

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**No. S-1-SC-40332**

**PUBLIC SERVICE COMPANY OF NEW MEXICO,**

**Appellant,**

**v.**

**NEW MEXICO PUBLIC REGULATION  
COMMISSION,**

**Appellee.**

**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,  
NMPRC Case No. 22-00270-UT**

**PUBLIC SERVICE COMPANY OF NEW MEXICO'S  
BRIEF IN CHIEF**

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## **RULE 12-318(G) NMRA STATEMENT OF COMPLIANCE**

The body of this Brief in Chief uses a proportionally-spaced typeface (Times New Roman), contains 8,643 words, as counted by Microsoft Word for Microsoft 365 MSO, and thus complies with the limitations of Rule 12-318(F)(3) NMRA.

## I. INTRODUCTION

This appeal presents a single issue. In the ratemaking case below, the New Mexico Public Regulation Commission (“NMPRC” or “Commission”) erred by imputing a capital structure to Appellant, Public Service Company of New Mexico (“PNM” or “Company”), rather than using PNM’s actual capital structure as the Commission has done in the past. That decision harms PNM because it means PNM will not have a reasonable opportunity to earn a fair return on the equity invested in the utility. At a time when investment is crucial both to ensure reliability and achieve the goals of the Energy Transition Act (NMSA 1978, §§ 62-18-1 through -23 (2019, as amended through 2023)), the Commission’s decision is not only erroneous, it sends a counterproductive message to investors who have many choices in competitive capital markets regarding the Commission’s willingness to depart from its prior practice, without advance notice, and contrary to this Court’s precedent.

PNM requests that the Court vacate the Commission’s decision to apply an imputed capital structure because that determination violated PNM’s due process and was arbitrary and capricious. The decision should be reversed and remanded to the Commission for the limited purpose of correcting this error.

PNM is a public utility whose electric utility rates and services are regulated by the NMPRC under the Public Utility Act, NMSA 1978, Sections 62-1-1 to 62-13-15 (1941 as amended through 2019) (“Act”). Like other utilities, PNM periodically

petitions the Commission for approval to change the rates that PNM charges its customers for electric service.<sup>1</sup> In a ratemaking proceeding, PNM bears the burden of showing that the proposed rate is “just and reasonable.”<sup>2</sup>

The Commission sets new rates based on the utility’s typical ongoing costs for running the Company and providing electric service, together with a reasonable return on the investments the utility makes in its plant, equipment and facilities over time. The reasonable return is based in part on a specific capital structure, which is the combination of long-term debt and equity the utility uses to fund its operations. These combined total costs, including the reasonable return on investment, are used to set rates. The Commission may approve rates within “a significant zone of reasonableness in which rates are neither ratepayer extortion nor utility confiscation.”<sup>3</sup>

The Commission’s Final Order<sup>4</sup> partially adopted the *Recommended Decision* (“RD”), issued by the designated Hearing Examiners on December 8, 2023. The

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<sup>1</sup> NMSA 1978, § 62-8-7 (2011).

<sup>2</sup> *See id.*

<sup>3</sup> *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm’n*, 2019-NMSC-012, ¶ 10 (internal quotations and citation omitted).

<sup>4</sup> **[58 RP 43869-43949]** (including Notice of Errata).



Final Order and RD reflect the Commission’s evaluations of myriad positions and evidence from a range of parties with disparate interests.<sup>5</sup>

Although the Commission attempted to balance the interests of consumers and investors on many of the contested issues below, the determination on PNM’s capital structure does not do so. The Commission’s decision to impute a capital structure for PNM failed to follow the Commission’s own past practices and caused unfair surprise. While the Commission has broad ratemaking discretion, that discretion must be exercised in light of its past practices. In this instance, the Court should hold that the Commission’s decision to impute a capital structure was without regard for PNM’s due process rights and was an arbitrary and capricious departure from its long-standing approach to setting a capital structure. PNM asks the Court to vacate and annul the Final Order as unlawful as to this single issue.

## **II. SUMMARY OF PROCEEDINGS**

### **A. NATURE OF THE CASE**

This is a direct appeal, pursuant to NMSA 1978, Section 62-11-1 (1993) and Rules 12-102(A)(2) and 12-601 NMRA, of the Commission’s decision on PNM’s

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<sup>5</sup> Separate appeals were filed by New Energy Economy, the Albuquerque Bernalillo County Water Utility Authority (“ABCWUA”), the New Mexico Department of Justice (“NMDOJ”) and the County of Bernalillo (“Bernalillo County”) and consolidated by the New Mexico Supreme Court in Docket No. S-1-SC-40307, to which PNM is an Appellee-Intervenor.

Application for Revision of Retail Electric Rates (NMPRC Case No. 22-00270-UT) (“Application”).

## **B. COURSE OF PROCEEDINGS**

PNM filed its Application for new rates pursuant to Section 62-8-7 of the Act on December 5, 2022.<sup>6</sup> The Commission set a procedural schedule, and numerous parties timely intervened.<sup>7</sup> After holding public comment hearings in August 2023, the designated Hearing Examiners conducted an evidentiary hearing on the merits of the Application from September 5 to September 22, 2023.<sup>8</sup> On December 8, 2023, the Hearing Examiners issued their RD to the Commission,<sup>9</sup> to which parties filed exceptions and responses.<sup>10</sup> The Commission issued its *Final Order* setting new rates for PNM on January 3, 2024. PNM and other parties moved for rehearing, but the NMPRC did not act on the rehearing requests; thus, the rehearing requests were deemed refused under NMSA 1978, Section 62-10-16 (1941).

### **1. Overview of Rate Terminology Relevant to Appeal**

A rate case examines a utility’s current costs of providing electricity to customers over the course of a year, so that the Commission can set rates that will

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<sup>6</sup> [58 RP 43875]

<sup>7</sup> [58 RP 43876]

<sup>8</sup> [58 RP 43876-43877]

<sup>9</sup> [57 RP 42657-43040]

<sup>10</sup> [58 RP 43877]

collect an annual revenue requirement reflective of those costs.<sup>11</sup> The process begins with a baseline of recent annual costs, referred to as the Base Period. The Base Period sets out 12 months of a utility’s actual expenses and investments from the Company’s books and records. The Base Period must end no sooner than four months before the filing date of a rate case to ensure this historical data is not stale.<sup>12</sup>

To reflect the ongoing annual costs of providing utility service for a “typical” 12-month period, a rate case next develops a test year period on which new rates are set. There are two types of test year periods: a Historical Test Year Period and a Future Test Year Period, which PNM has used for its last three rate cases. The Historical Test Year Period covers the same 12-month period as the Base Period, with known and measurable changes to the historical financial data. This a “backward” rather than “forward” look at the ongoing costs of running the utility. The second type of test year period—the Future Test Year Period—rolls the utility’s financial data forward to reflect the expected expenses and investments for the first year that the new rates are in effect.<sup>13</sup> The Future Test Year Period reflects the legislative directive for ratemaking found in Section 62-6-14(D) (2009):

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<sup>11</sup> See NMSA 1978, § 62-8-7 (2011).

