

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE APPLICATION OF)
PUBLIC SERVICE COMPANY OF NEW)
MEXICO FOR DECERTIFICATION AND)
ABANDONMENT OF 114 MW OF LEASED)
PALO VERDE NUCLEAR GENERATING)
STATION CAPACITY AND SALE AND)
TRANSFER OF RELATED ASSETS AND FOR)
APPROVAL TO PROCURE NEW)
RESOURCES UNDER 17.9.551 NMAC)
)
PUBLIC SERVICE COMPANY OF NEW)
MEXICO,)
)
Applicant.)
_____)**

Case No. 21-00083-UT

RECOMMENDED DECISION ON MOTIONS TO DISMISS

Carolyn R. Glick, Hearing Examiner for the New Mexico Public Regulation Commission (Commission), submits this Recommended Decision to the Commission pursuant to 1.2.2.12(B) NMAC.¹ The Hearing Examiner recommends that the Commission adopt this Recommended Decision in its Order.

This matter comes before Carolyn R. Glick, Hearing Examiner, upon:

- The Joint Motion to Dismiss Decertification and Abandonment Application and Supporting Memorandum (Joint Motion to Dismiss), filed jointly by New Energy Economy (NEE) and the Coalition for Clean Affordable Energy (CCAEE) on June 28, 2021;
- The Joint Response of the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) and Bernalillo County to the Joint Motion to Dismiss (ABCWUA/Bernalillo County’s Response), filed on July 12, 2021;
- Western Resource Advocates’ (WRA’s) Response to the Joint Motion to Dismiss (WRA’s Response), filed on July 12, 2021;

¹ 1.2.2.12(B) NMAC, titled “Motions to Dismiss,” states that the presiding officer may recommend dismissal or the commission may dismiss a proceeding on their own motion.

- Public Service Company of New Mexico’s (PNM’s) Response to the Joint Motion to Dismiss (PNM’s Response), filed on July 12, 2021;
- PNM’s Consolidated Reply to the Responses of ABCWUA/Bernalillo County and WRA to the Joint Motion (PNM’s Consolidated Reply)²; and
- The Consolidated Joint Reply to PNM’s Consolidated Reply and Response to Joint Motion to Dismiss Decertification and Abandonment Application (Intervenors’ Joint Reply), filed jointly by ABCWUA, Bernalillo County, CCAE, NEE and WRA on July 26, 2021.³

² In their Responses to the Joint Motion to Dismiss, both WRA and ABCWUA/Bernalillo County said that they support the Joint Motion to Dismiss and stated additional grounds in support of the Joint Motion to Dismiss. On July 13, 2021, the Hearing Examiner issued an order permitting PNM to file a reply brief limited to replying to new or alternative arguments raised by WRA, ABCWUA and Bernalillo County in their Response Briefs.

³ On July 21, 2021, the Hearing Examiner, on her own motion, issued an order permitting NEE, CCAE, WRA, ABCWUA and Bernalillo County to file reply briefs to PNM’s Response and Consolidated Reply.

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1. SUMMARY OF RECOMMENDED DECISION

In this case, PNM seeks approval to:

1. Abandon and decertify 114.43 MW of its Leased Interests in Palo Verde Nuclear Generating Station (PVNGS) Units 1 and 2 when the leases terminate;
2. Sell and transfer the PNM-owned assets and fuel supply associated with the Leased Interests (the PVNGS Assets) to the Salt River Project Agricultural Improvement and Power District (SRP), who will acquire the Leased Interests from the Lessors when the existing lease terms terminate;
3. Replace the 114.43 MW of the PVNGS Leased Interests with two purchased power agreements and three energy storage agreements and;
4. Create four regulatory assets for ratemaking purposes.

Intervenors in this case filed pleadings which, taken together, move to dismiss several of PNM's requested approvals.

The motions to dismiss relate to PNM's Leased Interests in PVNGS Units 1 and 2. PNM's participation in PVNGS began in 1977 when the Commission granted PNM a certificate of public convenience and necessity to own, operate and maintain an interest in each of PVNGS's three units. In 1985 and 1986, the Commission approved sale/leaseback agreements, which authorized PNM to sell its ownership interests in PVNGS Units 1 and 2 and then lease those interests back for approximately twenty-nine years.

Under the terms of each lease, PNM had three choices when the initial lease term expired: (1) allow the lease to expire; (2) renew the lease at 50% of the cost of the original lease; or (3) repurchase the lease asset at fair market value. In 2012 and 2013, PNM gave Lessors irrevocable notice that it would renew five of its Leased Interests (four in Unit 1 and one in Unit 2). Once the renewed lease terms expire, PNM cannot further extend the lease terms: it can only repurchase the Leased Interests or return the Leased Interests to the Lessors.

PNM was required to notify the Unit 1 Lessors by June 5, 2020 of its irrevocable decision to either repurchase or return its Unit 1 Leased Interests. PNM was required to notify the Unit 2 Lessor by January 15, 2021 of its irrevocable decision to either repurchase or return its Unit 2 Leased Interest. On June 11, 2020, PNM informed the Unit 1 Lessors and the Unit 2 Lessor of its decision to return the Unit 1 Leased Interests and the Unit 2 Leased Interest to the Lessors.

