, therefore, judicial in nature and beyond the authority of the Commission.[95]

In *N.M. Elec. Serv. Co. v. N.M. Pub. Serv. Comm'n*,[96] the New Mexico Supreme Court reversed an order of the New Mexico Public Service Commission ("PSC"), a predecessor agency to the Commission, requiring the utility to refund to its customers revenues it had received from a refund obtained from SPS, the utility's wholesale energy supplier.[97] SPS was ordered by the Federal Power Commission to reduce its wholesale power rates and refund over-collections to the utility. The utility received a $769,664.51 refund from SPS and passed a portion of the refund on to customers with whom it had contracts requiring rates to be adjusted according to the cost of

[91] *Mountain States*, 1977-NMSC-032, ¶ 86, 90 N.M. 325.
[92] *Mountain States*, 1977-NMSC-032, ¶¶ 88-90, 90 N.M. 325.
[93] *Mountain States*, 1977-NMSC-032, ¶ 88, 90 N.M. 325.
[94] RD at 13.
[95] *Mountain States Tel. & Tel. Co*., 1977-NMSC-032, ¶ 88, 90 N.M. 325.
[96] 1970-NMSC-097, 81 N.M. 683.
[97] *N.M. Elec.*, 1970-NMSC-097, ¶¶ 1-3, 81 N.M. 683.

wholesale power. The utility retained the balance of the refund which totaled $495,214.08. Following hearings convened by the PSC, the utility was ordered to refund $935,569.00 to customers based on the balance of the refund and hypothetical savings during the time SPS was charging under the reduced rate schedule.[98]

On appeal, the Court stated that "[t]he decisive question here is whether the [PSC] had the authority to order the [utility] to pay over to customers the refund it obtained from [SPS]."[99] After considering the multiple arguments of the PSC to support the retroactive refund, [100] the Court held that the PSC "had no such authority" to order the refund.[101] The same is true with respect to the implementation of the PVNGS Regulatory Liability under the facts in this case - there is no legal basis for ordering refunds or reparations based on the expiration of a PVNGS lease.[102]

C. The Accounting Order Does Not Avoid the Application of the Rule Against Retroactive Ratemaking.

The RD relies on the Commission's issuance of the Accounting Order to bypass the

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[98] *N.M. Elec.*, 1970-NMSC-097, ¶2, 81 N.M. 683.
[99] *N.M. Elec.*, 1970-NMSC-097, ¶ 3, 81 N.M. 683.
[100] *See N.M. Elec.*, 1970-NMSC-097, ¶¶ 5-8, 81 N.M. 683.
[101] *N.M. Elec.*, 1970-NMSC-097, ¶3, 81 N.M. 683.
[102] On at least two occasions the New Mexico Supreme Court has granted extraordinary relief in the form of partial interim stays of Commission orders where piecemeal and retroactive ratemaking were at issue on appeal. In *Southwestern Pub. Serv. Co. v. N.M. Pub. Regul. Comm'n*, Case No. S-1-SC-37248, the Court granted an interim stay of a $10.2 million retroactive rate refund based on reductions in SPS's federal tax expense under the Tax Cut and Job Act of 2017. *Southwestern Pub. Ser. Co. v. N.M. Pub. Regul. Comm'n*, Case No. S-1-SC-37248, Order (Nov. 11, 2018). Similarly, in *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, Case No. S-1-SC-39440, the Court granted an interim stay of Commission-ordered rate credits related to San Juan Generating Station costs included in PNM rates. *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n,* Case No. S-1-SC-39440, Amended Order, at 3 (Nov. 3, 2022). While the Court did not provide any discussion in its orders concerning the bases for granting the stays, there are certain relevant conclusions that can be inferred based on applicable law and the Rules of Appellate Procedure. Rule 12-207 NMRA provides that a decision by the Commission on a stay request shall only be set aside if it is shown to be (1) arbitrary, capricious, or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with the law. Rule 12-207(D)(1)-(3); *see also*, *City of Las Cruces v. N.M. Pub. Regul. Comm'n*, 2020-NMSC-016, ¶ 16, 476 P.3d 880. In addition, Section 62-11-6 provides that the Court may stay a Commission order, in whole or in part, on such terms as deemed just and in accordance with the practice of courts exercising equity jurisdiction. Significantly, an essential element for a stay pending appeal is a showing of a likelihood that the applicant will prevail on the merits. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708. It is unlikely the Court would have granted the stays absent a determination that SPS and PNM met the foregoing strict standards.

application of the rule against retroactive ratemaking.[103] It is correct that there are exceptions to the rule against retroactive ratemaking where an approved rate is specifically subject to refund, or there is specific statutory authorization for retroactive relief.[104] However, in order to avoid the prohibition against retroactive ratemaking 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."[105] No such notice was provided to PNM in Case No. 15-00261-UT when PNM was first authorized to recover the PVNGS lease costs in rates, or during PNM's last rate case, Case No. 16-00276-UT.

Indeed, PNM was never provided notice that its authorized revenue requirement 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 this rate case, and only about 60 days before the PVNGS Unit 1 leases were to expire by their terms on January 14, 2023. The "notice" that the Accounting Order provided was meaningless because it precluded any ability for PNM to initiate any rate proceeding to address this rate treatment prospectively or to account for the costs associated with the expiring PVNGS leases as well as other changes in PNM's cost of service. Accordingly, there was no way for PNM to mitigate the lost revenues resulting from the retroactive refund of the PVNGS Unit 1 lease costs.