<sup>12</sup> “‘Base Period’ means the applicant utility’s twelve (12) consecutive months of actual experience as reflected on the book balance of accounts, the last day of which shall not be more than one hundred fifty (150) days prior to the date of tender for filing.” 17.9.530.7(F) NMAC.

<sup>13</sup> See 17.1.3.7(G) NMAC (defining “future test year period” as starting no later than 13 months from rate case filing date).

The commission shall set rates based on a test period that the commission determines best reflects the conditions to be experienced during the period when the rates determined by the commission take effect. If a future test period is proposed, the commission shall give due consideration that the future test period may best reflect those conditions.

Another key component of setting new rates is a utility's capital structure. Utilities fund their operations and investments through a combination of debt and equity. A balanced capital structure is important for a utility to maintain favorable access to funds in the financial markets.<sup>14</sup> In a rate case, utilities use the capital structure to calculate their weighted average cost of capital. This overall cost of capital is based on the average of the long-term cost to borrow money and the return on equity that investors reasonably expect to earn on their investment in the utility. Beginning with the capital structure at the end of the Base Period, the Commission examines equity and debt adjustments in the rate case financial information (known and measurable changes), and ultimately establishes a capital structure for ratemaking purposes for the test year period (whether historical or future).

## **2. Summary of Facts Relevant to this Appeal**

The start of PNM's Future Test Year Period in the Application below is the beginning of calendar year 2024, to coincide with the effective date of new rates

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<sup>14</sup> Cf. NMSA 1978, § 62-3-1(B) (2008) (Commission to regulate to encourage and attract capital and investment for utility plant and operations).

beginning in January 2024. As required by Commission rule, PNM supported its Application with financial data on its actual capital structure at the end of the Base Period, along with accounting data and known or measurable changes to its books and records for the period of time between the Base Period and the Future Test Year Period. PNM used this information to present its proposed capital structure for the Future Test Year Period. As required by the Commission's rules, PNM also provided comparable data on its projected capital structure for two subsequent years.<sup>15</sup> PNM then used the respective long-term debt and equity ratio in its Future Test Year Period, times its cost of long-term debt and proposed return on equity, to calculate its weighted average cost of capital.

Since 2020, PNM has maintained a capital structure of approximately 48% long-term debt and 52% equity.<sup>16</sup> PNM's actual capital structure as of June 30, 2022 (the end of the Base Period) was 47.62% long-term debt, 52.07% common equity, and 0.31% preferred stock.<sup>17</sup> PNM requested that the Commission approve PNM's capital structure as of the end of the Test Period: 47.71% long-term debt, 52%

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<sup>15</sup> See 17.1.3.16(D)(1), (2) and (4) NMAC (cost of capital information to be provided for base period, linkage data and future test year period, as well as comparable data for two subsequent years, with equity and debt amounts for future test year period to be based on an average calculated in the same manner as the rate base); *see also* 17.9.530.13(A)(5) NMAC.

<sup>16</sup> [9 RP 04871; 54 RP 40392; 57 RP 43207]

<sup>17</sup> [9 RP 04871; 57 RP 43207]

common equity and 0.29% preferred stock,<sup>18</sup> slightly less than and consistent with the Company’s actual capital structure in the Base Period.<sup>19</sup>

At hearing, other parties took various positions regarding the capital structure to be used in setting rates, with the proposed equity ratios summarized in the following table:

<b>Party</b>	<b>Time Period</b>	<b>Capital Structure</b>	<b>Basis</b>	<b>Record Proper</b>
PNM	2022-2024	52% equity 48% long term debt	Actual	<b>[54 RP 40392; 57 RP 43207; 9 RP 04871; 26 RP 17844-17845]</b>
	Base Period (June 2022)	52.07% equity 47.62% long term debt	Actual	<b>[9 RP 04871; 57 RP 43207]</b>
	Test Period (calendar 2024)	52% equity 47.71% long term debt		<b>[9 RP 0487; 26 RP 17844-45]</b>
Staff	FTY Period (calendar 2024)	52% equity 47.71% long term debt	Actual	<b>[19 RP 12525-12526]</b>
NMDOJ	FTY Period (calendar 2024)	52% equity 47.71% long term debt	Actual	<b>[19 RP 12281-12282, 12309]</b> (position taken in testimony)

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<sup>18</sup> Preferred stock is an immaterial portion of the capital structure. All parties and the Commission used PNM’s preferred stock percentage of 0.29% in their Future Test Year Period capital structure. *See* **[58 RP 44241]**

<sup>19</sup> **[9 RP 04871; 26 RP 17844-17845]**

<b>Party</b>	<b>Time Period</b>	<b>Capital Structure</b>	<b>Basis</b>	<b>Record Proper</b>
	2015-2016	49.61% equity 50% long term debt	Prior rate case	<b>[55 RP 40776-40778]</b> (position taken post-hearing)
BernCo	2015-2016	49.61% equity 50% long term debt	Prior rate case	<b>[21 RP 14231; 55 RP 40776-40778]</b>
NM AREA	2015-2016	49.61% equity 50% long term debt	Prior rate case	<b>[54 RP 40059, 40076-40077]</b> (position taken in briefing)
	March 31, 2023	49.31% equity	Debt ratio included short-term debt	<b>[20 RP 13021; 26 RP 17847-17848; 57 RP 42944-42945]</b> (comparison at hearing)
RD and Final Order	2015-2016	49.61% equity 50% long term debt	Imputed prior rate case	<b>[57 RP 42948, 44241; 58 RP 43908-43914]</b>

PNM rebutted the parties' proposals and explained why the Commission should adopt PNM's proposed capital structure.<sup>20</sup>

Without prior notice, the RD sharply departed from the Commission's past practice of using a utility's actual capital structure, instead recommending that the

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<sup>20</sup> **[54 RP 40392-40397; 55 RP 40976-40983]**