In administrative adjudicatory proceedings involving substantial rights of an applicant, a state agency must adhere to fundamental principles of justice and procedural due process.[106] It is fundamental that the right to "reasonable notice and an opportunity to be heard and present any

[103] RD at 214-215.
[104] Case No. 11-00123-UT, *Recommended Decision*, at 47 (NMPRC Oct. 3, 2011).
[105] *Pub. Util. Comm'n of Cal. v. F.E.R.C.*, 988 F.2d 154, 164 (D.C. Cir. 1993) (emphasis added).
[106] *See State ex rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, ¶ 18, 108 N.M. 658.

claim or defense" should be "at a meaningful time and in a meaningful manner."[107] Because the Accounting Order was not issued until just before the PVNGS Unit 1 leases were to expire, the notice to PNM was not presented at either a reasonable time or in a reasonable manner. The lack of adequate notice violated PNM's due process rights with respect to any proposed rate reduction that is based on a refund tied to the costs of the PVNGS Unit 1 leases. Therefore, the Accounting Order is insufficient to avoid the application of the rule against retroactive ratemaking and would violate PNM's due process rights.

D. The RD's Recommendation to Implement the PVNGS Regulatory Liability Violates Other Well-Established Regulatory Principles.

PNM's Exception to the RD's recommendation concerning the PVNGS Regulatory Liability primarily focuses on the prohibition against retroactive ratemaking because this rule is dispositive with respect to this issue. However, the proposed implementation of the PVNGS Regulatory Liability violates several other well-established regulatory principles which provide separate grounds to reject the recommendation in the RD.

The implementation of the PVNGS Regulatory Liability violates the Commission's policy against piecemeal ratemaking which consists of changing rates for one item and ignoring all the other cost of service elements.[108] Relatedly, implementation of the PVNGS Regulatory Liability without consideration of all elements of PNM's cost of service would be arbitrary and capricious because it entirely omits consideration of relevant factors or important aspects of the problem at hand.[109] Finally, the failure to adhere to the rules against retroactive and piecemeal ratemaking

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[107] *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)); *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 (1983)).

[108] Case No. 15-00166-UT, *Final Order* at 43 (NMPRC Nov. 18, 2015).

[109] *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*, 2022-NMSC-011, ¶ 26, 506 P.3d 346.

would be an abrupt and impermissible departure from well-established Commission policies without proper notice to PNM.[110]

EXCEPTION IV. THE RD'S PROPOSED FINDING OF IMPRUDENCE WITH RESPECT TO PNM'S DECISION TO CONTINUE WITH FCPP DOES NOT PROPERLY WEIGH THE EVIDENCE OF PRUDENT ANALYSIS AND THE RECOMMENDED $84.8 MILLION IMPAIRMENT REMEDY IS EXCESSIVE.[111]

A. Introduction, Inconsistencies and Irregularities.

The issue of the prudence of PNM's decision in the 2012 to 2013 timeframe to continue as a participant in FCPP has now been before the Commission in four different proceedings. PNM agrees that the question of FCPP should finally be resolved in this case. However, the Commission should not adopt the resolution proposed in the RD. The RD proposes that the Commission find that PNM was imprudent in its decision to continue with FCPP beyond 2016, and that the remedy for the imprudence should be a write down of $84.8 million of PNM's net book value in FCPP representing a 32.4% reduction of PNM's total net book value.[112] The proposed finding of imprudence should be rejected because the record shows that PNM conducted an adequate analysis of whether to remain in FCPP. The proposed remedy of an $84.8 million write down of PNM's interest in FCPP should also be rejected as arbitrary and unduly punitive. To that point, the RD's alternative remedy of a $63.3 million write down, or 24.6% of the FCPP investment value, is a more balanced outcome given the continuing and reasonable use of the plant to reliably serve customers.

It is notable that in the four instances where FCPP imprudence has been litigated before

[110] *PNM Gas Servs.,* 2000-NMSC-012, ¶ 9, 129 N.M. 1; *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 7, 115 N.M. 678 (citation omitted).
[111] Exception III takes exception to Subsection 8.1 (pp. 18-199) of the RD. PNM also incorporates by reference Section XV (pp. 201-241) of PNM's BIC, and Section VII (pp. 82-113) of PNM's Post-Hearing Response Brief in response to Subsection 8.1 of the RD.
[112] RD at 1.

the Commission, the results have been highly inconsistent. In Case No. 15-00261-UT, New Energy Economy and the Coalition for Clean Affordable Energy claimed that the new FCPP coal sales agreement ("CSA") should not be approved because PNM's decision to remain in FCPP was imprudent. The Commission rejected the imprudence claims and found the CSA to be reasonable.[113] The decision was upheld on appeal.[114]

In Case No. 16-00276-UT, the Hearing Examiners proposed that PNM's decision to continue with FCPP was imprudent.[115] The Commission ultimately rejected the imprudence finding and ordered that the issue of FCPP prudence be addressed in PNM's next rate case so that a more complete record could be developed.[116] Much of the reasoning in the RD in this case is the same reasoning the Commission declined to adopt in the 2016 rate case.

The issue of FCPP prudence was expressly ordered to be litigated for the third time in Case No. 21-00017-UT where PNM sought to abandon its interests in FCPP and to securitize its abandonment costs pursuant to the Energy Transition Act. The evidence in Case No. 21-00017-UT included administrative notice of portions of the evidentiary record in Case No. 16-00276-UT and expert testimony from PNM witness Frank Graves. Other parties primarily relied on the Certification of Stipulation in Case No. 16-00276-UT. The Hearing Examiner in Case No. 21-00017-UT recommended a finding that there was insufficient evidence to make a determination on the issue of FCPP imprudence and recommended that the issue should be again deferred to another proceeding.[117] The Commission adopted that finding and went on to reject PNM's

[113] Case No. 15-00261-UT, *Final Order Partially Adopting Corrected Recommended Decision*, at 71 ¶ 202 (NMPRC Sept. 28, 2016).
[114] *PNM v. NMPRC,* 2019-NMSC-012, ¶¶ 90-95.
[115] Case No. 16-00276-UT, *Certif. of Stip.*, at 66-70 (NMPRC Oct. 31, 2017).
[116] Case No. 16-00276-UT, *Revised Order Partially Adopting Certif. of Stip.*, at 22-24, ¶¶ 65-67 (NMPRC Jan. 10, 2018).
[117] Case No. 21-00017-UT, *Recommended Decision on PNM's Request for a Financing Order,* at 85 (NMPRC Nov. 12, 2021).

abandonment and securitization application for not including sufficient detail about potential replacement resources.[118] The Commission's decision was upheld on appeal.[119]

In the instant case, the RD notes that evidence in this case largely repeats the evidence presented in Case No. 21-00017-UT, with the Hearing Examiners having harvested portions of the record in Case No. 16-00276-UT for administrative notice. PNM witness Graves again presented expert testimony on essentially the same topics as in Case No. 21-00017-UT, and other parties again relied heavily upon evidence and Certification of Stipulation in Case No. 21-00017-UT to support their positions. Despite the substantial overlap and similarity between the evidence in this case and the evidence in Case No. 21-00017-UT, the Hearing Examiners, unlike Case No. 21-00017-UT, now conclude that there is sufficient evidence to support a finding of imprudence on the part of PNM in its decision to remain a participant in FCPP. In sum, substantially the same evidence in this case has now led to a dramatically different proposed finding compared to Case No. 21-00017-UT.

An irregularity in the present proceedings is that the RD improperly relies directly on evidence from Case No. 21-00017-UT, which was never administratively noticed in this case. Because the RD in some instances cites directly to the evidence in Case No. 21-00017-UT,[120] it is unclear whether and to what extent the RD is based on the record in the prior case or evidence presented in this case. The Hearing Examiner declined PNM's request to take administrative notice of portions of the evidence in Case No. 21-00017-UT on the grounds that this case would stand on its own evidentiary record, and withdrew the Hearing Examiner's own proposal during

[118] Case No. 21-00017-UT, *Order on Recommended Decision on Requests for Approval of the Sale and Abandonment of PNM's Interest in the Four Corners Power Plant and Issuance of a Securitized Financing Order,* ¶¶ C, E, G at 13 (NMPRC Dec. 15, 2021) .
[119] *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, S-1-SC-39138, ¶ 31, __ P.3d ___ (July 6, 2023).
[120] *See, e.g.,* RD footnotes 257, 384, 386, 475, 476, 505, 511 and 521.

hearing to take administrative notice of portions of the hearing transcript in Case No. 21-00017-UT.[121] The RD's introduction of and direct reliance upon evidence from Case No. 21-00017-UT does not comport with the evidentiary rulings or Rule 1.2.2.35(D) NMAC.[122] It also raises due process issues to the extent the proposed decision relies on evidence from a separate proceeding not properly before the Commission in this record.[123]

PNM believes the RD's reflexive dismissal of PNM's evidence and arguments advanced in this case does not objectively evaluate PNM's position. PNM respectfully requests that the Commission carefully review the evidence related to the issue of FCPP prudence, in light of the Commission's findings in previous cases that the evidentiary record to support an imprudence determination (which was repeated or administratively referenced in this case) was either incomplete or insufficient.

B. PNM's Evaluation of Continued Participation in FCPP was Prudent.

The RD runs through a list of claimed deficiencies in PNM's evaluation of whether to remain a participant in FCPP. These alleged deficiencies include reliance on PNM's 2011 IRP,[124] the claimed flaws in PNM's May 2012 analysis,[125] the failure to update the May 2012 analysis between May 2012 and October 2013,[126] FCPP's diminished performance and forced outages,[127] the claim that PNM should have conducted a further review of its decision between October 2013 and 2015 when the final FCPP ownership agreements were executed,[128] the decision by EPE not

[121] Tr. Vol. 3, 965:11-966:12.
[122] *PNM Gas Servs.,* 2000-NMSC-012, ¶ 9, 129 N.M. 1 (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.'").
[123] *See T.W. Telecom of N.M.*, 2011-NMSC-029, ¶ 20-22, 150 N.M. 12 (Annulling the Commission's final order because it was based in part on evidence from another hearing.).
[124] RD at 86.
[125] RD at 86-97.
[126] RD at 97-104.
[127] RD at 104-107, 116-117.
[128] RD at 107-111.

to continue to participate in FCPP,[129] and certain additional developments in 2014.[130] In response to these claimed infirmities in the evaluations of whether to continue with FCPP, PNM respectfully requests that the Commission review the whole record on these issues which, among other things, reveals the following:

PNM Continuously Analyzed FCPP: PNM's conducted repeated evaluations of the need for and relative cost of FCPP for the period from 2008 leading up to the May 2012 Analysis, and each evaluation confirmed that FCPP was more cost-effective compared to other feasible options. PNM also prudently considered other pertinent factors, in addition to relative cost, such as FCPP's status as an existing certificated resource, the risks of building a new plant and the impending abandonment of 340 MW in the San Juan Generating Station ("SJGS").[131]

A Majority of the FCPP Owners Elected to Remain Participants in Four Corners: PNM was not an outlier in deciding to remain a participant in FCPP; the majority of the FCPP owners, consisting of Arizona Public Service Company ("APS"), Tucson Electric Power ("TEP") and Salt River Project Agricultural Improvement and Power District, opted to continue with the plaint. In the case of APS[132] and TEP, they have indicated their intention to remain in FCPP through 2031.[133]

The PNM Board of Directors Properly Considered the Risks and Benefits of FCPP: The PNM Board was provided a briefing memorandum outlining the potential risks and benefits of continuing with FCPP. Their decision to authorize execution of the CSA and related FCPP ownership agreements was an informed one.[134]

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[129] RD at 111-114.
[130] RD at 114
[131] PNM PNM BIC at 208; and PNM Response Brief ("PNM RB") at 88-90.
[132] The Arizona Court of Appeals recently reversed a finding of imprudence and associated disallowance with respect to APS's share of the costs for SCR emission controls at Four Corners. *See Ariz. Pub. Serv. Co. v. Ariz. Corp. Comm'n,* 91 Ariz. Cases Dig. ¶¶ 32-37, 526 P.3d 914 (Az. Ct. App. 2023). These are the same SCR emission controls that are subject to a prudence challenge in this case.
[133] PNM RB at 95-96
[134] PNM RB at 93-94.