Commission impute a capital structure that reduces the percentage of equity. While the RD conceded that “the Commission has relied on a utility’s actual capital structure” as adjusted for known and measurable changes for that utility’s test period, it recommended against doing so for PNM because “it is unclear how this pronouncement should guide the present case” since PNM used a Future Test Year Period.<sup>21</sup>

The RD found it significant that three intervenors advocated for leaving PNM’s capital structure at a debt/equity ratio based on evidence taken in PNM’s prior rate case that was filed seven years prior to the filing of the Application in this case.<sup>22</sup> Agreeing with certain intervenors’ claims that PNM organized itself to mitigate risk considerably,<sup>23</sup> the RD also found that PNM’s risk profile merits a decrease from its actual equity ratio.<sup>24</sup>

The Hearing Examiners recommended the Commission impute a capital structure for PNM’s 2024 rates using a ratio of 50.10% long-term debt and 49.61%

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<sup>21</sup> [57 RP 42946]

<sup>22</sup> [57 RP 42946-42947]. To set the capital structure for 2024 rates, the Hearing Examiners recommended that the Commission rely on financial data that was used in the rate case PNM filed in 2016. *See In the Matter of Pub. Serv. Co. of N.M.*, NMPRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, ¶ 10 at 3 (Jan. 1, 2018).

<sup>23</sup> [57 RP 42947]

<sup>24</sup> *Id.*



equity.<sup>25</sup> This abrupt departure from past practice lowers PNM’s equity ratio in its capital structure by 200 basis points or 2%.

### **3. Disposition Below**

On January 4, 2024, over PNM’s exceptions,<sup>26</sup> the Commission issued its *Final Order*,<sup>27</sup> adopting the Hearing Examiners’ recommended capital structure.<sup>28</sup> The Commission found the Hearing Examiners’ rationale for significantly reducing PNM’s equity ratio to be reasonable.<sup>29</sup> The *Final Order* specifically determined that evaluation of PNM’s actual capital structure subject to “known and measurable” changes did not apply because the “‘known and measurable’ standard for evaluating a utility’s actual capital structure is premised on a base period and a historical test year rather than a future test year.”<sup>30</sup> Both the RD and Final Order, however, ignore that PNM’s Future Test Year Period capital structure essentially matched the actual historical Base Period. Additionally, while neither the RD nor the Final Order makes any express finding regarding PNM’s actual equity ratio,<sup>31</sup> they ignore the Commission’s long-standing practice of excluding short-term debt from the

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<sup>25</sup> [57 RP 42948].

<sup>26</sup> [57 RP 43205-43210]

<sup>27</sup> [58 RP 43401-43867]

<sup>28</sup> [58 RP 43908-43914]

<sup>29</sup> [58 RP 43913; 57 RP 42948]

<sup>30</sup> [58 RP 43911-43912]

<sup>31</sup> [57 RP 42946-42948; 58 RP 43911-43914]

calculation of long-term debt by crediting intervenor testimony that PNM’s “actual” equity ratio should be 49.31% rather than 52%.<sup>32</sup> The Commission offered no reasonable explanation for deviating from its long-standing practices.

The Commission’s 2% reduction to equity by imputing a 49.61% equity ratio operates to reduce PNM’s earnings across the board: the imputed equity ratio lowers the weighted average cost of capital and thereby reduces PNM’s overall rate of return authorized by the Commission. As result, potential lenders and investors view PNM as actually earning a significantly lower rate of return on equity than is authorized.

### III. ARGUMENT

#### A. SUMMARY OF ARGUMENT

While the Commission has broad discretion in exercising its ratemaking authority, that discretion is not unlimited:

The [Commission] is bound by, and limited to, its existing rules and regulations, proper application of the law, compliance with the constitutional mandate, and by previously established methods of ratemaking, absent a change in circumstances peculiar to the company and the pending case, making it necessary that there be a departure from established method.<sup>33</sup>

This Court has determined that the Commission “is not free to disregard its own rules and prior ratemaking decisions” or “to change its position without good cause

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<sup>32</sup> [26 RP 17847-17848; 58 RP 43912]

<sup>33</sup> *Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n*, 1993-NMSC-032, ¶ 8, 115 N.M. 678 (quoting *In re Gen. Tel. Co. of Sw.*, 1982-NMSC-106, ¶ 29, 98 N.M. 749).

and prior notice to the affected parties,”<sup>34</sup> but the Commission did just that—ignoring its own practice and procedure to impute a lower equity ratio. The Commission erred in three significant ways by imputing a capital structure to set PNM’s new rates.

First, the Commission violated PNM’s due process rights by departing from long-standing practices and procedures without notice, resulting in unfair surprise to the detriment of investors. The record and Commission decision do not reflect changed circumstances necessitating the rejection of the Commission’s past reliance on an actual capital structure for ratemaking purposes in favor of imputing a capital structure from past proceedings. Second, the Commission’s deviation from its “known and measurable” standard of ratemaking, in the absence of changes in circumstances peculiar both to PNM and this particular case, is contrary to this Court’s precedent in rate cases, and thus is arbitrary and capricious. Finally, the Commission’s decision is out of step with the State’s energy policies, which require PNM to attract increasing and significant capital to fund system investments for the energy transition.

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<sup>34</sup> *In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 9, 129 N.M. 1 (quoting *Hobbs Gas Co.*, 1993-NMSC-032, ¶ 12).

## B. STANDARD OF REVIEW AND PRESERVATION

The Court reviews the Commission’s rate decisions “to decide whether they are arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency’s authority, or otherwise inconsistent with law, with the burden on the appellant to make this showing.”<sup>35</sup>

Constitutional issues, including due process challenges, are questions of law subject to *de novo* review.<sup>36</sup>

Under an arbitrary and capricious review, this Court determines whether the decision was unreasonable or without a rational basis, when viewed in light of the whole record.<sup>37</sup> An agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.<sup>38</sup>

On questions of fact, the Court will not reweigh the evidence, but does look to the record as a whole to determine whether substantial evidence supports the

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<sup>35</sup> *Citizens for Fair Rates & Env. v. N.M. Pub. Regul. Comm’n* (“CFRE”), 2022-NMSC-010, ¶ 12.

<sup>36</sup> *Cordova v. LeMaster*, 2004-NMSC-026, ¶ 10, 136 N.M. 217 (“Claims involving the denial of procedural due process are questions of law, which we review *de novo*.”).

<sup>37</sup> *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 16.

<sup>38</sup> *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm’n*, 2019-NMSC-015, ¶ 8 (“NMIEC 2019”).