The Claimed Poor Performance of FCPP is Overstated: The claims of poor performance by FCPP were based on limited data and reflected deferred maintenance in the 2012-2013 time period while the owners assessed whether to continue running the plant. [135] When additional plant reliability data are considered, it shows that FCPP has performed well for a plant of its vintage and coal quality. Recent FCPP performance data show good performance with summer equivalent availability factors of 89.6% in 2021 and 93.2% in 2022, including during extreme regional heat waves.[136]

An Update of the May 2012 Analysis Was Not Necessary: PNM had a continuing need for baseload generation, particularly in light of the proposed retirement of 340 MW of SJGS and stayed informed on the generation market and knew there were no market changes that would impact its 2012 analysis. A further analysis at the end of 2013 would have only confirmed that FCPP was needed and cost effective as demonstrated by the updated analysis performed in January 2014.[137] Similarly, the claim that PNM should have updated its analysis between January 2014 and March 2015 when the owners executed the FCPP ownership agreements is incorrect. The actual decision point on moving forward with FCPP was upon the execution of the CSA in 2013. Final execution of the FCPP ownership agreements was delayed only due to the issue of who would assume EPE's share of the plant.[138]

The May 2012 Analysis: The May 2012 Analysis showed that replacing FCPP with a combined cycle gas plant would be $33.5 million to $44 million less costly for PNM customers. PNM witness O'Connell explained that PNM did not include ongoing capital costs in the May 2012 Analysis because these costs were considered sunk costs and, in the context of IRP capacity

[135] PNM RB at 96.
[136] PNM RB at 97.
[137] PNM RB at 92-93.
[138] PNM BIC at 216.

expansion modeling of various portfolios, these costs generally cancel each other out. PNM started including ongoing capital expenditures beginning in 2014 when examining potential resource retirement scenarios.[139]

The foregoing is not an exhaustive response to the claimed infirmities in PNM's evaluation process in deciding to continue with FCPP. However, it provides a useful reference to salient facts demonstrating that PNM was prudent and that the criticisms are overstated or unwarranted.

C. The Prudence of PNM's FCPP Analysis Was Independently Confirmed.

PNM's expert, Frank Graves, independently reviewed the evidence concerning PNM's decision making process related to FCPP and noted that there is no single objective notion of what is sufficient in resource planning and that reasonable persons can disagree about what is the appropriate level of analysis without one or the other's approach being imprudent. He noted that the resource planning process has evolved significantly since 2013. Prudence should be determined by whether a utility reasonably considered relevant information at the time of its evaluation. While PNM Witness Graves candidly acknowledged that PNM could have done more as part of its evaluation process, he confirmed that the process was still sufficient to be prudent.[140]

PNM Witness Graves also conducted an independent analysis of the relative cost effectiveness of FCPP versus the combined cycle gas plant identified as the next least cost resource that accounted for the claimed deficiencies in PNM's May 2012 analysis which showed that FCPP will still likely be more cost effective than the alternative gas plant by $46 million.[141] This analysis and Graves' FCPP damage analysis were presented pursuant to the holding of the New Mexico Supreme Court which provides that "[it] is possible that the utility may be able to present sufficient

[139] PNM BIC at 217-218 and PNM RB at 90-91.
[140] PNM BIC 211-213.
[141] PNM RB at 215.

information from external sources . . .to establish that its ultimate decision was prudent - regardless of what internal decision-making process was used.."[142] The RD claims that the foregoing language from *PNM v. NMPRC* is mere dicta and that no or little consideration should be given to this analysis.[143] PNM disagrees that this ruling is dicta.[144] However, even if the language is dicta from the New Mexico Supreme Court, a lower court, and in this case the Commission, "should give such language adequate deference and not disregard it summarily."[145] Therefore, the Commission must give due regard to the analyses presented by PNM Witness Graves which shows that PNM was prudent and that customers were not harmed as a result of PNM's 2012-2013 decision to continue with FCPP.

D. The RD's Proposed Remedy of an $84.8 Million Impairment to PNM's Investment in FCPP is Arbitrary and Punitive.

At the outset it is essential to note that even in the absence of a finding of imprudence, PNM has been subject to disallowances in the form of a debt only return on PNM's post-2016 FCPP investments resulting in a $4.7 million annual revenue reduction which will total $33.1 million through 2024.[146] Thus, a remedy for imprudence has already been imposed and must be taken into account if further imprudence disallowances are considered. The RD proposes as a further remedy that PNM's net book value of FCPP be reduced by $84.8 million, or 32.4%. In the event PNM's 2012-2013 decision is found to be imprudent, the proposed remedy in the RD should be rejected as arbitrary and excessive.

PNM witness Graves presented a Remedy Analysis in this case to assess the potential financial impacts to PNM's customers from PNM's decision to continue with FCPP compared to

[142] *Public Service Co. of N.M. v. N.M. Public Regul. Comm'n*, 2019-NMSC-012, ¶ 32, 444 P.3d 460 ("*PNM v. NMPRC*").
[143] RD at 35-36.
[144] PNM RB at 105.
[145] *State v. Johnson*, 2001-NMSC-001, ¶ 16, 130 N.M. 6.
[146] PNM Ex. 6 (Monroy Reb.) 65:12-66:3.

the alternative combined cycle gas plant and determined that customers were better off by approximately $15 million with FCPP.[147] Based on the Graves Remedy Analysis, no further remedy is warranted, particularly considering that PNM has effectively already been assessed a remedy in the form of a debt-only return on its post-2016 FCPP investments.