Commission’s decision.<sup>39</sup> For a decision to be based on substantial evidence, the evidence relied on by the Commission must be “credible in light of the whole record and . . . sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.”<sup>40</sup> Where the Commission departs from its past practice and policy, there must be adequate prior notice and substantial evidence of changed circumstances to do so.<sup>41</sup>

PNM offered both evidence and argument on its capital structure below, including in its exceptions to the RD, preserving the issue for this appeal.<sup>42</sup>

**C. THE COMMISSION VIOLATED PNM’S DUE PROCESS RIGHTS BY DEPARTING FROM PAST PRACTICE AND POLICY WITHOUT NOTICE OR A SHOWING OF CHANGED CIRCUMSTANCES.**

The Commission violated PNM’s due process rights by deviating from its past practice and policy without prior notice to PNM; this unfair surprise detrimentally affects PNM and its investors. To the extent that PNM must operate at a capital structure that is higher than approved for ratemaking, PNM does not earn a return on that difference, thus requiring PNM to recover any costs expended above the approved equity ratio at the lower rate applicable to long-term debt.

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<sup>39</sup>*N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm’n*, 2007-NMSC-053, ¶ 24, 142 N.M. 533; *CFRE*, 2022-NMSC-010, ¶ 13.

<sup>40</sup> *CFRE*, 2022-NMSC-010, ¶ 13.

<sup>41</sup> *Hobbs Gas Co.*, 1993-NMSC-032, ¶¶ 7-9 (citation omitted).

<sup>42</sup> [54 RP 40392-40397; 55 RP 40976-40983; 57 RP 43205-43210]

“The right to *prior* notice and a hearing is central to the Constitution’s command of due process.”<sup>43</sup> An agency is not permitted to make “opportunistic changes in ratesetting methodologies just to minimize return on capital investment . . . ,”<sup>44</sup> and utilities must be provided with an opportunity to to earn a fair return on its investment.<sup>45</sup> The Court has consistently applied this principle in reviewing Commission decisions, and the “Commission may not depart from past practice and policy without notice “absent a change in circumstances peculiar to the company and the pending case, making it *necessary* that there be a departure from established method.”<sup>46</sup> This Court recently vacated the Commission’s refusal to approve a known and measurable change to El Paso Electric Company’s (“EPE”) actual capital structure that EPE included in its Historical Test Year Period that occurred nine months after the end of EPE’s Base Period.<sup>47</sup> In the EPE rate case, the

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<sup>43</sup> *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (emphasis added).

<sup>44</sup> *Verizon Comms. v. F.C.C.*, 535 U.S. 467, 527 (2002); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989) (“[A] State’s decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.”).

<sup>45</sup> *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n of West Virginia*, 262 U.S. 679, 692 (1923); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944); *City of Charlottesville v. FERC*, 774 F.2d 1205, 1207 (D.C. Cir. 1985).

<sup>46</sup> *Hobbs Gas Co.*, 1993-NMSC-032, ¶ 8 (citation omitted) (emphasis added).

<sup>47</sup> *El Paso Elec. Co. v. N.M. Pub. Regul. Comm’n*, \_\_\_-NMSC-\_\_\_, 2023 WL 3166936, ¶¶ 19, 21-23 (No. S-1-SC-38874, May 1, 2023) (non-precedential decision).

Commission decided the known capital structure change was “too remote” and concluded that excluding the change was “a better result for ratepayers as it leads to a lower revenue requirement and lower rates.”<sup>48</sup> In the *EPE* appeal, the Court held that although the Commission has broad discretion to impute a capital structure, “the PRC’s adoption of a new six-month rule in the final order violated due process, when no party presented evidence or argued in favor of such a rule at any point in the proceedings.”<sup>49</sup> The Court specifically noted that a change to past practices or procedures requires substantial evidence that justifies such a change.<sup>50</sup>

In this case, the Commission imputed a reduced equity well below PNM’s actual capital structure, based on the surprising declaration that the established known and measurable standard use to set the utility’s test period capital was inapplicable in Future Test Year Period rate cases. This declaration is despite the Commission having applied this standard to set PNM’s capital structure in two previous PNM Future Test Year Period rate cases, and despite the fact that PNM’s actual capital structure in its Future Test Year Period nearly exactly matches the capital structure of PNM’s historical Base Period.

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<sup>48</sup> *In the Matter of El Paso Electric Co.*, NMPRC Case No. 20-00104-UT, *Order Adopting Recommended Decision with Modifications*, ¶¶ 85-86 at 29-30 (June 23, 2021).

<sup>49</sup> *El Paso Elec. Co.*, 2023 WL 3166936, ¶ 23 (non-precedential decision).

<sup>50</sup> *Id.*

The Commission also applied new or previously rejected concepts for setting a capital structure for ratemaking purposes, all without explaining why the circumstances in PNM’s case specifically required these departures from past ratemaking practices. In contrast, the Commission has always been clear in PNM’s prior rate cases—including cases using a Future Test Year Period—that an actual capital structure subject to certain known and measurable changes will be applied.

The Commission further has explicitly rejected arguments seeking to reduce PNM’s equity ratio by including short-term debt in calculating the long-term debt/equity ratio. In PNM’s 2015 Future Test Year Period rate case, the Hearing Examiners rejected Staff’s argument for including term loan debt in the capital structure calculation, because it is classified as short-term debt under the Act, concluding: “Staff presents no compelling argument for changing the PRC policy of relying on the actual percentages of debt and equity for regulatory purposes at the end of the Test Period.”<sup>51</sup>

Rejecting PNM’s actual capital structure in favor of a new regulatory standard or rule violates PNM’s due process rights, in that PNM had no way of knowing that the Commission would impute a regulatory capital structure using standards that

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<sup>51</sup> *In the Matter of Pub. Serv. Co. of N.M.*, NMPRC Case No. 15-00261-UT, *Corrected Recommended Decision*, at 30-31 (Aug. 15, 2016) (quoting *2015 EPE Rate Case*), approved by *Final Order Adopting Corrected Recommended Decision* (Sept. 28, 2016). **[57 RP 43206]**



deviate from prior Commission practice.<sup>52</sup> In order to deviate from past practice and policy in a rate case, the Commission must provide prior notice to a prospective change in its policy, or substantial evidence of changed circumstances that allow for a departure from past practices.<sup>53</sup> Similarly, the Commission cannot arbitrarily switch ratemaking methodologies to the detriment of investors without implicating the constitutional rights of the utility.<sup>54</sup>

In this case, the Commission does not cite to substantial evidence of a change in circumstances that would warrant a departure from the use of PNM’s actual capital structure at the end of the Future Test Year Period, other than its mistaken belief that it had not applied the “known and measurable” standard in such cases previously. Nor was there an explanation for the arbitrary switch to an imputed capital structure that does not reflect current financial information for calculating the equity ratio when setting rates for the applicable Future Test Year Period. Finally, the Commission does not explain why it implicitly departed from its past methodology that expressly excluded short-term debt when calculating PNM’s capital structure.