In response to the Graves Remedy Analysis, Sierra Club was allowed to submit sur-rebuttal testimony of Sierra Club witness Fisher, who opined that the Graves Remedy Analysis was "fundamentally flawed in its construction."[148] The RD found that the Graves Remedy Analysis was "methodologically flawed" and agrees with Sierra Club witness Fisher that the Graves Remedy Analysis is "speculative"[149] Notwithstanding the determination that the entire analytical method is flawed and speculative, the RD proceeds to use that methodology, albeit with inputs used by Sierra Club witness Fisher, as the starting point for assessing the proposed remedy. It is inherently inconsistent to find that the method to calculate a remedy is flawed, but then to use that very method as the basis for developing a proposed remedy. "[A]n internally inconsistent analysis is arbitrary and capricious."[150] For these reasons, the RD's proposed remedy is arbitrary and capricious and should not be adopted.

The RD's proposed remedy is overly punitive, particularly considering that there is no evidence of any bad faith on the part of PNM in its decision to remain a participant in FCPP and given that the majority of other owners found it was reasonable to continue operating the plant. It is also important to note that there is no specific, actual alternative generation resource that has

[147] PNM BIC at 233-234.
[148] Sierra Club Ex. 2 (Fisher Sur-Reb.) 3:29-30.
[149] RD at 154.
[150] *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) (citation omitted); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (accord). New Mexico courts have applied analogous reasoning in areas outside of administrative law. *See, e.g., Gabaldon v. Erisa Mortg. Co.,* 1999-NMSC-039, ¶¶ 31-33, 39, 128 N.M. 84 (noting internal inconsistencies in Court of Appeals' analysis of negligent entrustment claim, reversing); *Macias v. Macias*, 1998-NMCA-170, ¶¶ 20-21, 126 N.M. 303 (vacating and remanding district court findings on transmutation of property based on internal inconsistencies).

been shown to be more cost-effective than FCPP. Other potential alternative resources are merely hypothetical, and they may or may not be more cost effective than FCPP, depending on whose expert is believed.

The RD discusses at length the remedy analyses conducted by the Oregon Public Utility Commission in the 2012 *PacifiCorp* cases. The remedy that was imposed in the 2012 *PacifiCorp* case was a 10% disallowance on a $170 million investment, i.e. $17 million.[151] The RD also references a case from Indiana where a $10 million disallowance was imposed on a $511 million investment where the utility had failed to properly model the investment.[152] The RD's proposed 32.4% ($84.8 million) reduction to PNM's entire net book value of FCPP is far in excess of the remedies imposed in these cases cited in the RD.

If imprudence is found by the Commission, any remedy involving a write-down of PNM's investment in FCPP should not exceed the RD's alternative remedy of the after-tax equivalent of $63.3 million or 24% of PNM's investment in FCPP.[153] While the RD recommends against this alternative because it will increase PNM's revenue requirement, this remedy more fairly reflects that reasonable investments were made to provide reliable service to customers from FCPP. It also considers the impairment imposed previously through a debt only return since 2018 on post-2015 investments.

EXCEPTION V. PORTIONS OF THE RD RELATED TO CONSTRUCTION WORK IN PROGRESS, OPERATIONS AND MAINTENANCE EXPENSES, AND PLANT DEPRECIATION ARE NOT CONSISTENT WITH THE RECORD OR PAST PRACTICE.

The following exceptions relate to the RD's determination related to CWIP for PVNGS, certain disallowances for O&M expense, and plant depreciation.

[151] RD at 38.
[152] RD at 176, n. 568.
[153] RD at 177-178.

A. The RD's Exclusion of Incorrectly Identified CWIP from the PVNGS Regulatory Asset.[154]

PNM takes exception to the RD's recommendation that PNM should not be permitted to recover CWIP associated with the $45 million in costs for the portion of the PVNGS regulatory asset for which PNM will not earn a return. PNM is not seeking to recover any CWIP as part of this $45 million. To that end, the RD states that the Hearing Examiner is aware of PNM's position that PNM is not in fact requesting CWIP as of the end of the Test Period in base rates and offers that PNM can further explain this position in exceptions to illuminate the Commission as to why Staff is incorrect as to the inclusion of CWIP in the Test Period.[155]

As a way of background, Staff witness Dasheno recommended that CWIP balances be excluded from the total undepreciated investment value of the PVNGS Unit 1 and Unit 2 regulatory assets.[156] Staff misapplies the standards in 17.9.530.13(B)(4) NMAC to PNM's rate case filing in that Staff argues that PNM was required to provide evidentiary support pursuant to Rule 530[157] Schedule (B)(4) of the CWIP amounts in the Unit 1 and 2 regulatory assets.[158] The general issue is that Staff mistakenly claims that PNM included CWIP in the Test Period. Contrary to Staff's assertions, PNM is not requesting recovery of any amount of CWIP as of the end of the Test Period in base rates.[159] The amounts that Staff refers to as CWIP are capital expenditures that PNM will have paid prior to the end of the Test Period and do not reflect any CWIP.[160]

At the hearing in this case, PNM witness Sanders was cross examined by Staff on a

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[154] Exception V.A takes exception to portion of Subsection 8.2.1 (pp. 201-12) of the RD that related to purported CWIP balances in the $96.3 million PVNGS regulatory asset at issue. PNM also incorporates by reference Subsection XVI.G.1 (pp. 281-82) of PNM's BIC and Subsection IX.G.1 (pp.143-44) of PNM's RB in response to Subsection 8.6.4 of the RD.
[155] RD at 210-11.
[156] PNM BIC at 281 (citing Staff Ex. 3 (Dasheno Dir.) 16:12-18:10 and PNM Ex. 9 (Sanders Reb.) 31:8-9.).
[157] 17.9.530 NMAC ("Rule 530").
[158] PNM Ex. 9 (Sanders Reb.) 31:13-17.
[159] 17.1.3 NMAC; *see* PNM Ex. 7 (Sanders Dir.) 20:15-18.
[160] PNM Ex. 9 (Sanders Reb.) 31:18-32:1.