Instead, the Final Order justifies its deviation from precedent on the speculative concern that if the Commission always had to apply a utility’s actual capital structure subject to known and measurable changes, a utility could engage in

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<sup>52</sup> *El Paso Elec. Co.*, 2023 WL 3166936, ¶¶ 22-23.

<sup>53</sup> *Hobbs Gas Co.*, 1993-NMSC-032, ¶¶ 8-9, 115 N.M. 678.

<sup>54</sup> *Verizon Comms.*, 535 U.S. at 527; *see also Duquesne*, 488 U.S. at 315.

“unwise business practices that result in a heavily imbalanced debt/equity ratio that would harm ratepayers.”<sup>55</sup> No evidence supported this supposition, and the Commission did not find that it believes PNM’s debt/equity ratio was based on business decisions that would harm customers or is the result of an imbalanced debt/equity ratio. Indeed, the Commission has consistently approved a higher common equity ratio in other cases where the proposed common equity ratio matched known and measurable amounts—meaning that the Commission has never before assumed a higher equity to debt ratio should automatically translate as harming customers or creating an unbalanced capital structure.

The Commission also attempted to rationalize its imputed capital structure based on the contention that PNM’s actual equity ratio of 52% would place an undue burden on customers.<sup>56</sup> Again, the Commission provided no notice that it would apply a new “burdensome” standard rather than its long-standing “known and measurable” standard. The contention that a 52% equity ratio is unduly burdensome was premised on the observation that if the equity ratio goes up, the rates paid by customers increase. However, any increase in a utility’s cost of service by definition results in a rate increase for customers; this does not automatically mean that an

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<sup>55</sup> **[58 RP 43912]**

<sup>56</sup> **[57 RP 42945-42947** (noting the NMDOJ’s and Bernalillo County’s argument that “PNM’s 52% equity ratio would place an undue burden on PNM’s ratepayers” and finding that “the intervenors have the better argument”); **58 RP 43912]**

“undue” burden is placed on customers or that an increase is unreasonable. Mere contention, without more, is not evidence that PNM’s equity ratio is inherently unreasonable and is insufficient support for the Commission’s speculation that imputing a capital structure in this case would avoid potential customer harm to customers.<sup>57</sup>

The Commission also failed to explain why PNM’s actual equity ratio of 52% would place an “undue burden” on PNM’s customers given the Commission has approved higher equity ratios for Southwestern Public Service Company (“SPS”), another investor-owned utility in New Mexico, of 53.97%, 54.72% and 54.70% on the ground that those ratios reflected the utility’s actual capital structure at the time.<sup>58</sup>

In consistently holding that an actual capital structure provides reasonable long-term debt and equity ratios, the Commission necessarily has determined that this is a fair and balanced approach for customers and investors when setting rates. The Commission failed to explain how PNM’s actual capital structure suddenly

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<sup>57</sup> *Resolute Wind 1 LLC v. N.M. Pub. Regul. Comm’n*, 2022-NMSC-011, ¶ 26 (Substantial evidence “is evidence that a reasonable mind would regard as adequate to support a conclusion.” (quoting *Doña Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regul. Comm’n*, 2006-NMSC-032, ¶ 11, 140 N.M. 6)).

<sup>58</sup> *See In the Matter of Sw. Pub. Serv. Co.*, NMPRC Case No. 20-00238-UT, *Certif. of Stip.*, at 70 (Dec. 21, 2021), approved by *Final Order Adopting Certif. of Stip.* (Feb. 16, 2022); *In the Matter of Sw. Pub. Serv. Co.*, NMPRC Case No. 17-00255-UT, *New Final Order on Partial Mandate from the N.M. Sup. Ct.*, ¶ 6 at 3 (Mar. 6, 2019); *In the Matter of Sw. Pub. Serv. Co.*, NMPRC Case No. 22-00286-UT, *Certif. of Stip.*, at 47-48, 52-53 (Sept. 6, 2023), adopted by *Final Order Adopting Certif. of Stip.*, ¶ 18 at 7 (Oct. 19, 2023).

imposes a *de facto* unreasonable burden on PNM's customers, such that the Commission was required by changed circumstances to impute a capital structure for ratemaking purposes.

The Commission also applied a never-before-used principle for determining a capital structure, which is that PNM's equity ratio should be reduced because intervenors discussed their belief that PNM has organized itself in various ways to mitigate risk.<sup>59</sup> There is no evidence in the record, however, that PNM's organizational structure has changed in some significant way in order to mitigate risk, and in fact it has not. The Commission does not articulate how this offhanded assessment of PNM's "risk" warrants a departure from the long-standing past practice of using a utility's actual capital structure when setting rates. Indeed, in the eyes of investors, the Commission's departure from prior practice only increases perceived risk because predictability is essential in attracting investment.

PNM's risk profile has not been a basis for a downward (or upward) adjustment to PNM's actual capital structure in previous rate cases. And to PNM's knowledge, the Commission has never applied a similar risk adjustment factor in setting other utilities' capital structure.

The Commission appears to instead justify its arbitrary imputation of a reduced equity ratio on the grounds that PNM argued for incorporating certain

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<sup>59</sup> [57 RP 42947; 58 RP 43912]

business risk factors when determining the rate of return on equity. As to the determination of a rate of return, however, the Commission makes PNM's point: the Commission refused to consider alternative, potentially better, methods of calculating the return on equity, such as proposed by PNM, because changing the methodology it has used in the past without notice to stakeholders "would raise due process problems."<sup>60</sup> The RD also ironically notes that "the New Mexico Supreme Court very recently instructed this Commission that it cannot make significant changes to the analysis it employs to answer issues implicating the Commission's discretionary authority without making clear that this is a possibility and allowing stakeholders meaningful process to challenge such a move."<sup>61</sup>

The Commission's departure from past practice prejudiced PNM's presentation of its case. PNM justifiably relied on the Commission's prior practice of using actual capital structure in its presentation and post-hearing briefs.<sup>62</sup> If PNM had been provided prior notice that the Commission might abandon its past practice, it would have shaped its presentation and briefing differently to make even clearer that there was no basis for such a departure.

The Commission violated PNM's due process by using surprising new standards to impute a utility's capital structure, without providing notice that it

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<sup>60</sup> [57 RP 42930]

<sup>61</sup> [57 RP 42909]

<sup>62</sup> [54 RP 40397; 55 RP 40977]

intended to depart from its past practice of setting a capital structure based on actual long-term debt and equity ratios. This arbitrary switch from its past practices to the detriment of utility investors was without justification or an explanation of a change in circumstances that warranted the implementation of new standards.

**D. REJECTING ITS KNOWN AND MEASURABLE STANDARD FOR SETTING A CAPITAL STRUCTURE WAS AN ARBITRARY AND CAPRICIOUS DEPARTURE FROM PAST PRACTICE AND POLICY BY THE COMMISSION.**

The Public Utility Act directs the Commission to justify any changes to its past practices or procedures through substantial evidence on the record.<sup>63</sup> Even in the absence of a due process violation, the Commission's departure, without notice or showing of changed circumstances, was arbitrary and capricious. "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record."<sup>64</sup>

PNM's request to use its actual capital structure was consistent with how the Commission set the capital structure using PNM's actual 50/50 debt/equity ratio in PNM's 2015 and 2016 rate cases, both of which used Future Test Year Periods. But circumstances had changed since those rate cases; PNM began maintaining a capital structure of nearly 52% equity in 2020, reflecting the need for a strong balance sheet

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<sup>63</sup> NMSA 1978, § 62-6-14(C) (2009).

<sup>64</sup> *N.M. Att'y Gen. v. N.M. Pub. Regul. Comm'n*, 2013-NMSC-042, ¶ 10 (quoting *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97).

to fund the energy transition.<sup>65</sup> PNM’s proposed equity ratio of 52% reflects the actual long-term debt and equity ratios found in both the historical Base Period (with 52.07% equity) and Future Test Year Period (with 52% equity).<sup>66</sup>

Because PNM used a Future rather than Historical Test Year Period, the Commission determined it was free to impute a capital structure that was unrelated to PNM’s actual long-term debt/equity ratio, regardless of the Base and Future Test Year Period in the record. The Commission wrongly and arbitrarily concluded that it could impute a capital structure because it had not and could not approve a Future Test Year Period capital structure based on a utility’s actual capital structure as adjusted for known and measurable changes from the Base Period.<sup>67</sup>

The Commission’s holding flies in the face of the fact that the Commission *has* applied the “known and measurable” standard in three previous cases using Future Test Year Periods.

The Commission has consistently used the utility’s actual capital structure under the known and measurable standard in setting the utility’s rates regardless of

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<sup>65</sup> See, e.g., NMSA 1978, §§ 62-18-1 through -23 (2019, as amended through 2023) (Energy Transition Act).

<sup>66</sup> [57 RP 43207] PNM’s Exceptions to the RD noted that at the end of the Base Period, PNM’s actual capital structure included 52.07% common equity, while at the end of the Test Year Period, the actual capital structure had 52.00% common equity, and argued that the RD’s recommended capital structure with only 49.61% equity in no way reflects either the Base or Test Period actual capital structure – contrary to past Commission policy.

<sup>67</sup> [58 RP 43911-43912]

the period covered in the test year for investor-owned utilities that operate in New Mexico. In PNM's 2015 and 2016 rate cases, both of which used a *Future* Test Year Period, the Commission approved the utility's actual capital structure.<sup>68</sup> For SPS, the Commission approved a stipulated capital structure for SPS of 54.70% common equity in its 2022 rate case, which, although lower than SPS's Test Year Period capital structure, reflected SPS's actual capital structure during the Base Period.<sup>69</sup> Importantly, SPS's 2022 rate case was based on a Future Test Year Period.

The Commission's rationale in SPS's 2022 rate case was the same as was applied in SPS's prior rate case using a Historical Test Year Period, where the Commission found it was reasonable to use SPS's capital structure at the end of the Test Year with a 52.72% equity ratio because it was consistent with prior Commission policy of adopting utilities' actual capital structure.<sup>70</sup> Although the Commission did not initially approve SPS's actual capital structure in an earlier 2017 rate case, on appeal, SPS and the Commission agreed to adjust the originally

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<sup>68</sup> *In the Matter of Pub. Serv. Co. of N.M.*, NMPRC Case No. 15-00261-UT, *Corrected Recommended Decision*, at 30-31 (Aug. 15, 2016), *approved by Final Order Partially Adopting Corrected Recommended Decision* (Sept. 28, 2016). PNM's proposed Future Test Period capital structure was also adopted without discussion in PNM's 2016 Rate Case, NMPRC Case No. 16-00276-UT.

<sup>69</sup> *In the Matter of Sw. Pub. Serv. Co.*, NMPRC Case No. 22-00286-UT, *Certif. of Stip.*, at 47-48, 52-53 (Sept. 6, 2023), with a 54.70% equity ratio approved by *Final Order Adopting Certif. of Stip.* (Oct. 19, 2023).

<sup>70</sup> *In the Matter of Sw. Pub. Serv. Co.*, NMPRC Case No. 20-00238-UT, *Certif. of Stip.*, at 70 (Dec. 21, 2021), *approved by Order Adopting Certif. of Stip. in Its Entirety and Granting SPS's Motion for Reconsideration* (Feb. 16, 2022).



approved 51% equity ratio to 53.97% equity, consistent with substantial evidence that the agreed-upon equity ratio more closely reflected SPS’s actual equity.<sup>71</sup> Similarly in EPE’s rate cases, the ultimate outcomes have looked to the Commission’s reliance on the actual percentages that of debt and equity for regulatory purposes at the end of the test period, based on the Commission’s consistent policy and practice.<sup>72</sup>

The Commission has repeatedly and consistently found that basing the capital structure on actual experienced data yields a better result.<sup>73</sup> In the ratemaking context, this means that the Commission “is bound by, and limited to . . . previously established methods of ratemaking, absent a change in circumstances peculiar to the company and the pending case, making it *necessary* that there be a departure from the established method.”<sup>74</sup>

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<sup>71</sup> *In the Matter of Sw. Pub. Serv. Co.*, NMPRC Case No. 17-00255-UT, *New Final Order on Partial Mandate From the New Mexico Sup. Ct.*, at 3, ¶ 6 (Mar. 6, 2019).

<sup>72</sup> *See In the Matter of El Paso Electric Co.*, NMPRC Case No. 15-00127-UT, *Recommended Decision* at 70 (Feb. 16, 2016); *see also In the Matter of El Paso Electric Co.*, NMPRC Case No. 20-00104-UT, *Recommended Decision*, at 35 (Apr. 6, 2021) (citing NMPRC Case No. 15-00127-UT, *Recommended Decision* Feb. 16, 2016 and *Order Adopting Recommended Decision with Modifications*, at 29, ¶ 85 (June 23, 2021)).