workpaper that specifically referenced a PVNGS leased capacity CWIP balance. PNM witness Sanders explained why this reference is a modeling assumption and does not in fact represent any CWIP balances that PNM will seek recovery of in the Test Period as follows:

> Yes, there is a CWIP assumption, however that is assuming the amounts that were in CWIP at the time of the lease expiration are then removed out of [or credited to] Account 107 and recorded [or debited] to the Regulatory Asset of FERC Account 182. … What is included in the Test Period is the Regulatory Asset … PNM has not included CWIP in the Test Period; that is just a modeling assumption to build the value of the Regulatory Asset needed to properly reflect what is included in that Regulatory Asset as the buildup.[161]

In other words, Staff is using a workpaper that shows how the regulatory asset was derived to make an assumption that PNM is including CWIP in the Test Period; but as PNM witness Sanders explains, the amount referenced is no longer booked as CWIP in FERC Account 107 for purposes of PNM's Test Period. PNM witness Sanders further detailed why the workpaper reference to CWIP that Staff is using is just a modeling assumption and does not in fact reflect CWIP recovery in PNM's Test Period:

> When I say it is modeling, it is modeling how the accounting will actually occur upon the abandonment. On PNM's books and record, for this Unit 1, in January of 2023 when that [unit] retired, PNM would have credited plant-in-service, and then debited the Regulatory Asset for items that are included in FERC Account 101 to establish that portion of it. … PNM would then credit what was included in FERC Account 107 for CWIP, and debit the Regulatory Asset. This is purely just attempting to show the accounting of how you would build up the Regulatory Asset [that] PNM is requesting in this case, no different than clearing to plant-in-service included within our Test Period.[162]

Based on the record evidence that clarifies why Staff's assumption that PNM is seeking to recover CWIP amounts in the Test Period for the PVNGS regulatory asset is incorrect, the Commission should permit PNM to recover the full amount of the $45 million PVNGS regulatory asset at issue.

To the extent that the Commission does not permit recovery in this case of the amounts

[161] Tr. Vol. 2 (Sanders) 664:6-665:1.
[162] Tr. Vol. 2 (Sanders) 665:17-666:15.

incorrectly identified as CWIP, PNM seeks confirmation that in a future rate case, PNM can provide further explanation and evidence why these amounts do not reflect any CWIP or, alternatively, comply with the CWIP standards in 17.9.530.13(B)(4) NMAC.

B. The RD Makes a One-Sided Adjustment to PNM's Normalization of Outage Expense.[163]

PNM takes exception to the RD's recommendation to reduce PNM's outage normalization expense based on a one-sided claim from the NMAG that PNM included a large outlier to calculate a multi-year average to determine normalized maintenance outage expense.[164] To arrive at its Test Period O&M expenses, PNM normalized generation O&M costs related to baseload planned power plant outages over the six-year period of June 2016 through June 2022.[165] The NMAG argues the maintenance costs incurred at FCPP for the period July 2017-June 2018 do not appear to be representative of future operations,[166] and the RD agrees with the NMAG on this point.[167]

What the NMAG and the RD failed to address, however, is that the purpose of normalization is to smooth out the swings in maintenance costs year over year. If an outlier on the high side for July 2017 to June 2018 is meant to be modified or eliminated in the normalization calculation, so should the outlier that showed a negative outage maintenance expense of $233,936 from July 2018 through June 2019.[168] In other words, NMAG witness Crane's proposal adopted by the RD inappropriately seeks to modify the data asymmetrically. Thus, while the NMAG and RD claim PNM's calculation runs contrary to the purpose of determining normalized outage expenses, adjusting a high-side outlier while failing to adjust a low-side outlier also runs contrary

[163] Exception V.B takes exception to Subsection 8.6.4 (pp. 293-95) of the RD. PNM also incorporates by reference Subsection XI.C (pp. 93-94) of PNM's BIC and Subsection VI.G (pp. 42-43) of PNM's RB in response to Subsection 8.6.4 of the RD.
[164] NMAG/Bern Co. Brief at 64-65.
[165] PNM Brief at 93.
[166] NMAG/Bern Co. Brief at 64.
[167] RD at 293-94.
[168] PNM BIC at 94.

to the purpose of the normalization calculation based on actual, incurred expenses. The RD's recommendation should be rejected, and PNM's six-year outage normalization expense should be approved. Alternatively, the outage normalization expense should be recalculated to remove both the high-side and low-side outliers during the six-year period.

C. The RD's Modification to PNM's Group Incentive Plan Is Not Supported by Substantial Evidence in the Record.[169]

The Commission's decisions must be supported by substantial evidence.[170] "A decision is supported by substantial evidence when it is supported by evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency."[171] The Commission's decisions are arbitrary and capricious if they "provide[] no rational connection between the facts found and the choices made, or entirely omit[] consideration of relevant factors or important aspects of the problem at hand."[172]

The RD makes findings wholly unsupported by the credible evidence in the record to reduce PNM's Group Incentive Plan ("GIP") proposal to allow for only 60% recovery of the requested recovery amount. The RD bases its decision on Staff's contentions, as the RD puts it, that "the GIP is likely to be more effective if there is consequence to the company to offer the program and, thus, incentive for the company to pay the awards which would necessarily mean the employees are exceeding work expectations."[173] However, there is no evidence in the record for Staff or the RD to conclude PNM has not paid out incentives during the past several years. Nor

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[169] Exception V.C takes exception to Subsection 8.6.6.5 (pp. 301-04) of the RD. PNM also incorporates by reference Subsection XI.G.5 (pp.106-09) of PNM's BIC and Subsection VI.M (pp. 57-61) of PNM's RB in response to Subsection 8.6.4 of the RD.