<sup>73</sup> *Cf. In the Matter of El Paso Electric Co.*, NMPRC Case No. 20-00104-UT, *Order Adopting Recommended Decision with Modifications*, at 30, ¶ 86 (June 23, 2021) (Commission noting 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).

<sup>74</sup> *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 21 (quoting *Hobbs Gas Co.*, 1993-NMSC-032, ¶ 8) (emphasis added).

Here, the Commission fundamentally erred by departing from its established method. The Commission wholly failed to acknowledge its past practices in Future Test Year Period rate cases when it claimed its “known and measurable” standard could not apply. The Commission also failed to explain why its logic for using an actual capital structure in a Historical Test Year Period, which adjusts for verifiable changes, should not also apply in a Future Test Year Period that makes the exact same types of verifiable adjustments.

To this point, the Commission’s own Future Test Year Rule (17.1.3 NMAC) refutes the Commission’s logic. The Future Test Year Rule requires adjusted base period information and financial “linkage” data for the months between the Base Period and the Future Test Year Period to evaluate potential adjustments for known and measurable changes, i.e., so that the parties and the Commission can “test the validity of the information in the future test year period” and “validat[e] the information contained in the future test year period.”<sup>75</sup> The Future Test Year Rule expressly requires actual capital structure information be supplied “for at least the base period, the linkage data, the future test year period and the adjusted base period,” as well as forward-looking projects for two subsequent years.<sup>76</sup> Thus, the

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<sup>75</sup> 17.1.3.7(A), (H) NMAC; *see also* 17.1.3.17 NMAC (future test year period amounts shall be fully described, justified and supported through linkage data).

<sup>76</sup> 17.1.3.16(D)(1)-(2) NMAC.

use of the “known and measurable” standard is not limited to rate cases using a Historical Test Year Period.

In addition to departing from its known and measurable standard, the Commission also ignored its past practice and policy of excluding short-term debt from its calculation of the long-term debt/equity ratio to determine a utility’s capital structure. The *Final Order* noted there was evidence that PNM’s actual equity ratio is 49.31% rather than 52%. The facts were clear that those calculations included short-term debt not accounted for in regulatory ratemaking, and therefore does not reflect PNM’s capital structure for regulatory purposes.<sup>77</sup>

The Commission also relied on the fact that its imputed capital structure fell within the range of capital structures held by a proxy group of utilities to find its lower imputed equity ratio was reasonable. In the past, the Commission has only imputed a capital structure based on a proxy analysis where a utility did not have a stand-alone balance sheet or was privately held without any debt.<sup>78</sup> The mere fact that other utilities in a proxy group have a range of lower (or higher) capital

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<sup>77</sup> [54 RP 40394]

<sup>78</sup> See *In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 19, 129 N.M. 1 (Commission was arbitrary in finding applicant failed to meet burden of providing in not providing calculations with actual capital structure where applicant in fact did not have one and imputed capital structure was consistently used in previous cases); *In re Zia Nat. Gas Co. v. N.M. Pub. Util. Comm’n*, 2000-NMSC-011, ¶¶ 5-10, 128 N.M. 728 (upholding imputation of capital structure for privately held natural gas utility with 100% equity where substantial evidence of current comparable utilities supported a more balanced capital structure).

structures—within which both PNM’s actual and the Commission’s imputed capital structure fall—does not justify the Commission’s departure from using actual known capital structures in order to impute a lower equity ratio.

Further, PNM’s argument that its capital structure was within the proxy group’s range does not “cut against [itself]” as the Commission asserts.<sup>79</sup> Rather, that argument more reasonably supports the conclusion that an actual capital structure that fell within a range of authorized capital structures does not warrant imputing a different structure. Implicitly or explicitly applying new standards for the purpose of imputing a capital structure with a reduced equity ratio not only raises due process concerns, it represents a stark and abrupt departure from Commission practice. Under the Court’s standard of review, this unjustified departure from past practice without discussion of the necessity for a new form of analysis is arbitrary and capricious and is grounds to vacate the Final Order.

The Court has held that “an agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.”<sup>80</sup> Here, the Commission’s decision has no rational connection to the facts

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<sup>79</sup> [57 RP 42947; 58 RP 43912]

<sup>80</sup> *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm’n*, 2019-NMSC-015, ¶ 8 (quoting *Albuquerque CAB Co. v. N.M. Pub. Regul. Comm’n*, 2017-NMSC-028, ¶ 8) (alteration omitted).

and omits consideration of what in the past has been the most important factors: the utility's actual capital structure under the known and measurable standard, and the exclusion of short-term debt amounts from the capital structure's long-term debt ratio. In order to impute a reduced equity ratio, the Commission deviated from its past practice and policy on these points. Indicating that maintaining the status quo for a ratemaking element using data that is more than seven years old from PNM's prior rate case is contrary to policy and the Commission's rate case rules requiring that proposed rates be based on contemporaneous financial data.<sup>81</sup>

The Commission decision is arbitrary and capricious where it is "unreasonable or without a rational basis, when viewed in light of the whole record."<sup>82</sup> Because the Commission cannot cite to substantial evidence to justify ignoring its own rules and changing its past practices, its decision is arbitrary and capricious and should be vacated by the Court.

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<sup>81</sup> [57 RP 42947 (noting intervenor arguments to "leave PNM's capital structure as it is."); 57 RP 42944 ("The NMAG and County note that in Case No. 15-00261-UT the Commission set PNM's equity ratio at 49.61% and that this ratio was maintained in the stipulation in Case No. 16-00276-UT. The point of this observation is, presumably, that preserving the status quo is uncontroversial and necessarily principled as the status quo is itself predicated on judgment tested by time.")]

<sup>82</sup> *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 16 (quoting *Sierra Club*, 2003-NMSC-005, ¶ 17).

## **E. THE COMMISSION’S DECISION TO IMPUTE A LOWER EQUITY RATIO FOR PNM’S CAPITAL STRUCTURE DOES NOT ALIGN WITH STATE POLICY.**

In concluding a capital structure imputed from PNM’s past rate case should be adequate, the Commission noted that the state’s energy transition policy goals are “ever-present” in the Commission’s decision-making.<sup>83</sup> That conclusion works against the Commission’s reliance on PNM’s 2015 and 2016 rate cases to impute a reduced equity ratio. In 2019, the Legislature set ambitious goals for the state’s energy transition, requiring public utilities to have carbon-free generation resource portfolios by 2045.<sup>84</sup> This transition requires significant new investments in utility plant and infrastructure to accommodate the retirement of fossil-fuel generation and the addition of renewable and non-carbon-emitting resources to serve customer loads. The Legislature also established directives for utilities to invest in transportation electrification and grid modernization.<sup>85</sup> These policies are framed by the Act’s declared policy that the Commission must set fair, just and reasonable rates and must regulate “to the end that capital and investment may be encouraged

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<sup>83</sup> **[58 RP 43913]**

<sup>84</sup> NMSA 1978, § 62-16-4(A) (2019).

<sup>85</sup> NMSA 1978, § 62-8-12 (2019) (requiring applications to expand transportation electrification beginning no later than 2021); NMSA 1978, § 62-8-13 (2020) (providing approval process for grid modernization applications).

and attracted so as to provide for...proper plants and facilities and demand-side resources for the rendition of service to the general public and to industry.”<sup>86</sup>

In order to meet these legislative policies, PNM has been steadily increasing its investments in its plant and infrastructure over the past several years, as reflected in its Application.<sup>87</sup> When financial markets see such increases, there is an expectation that a utility maintain a strong balance sheet with regard to its capital structure; that means PNM must maintain a higher equity ratio as its investments increase in order to have access to favorably priced long-term debt.<sup>88</sup>

PNM presented uncontested evidence that its capital structure is designed to support its ongoing capital program and encompass investments needed to accomplish the energy transition,<sup>89</sup> which requires increasing and significant investments in PNM’s plant, facilities, and equipment. PNM also testified that its actual equity ratio—maintained since 2020—directly reflects its current and future efforts to significantly increase its capital investment program to accomplish the

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<sup>86</sup> NMSA 1978, § 62-3-1(A)(2), (B) (2008).

<sup>87</sup> **[2 RP 00088, 000091; 7 RP 01916]**

<sup>88</sup> **[26 RP 17847]**

<sup>89</sup> PNM is required to supply 100 percent of all retail electricity sales to its customers from zero-carbon resources by 2045. NMSA 1978 § 62-16-4(A)(6) (2019).

energy transition.<sup>90</sup> The intervenors also acknowledged that PNM will require increased investment as it continues its energy transition.<sup>91</sup>

PNM’s Treasurer testified that the Company 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,<sup>92</sup> and, importantly, explained that credit rating agencies require a strong balance sheet in terms of an equity ratio when a utility embarks on significant ongoing capital investments.<sup>93</sup> PNM provided un rebutted evidence that when a utility invests heavily in its system, as PNM is doing, it is important to demonstrate strong financial credit metrics by having a greater proportion of equity available; investors will not otherwise be incentivized to invest without higher rates of return.<sup>94</sup>

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<sup>90</sup> [7 RP 01915-01916; 26 RP 17846-17847]

<sup>91</sup> See [52 RP 35615-35616 (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)]; [52 RP 35710 (“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.”)]; [45 RP 33602-33603 (agreeing that the utility needs a strong financial footing to make the energy transition)]; [45 RP 33649-336450 (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)].

<sup>92</sup> [9 RP 04871; 54 RP 40371, 40391-40392]

<sup>93</sup> See [26 RP 17847-17849]

<sup>94</sup> See [25 RP 17237 (noting that an equity percentage of 46% to 49% “ignore[s] that even with an actual equity ratio of 52%, credit rating agencies score PNM as just two notches above speculative grade”)]; [26 RP 17651-17652 (noting that the evidence shows that long-term capital costs—including the ROE—have increased



Using a utility’s existing capital structure when setting rates is consistent with the Act’s recognition that “public utilities’ financing involves the investment of large sums of money, including capital obtained from many members of the general public.”<sup>95</sup> The Commission is not free to ignore the evidence that is contrary to its ultimate determinations.<sup>96</sup> There must be more than a scintilla of evidence that supports an agency’s findings; the Commission’s decision is arbitrary where it is not supported by substantial evidence.<sup>97</sup> The Commission concluded, however, that the approved imputed capital structure using data from its last rate case filed in 2016, “should be adequate to co-exist” with the state’s legislative policies. The Commission’s bare assertion is not supported by citations to the record and is contrary to the substantial evidence in the record.

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substantially, and that investors can reasonably expect capital costs to be sustained at least through 2028”); [26 RP 17652 (“In considering utilities with comparable risks, investors will always seek to provide capital to the opportunity with the highest expected return.”)]; [26 RP 17660 (“The cost of capital is an opportunity cost based on the returns that investors could realize by putting their money in other alternatives, and the total capital invested in utility stocks is only the tip of the iceberg of total common stock investment.”)]; [26 RP 17662 (“When investors are confident that a utility has supportive regulation, they will make funds available on more reasonable terms, and even in times of turmoil in the financial markets.”)]

<sup>95</sup> NMSA 1978, § 62-3-1(A)(2) (2008).

<sup>96</sup> See, e.g., *New Mexico Exchange Carrier Group v. N.M. Pub. Regul. Comm’n*, 2016-NMSC-015, ¶ 28 (Court reviews whole record in favor of and contrary to PRC decision to determine if decision is supported by substantial evidence).

<sup>97</sup> *N.M. Att’y Gen. v. N.M. Pub. Regul. Comm’n*, 2000-NMSC-008, ¶ 11, 128 N.M. 747 (substantial evidence is more than a mere scintilla, and is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”) (citation omitted).

The policy goals referenced by the Commission support using the actual capital PNM has maintained since 2020, with an equity ratio of 52%. The record evidence demonstrates that using PNM's actual equity ratio rather than a lower imputed ratio is necessary to encourage and attract capital for the significant utility investments required to meet state policy.

#### **IV. CONCLUSION**

For the reasons stated above, PNM respectfully requests that the Court vacate the Commission's Final Order on the limited issue regarding PNM's capital structure. The Court should determine that the Commission's decision to impute a capital structure violated PNM's due process rights and is arbitrary and capricious because it departed without justification from the Commission's past practice. The imputed capital structure also fails to set rates to the end of encouraging and attracting capital to meet the energy transition initiatives of the state.

Respectfully submitted this 25th day of October 2024.

**PUBLIC SERVICE COMPANY OF NEW MEXICO**

*/s/ Stacey J. Goodwin*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Public Service Company of New Mexico’s Brief in Chief was served in accordance with Rule 12-307 NMRA by email to the parties listed below on October 25, 2024:

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