[170] *Citizens for Fair Rates v. N.M. Pub. Regul. Comm'n*, 2022-NMSC-010, ¶12, 503 P.3d 1138 (citing *New Energy Econ., Inc. v. N.M. Pub. Regul. Comm'n*, 2018-NMSC-024, ¶ 24, 416 P.3d 277).

[171] *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-015, ¶ 8, 450 P.3d 393 (citing *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2007-NMSC-053, ¶ 24, 142 N.M. 533).

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

[173] RD at 302-303.

is there evidence that the GIP is *not* effective or is somehow "likely" to be more effective under the terms of the RD.

Staff witness Mauldin based his allegations of the GIP's ineffectiveness on the assertion that there is not a positive correlation between increased GIP spending and voluntary employee turnover, and speculates the program is not successful.[174] At hearing, however, Staff witness Mauldin admitted that during the two years of data he relied on to assert the program was not successful, 2021 and 2022, employee turnover was heavily affected by the pandemic and nationwide recruiting that favored fully remote work policies.[175] Staff witness Mauldin failed to consider the relevant and important evidence that COVID impacted the employee turnover nationwide, and failed to refute PNM witness Pino's explanation of pandemic-related employee turnover in both her direct and rebuttal testimonies.[176] By its own admission, Staff's analysis did not make adjustments in the assessment of the success of the GIP to account the effect of the pandemic and remote work in 2021 and 2022,[177] and thus, Staff witness Mauldin's "correlation" resulting from that analysis simply cannot be relied upon. Incomplete analysis is not credible evidence, and relying on such incomplete evidence is arbitrary and capricious. Weighing this against PNM witness Pino's testimony explaining that employee turnover increased at PNM as well as nationwide directly due to the COVID pandemic, there is no adequate basis for the RD to conclude the GIP is not effective in helping recruit and retain employees.

For similar reasons, the RD's findings that "Staff does not expressly say so, but is implicitly arguing that the GIP will be more effective if the company itself experiences consequence for

[174] Staff Ex. 4 (Mauldin Dir.) 15:11-19:18; *see* PNM's BIC at 107.
[175] Tr. Vol. 11 (Mauldin) 2849:16-2851:2; *see* PNM BIC at 107.
[176] PNM Ex. 26 (Pino Dir.) 10:1-9; PNM Ex. 28 (Pino Rebuttal) 4:1-5.
[177] Tr. Vol 11 (Mauldin) 3850:16-3851:2.

offering the awards and penalty if the awards are not distributed" should be rejected. [178] There is no credible basis—implicit or otherwise—for the Commission to find that the GIP will be, or needs to be, more effective if PNM is not allowed to recover the program's costs. The Commission must base its decisions on the record evidence, not implications or evidence that omits key factual considerations.[179]

Staff's stated concern is that "[i]f employee groups fail to meet the necessary criterion to receive the at risk pay provided by the GIP, the Company will not pay these amounts, but will, regardless, be collecting the requested amount through rates."[180] The RD adopts that concern, stating "[i]f the GIP program is just a guaranteed stream of payments from ratepayers that need not ever be distributed, there is not financial incentive for PNM to ensure the program is effective."[181] Neither Staff nor the RD address PNM's substantial evidence that PNM does not have discretion regarding distribution of the GIP payments when goals are met. PNM witness Pino made clear that while the overall amount of the GIP pool is at management's discretion, "individual payments from the overall pool are based on a defined calculation and are not discretionary."[182] Moreover, no party showed or claimed that PNM's employees are not meeting the GIP criteria such that no employees could receive the GIP payments. Further, the evidence shows that the requested incentive amount reflects actual incentive payouts to employees over the past several years.[183] The evidence shows that the RD's finding that GIP payments "need not ever be distributed"[184] is simply not true. For these reasons, the Commission should reject the RD's recommendation to reduce PNM's GIP request.

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[178] RD at 303.
[179] *Citizens for Fair Rates*, 2022-NMSC-010 ¶ 12, 503 P.3d 1138.
[180] Staff Ex. 4 (Mauldin Dir.) at 18:9-11.
[181] RD at 303.
[182] PNM Ex. 28 (Pino Rebuttal) 3:13-14.
[183] PNM Ex. 26 (Pino Dir.) 17:11-13, 20:4-8; PNM Ex. 28 (Pino Rebuttal) 5:16-20.
[184] RD at 303.

D. The RD's Rejection of PNM's Proposal to Accelerate Depreciation of Certain Natural Plants to Align with the Expected Service Life of the Plants is Inconsistent with a Recent PRC Decision and the Energy Transition Act.[185]

PNM takes exception to the RD's denial of PNM's request to accelerate depreciation of its Afton, La Luz, Lordsburg, and Luna natural gas plants on the basis that accelerated depreciation should be considered as part of a plant abandonment and replacement resource request.[186] By contrast, the Commission just approved a Certification of Stipulation ("Certification") for SPS that accelerated depreciation for one coal and five natural gas units without a corresponding abandonment and replacement resource application.[187] Two central themes emerged from the Certification's recommendation to accelerate depreciation for SPS's carbon-based units. First, the Certification indicated that accelerated depreciation was more palatable given the "reduced revenue requirement increase as compared to SPS's as-filed case."[188] Second, the Certification noted NMAG witness Crane's testimony that "the stipulated depreciation rates will facilitate the transition to carbon-free, which is reasonable given the ETA's requirements."[189]

The RD is inconsistent with the Commission's recent SPS decision on accelerated fossil fuel plant retirements. First, that Certification did not require as a condition precedent to approving accelerated depreciation an abandonment and replacement resources case for each of the coal or gas units at issue. Second, as was the case for SPS, PNM's revenue requirement has been significantly reduced compared to its as-filed case. Finally, accelerated depreciation of PNM's

[185] Exception V.D takes exception to Subsection 8.6.6.5 (pp. 301-04) of the RD. PNM also incorporates by reference Subsection XI.G.5 (pp.106-09) of PNM's BIC and Subsection VI.M (pp. 57-61) of PNM's RB in response to Subsection 8.6.4 of the RD.
[186] RD at 315 ("The Commission must of course consider those concerns and would be in a far better position to do so if it had a clearer understanding about abandonment of the gas plants and what replacement resources will fill the generation gap when they are abandoned.").
[187] Case No. 22-00286-UT, *Certif. of Stip.*, at 63-65 (NMPRC Sept. 6, 2023), approved by *Final Order Adopting Certif. of Stip.* (NMPRC Oct. 19, 2023).
[188] Case No. 22-00286-UT, *Certif. of Stip.*, at 64.
[189] Case No. 22-00286-UT, *Certif. of Stip.*, at 64.

carbon-emitting gas units is in line with the ETA deadline to transition to carbon free generating units.

PNM requests that, consistent with the SPS decision, the Commission reject the RD's recommendation to deny accelerated depreciation for the Afton, La Luz, Lordsburg, and Luna natural gas plants.

E. The RD's Modified Non-Labor Escalation was Not Carried Through for Revenue Credits.

While PNM is not taking exception to the RD's proposed modifications to PNM's non-labor escalation factor,[190] PNM wishes to call the Commission's attention to an incongruence between Appendix D to the RD and the RD's determination that the modified non-labor escalation should apply to revenue credits.[191] Appendix D does not apply the modified non-labor escalation to revenue credits consistent with the RD. As such, when PNM makes its compliance filing based on a final Commission order, this RD finding should also be implemented for revenue credits.

EXCEPTION VI. THE RD'S RECOMMENDATION TO CONTINUE PROCEEDINGS ON BANDING AND THE CUSTOMER CHARGE WILL LIKELY BE CONFUSING TO CUSTOMERS WILL RESULT IN ADDITIONAL RATE CHANGES.[192]

PNM takes exception to the RD's recommendation to maintain the currently applicable banding and customer charge for each rate class, and to hold supplemental proceedings to determine new levels of banding and applicable customer charges based on the evidence in this case.[193] The RD's recommendation will result in imposing two separate and potentially confusing back-to-back rate changes on customers: one implementing the new revenue requirement and at least some rate design, and another implementing any changes from modifications to banding and

[190] *See* Subsection 8.6.1 of the RD.
[191] RD at 290.
[192] Exception VI takes exception to Subsections 8.9.2 and 8.9.3 (pp. 331-34) of the RD. PNM also incorporates by reference Subsections XVII.D. and XVIII.E.2 (pp. 319-28) of PNM's BIC and X.C.1 and X.D (pp. 146-47 and 158-63) of PNM's RB in response to Subsection 8.4.1 of the RD.
[193] RD at 331-34.

the customer charge. While PNM understands the Hearing Examiner's logic to determine certain rate design elements after the revenue requirement is determined, PNM cannot support unnoticed supplemental proceedings that do not result in final rates within the statutory timeframe, or a result that has no basis in the already completed record in this case. Post-final order changes to the customer charge and banding will have both intra-class and inter-class rate impacts: customers in the same customer class, as well as customers in different customer classes, will see higher or lower rates stemming from any supplemental changes to banding and the customer charge. Moreover, changes to banding and customer charges may have other unforeseen impacts on overall rate design, but the RD does not move all rate design issues to supplement proceedings.

PNM requests that the Commission finalize rates now to avoid potential confusion and a second round of rate changes for customers. The Commission should either adopt the currently applicable banding and customer charges or consider the evidence in this case now and include a determination in its final order of these "reserved" issues. PNM believes that the record supports adoption of its rate design in this case, including PNM's proposed customer charges. PNM takes exception to and does not support supplemental proceedings to revise banding and customer charges.

CONCLUSION

Based on the facts in evidence and the legal arguments presented in PNM's briefs, PNM respectfully requests that the Commission grant PNM's Exceptions.

Dated this 15th day of December, 2023.

PUBLIC SERVICE COMPANY OF NEW MEXICO
/s/ Stacey Goodwin

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GCG#531878

Exhibit A

Is contained in the following 1 page.

Summary of Impacts for PNM Exceptions

Test Period Description	Non-Fuel Revenue Requirement	Fuel Revenue Requirement	Total Retail Revenue Requirement
As Filed Test Period - PNM Retail	**790,979,680**	**120,150,430**	**911,130,110**
Total Recommended Decision Adjustments:	**(58,075,124)**	**-**	**(58,075,124)**
Recommended Decision Revenue Requirement	**732,904,556**	**120,150,430**	**853,054,986**
PNM Exceptions			
PNM Exception 1 - Capital Structure @ 52% Equity	5,330,542	-	5,330,542
PNM Exception 2 - ROE @ 9.575%	5,643,470	-	5,643,470
PNM Exception 3 - Reject PVNGS Regulatory Liability	7,716,494	-	7,716,494
PNM Exception 4 - FCPP Imprudence Remedy $63.3M	1,889,688	-	1,889,688
PNM Exception 5A - PVNGS Regulatory Asset to Include CWIP	1,043,002	-	1,043,002
PNM Exception 5B - O&M (Four Corners Outage Normalization)	1,399,928	-	1,399,928
PNM Exception 5C - O&M (Business Unit Group Incentive Plan)	1,833,448	-	1,833,448
PNM Exception 5D - Depreciation on PNM Gas Plants	2,482,954	-	2,482,954
PNM Exception 5E - Non-Labor factor applied to revenue credits	372,392	-	372,392
Total Impact of PNM Exceptions	**27,711,918**	**-**	**27,711,918**
Revenue Requirement with PNM Exceptions	**760,616,474**	**120,150,430**	**880,766,904**

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 Exceptions to December 8, 2023 Recommended Decision** was emailed to parties listed below on December 15, 2023.

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Dated this 15th day of December, 2023.

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