The first motion to dismiss moves to dismiss PNM's request to abandon its Leased Interests in PVNGS Units 1 and 2 because (1) the Commission, in approving the sale/leaseback agreements, already approved abandonment of the Leased Interests if PNM does not exercise its right to repurchase the Leased Interests; and (2) PNM has given irrevocable notice that it intends to return its Leased Interests to the Lessors. PNM does not object to the Commission summarily determining that abandonment approval is not required, but argues that the Commission should do so by issuing a declaratory order, not an order granting the motion to dismiss. For the reasons stated below in Section 7, issuance of a declaratory order is inappropriate, and the motion to dismiss should be granted with prejudice because the Commission has already granted PNM approval to abandon the PVNGS Leased Interests when they terminate, and the Commission has no authority to deny the abandonment request. Granting the motion to dismiss does not mean that PNM cannot abandon its Leased Interests in PVNGS Units 1 and 2; rather, it means advance Commission abandonment approval is not necessary because the Commission has already approved abandonment of the Leased Interests when they terminate.

The second motion to dismiss moves to dismiss PNM's request for approval to sell the PVNGS Assets because (1) the Public Utility Act only requires advance Commission approval for a public utility to sell public utility plant "constituting an operating unit or system or any substantial part thereof"; and (2) the PVNGS Assets do not constitute an operating unit or system or any substantial part thereof. PNM agrees that the PVNGS Assets do not constitute an operating unit or system or any substantial part thereof and does not object to the Commission

summarily determining that sale approval is not required, but again argues that the Commission should do so by issuing a declaratory order, not an order granting the motion to dismiss. PNM's request for issuance of a declaratory order should be denied, and the motion to dismiss should be granted with prejudice because the PVNGS Assets do not constitute an operating unit or system or any substantial part thereof, and the Commission has no authority over the sale. Granting the motion to dismiss does not mean that PNM cannot sell the PVNGS Assets; rather, it means that the Commission has no jurisdiction over the sale.

The third motion to dismiss moves to dismiss PNM's request for approval to create three of four regulatory assets. Creation of a regulatory asset allows a public utility to preserve its ability to recover one-time costs that it incurs between rate cases, which it would otherwise be required to expense in the year the costs are incurred.

One of the regulatory assets that PNM seeks approval to create is for its costs of obtaining an order authorizing abandonment. Because PNM's request for approval to abandon its PVNGS Leased Interests should be dismissed with prejudice, its request for approval to create a regulatory asset to recover the costs of an abandonment proceeding should also be dismissed with prejudice.

The two remaining challenged regulatory assets are for the undepreciated costs of improvements made by PNM to its PVNGS Unit 1 Leased Interests and its PVNGS Unit 2 Leased Interest. PNM, as Lessee, was and is responsible for the cost of leasehold improvements. PNM's request should be dismissed for good cause for the reasons stated below in Section 9, and the motion to dismiss PNM's request to create two regulatory assets for the undepreciated costs of improvements to its PVNGS Leased Interests should be granted with prejudice. Granting the motion to dismiss does not mean that PNM cannot seek to recover these undepreciated costs; rather, it means that PNM must do so in a general rate case.

2. PNM’S ARGUMENT TO NOT CONSIDER SOME OF THE MOTIONS TO DISMISS

The Joint Motion to Dismiss, the Joint Response of ABCWUA and Bernalillo County and the Response of WRA, taken collectively, move to dismiss several of PNM’s requests. PNM argues that additional arguments and new motions made by ABCWUA, Bernalillo County and WRA in their Response Briefs should not be considered because they are untimely in light of the June 28, 2021 deadline for filing dispositive motions.⁴ PNM’s Consolidated Reply at 6-7. PNM might be technically correct, but any new arguments or motions made in the Intervenors’ Response Briefs should be considered for efficiency purposes. PNM is not prejudiced by considering the new arguments or motions because the Hearing Examiner allowed PNM to file replies to any new arguments or motions.

3. HISTORY OF PNM’S INVOLVEMENT IN THE PALO VERDE NUCLEAR GENERATING STATION

In 1977, in Case No. 1216, the Commission granted PNM a Certificate of Public Convenience and Necessity (CCN) to participate in the Arizona Nuclear Power Project (PVNGS). PNM was granted authority to participate in PVNGS as a tenant in common and allowed to own, operate and maintain an undivided 10.2% interest in each of three PVNGS units (PVNGS Units 1, 2 and 3), together with common facilities incident to the units. Case No. 1216, Findings of Fact and Order, Decretal ¶ C (2-8-77). The Commission ordered that PNM’s CCN for its PVNGS interests shall “remain effective from and after the date of this Order[.]” *Id.* at 25, ¶ H.

In 1985, the PRC approved sale/leaseback agreements, which authorized PNM to sell and lease back substantially all of its 10.2% undivided ownership interest in PV Unit 1 to third party investors, who simultaneously leased the assets back to PNM. Case No. 1995, Order (11-

⁴ In an order dated June 11, 2021, the Hearing Examiner granted NEE’s motion to extend the filing deadline for dispositive motions to June 28, 2021.

27-85). In 1986, in Phase I of Case No. 2019, the Commission authorized PNM to sell all or a portion of its 10.2% undivided ownership interest in PVNGS Unit 2 [and up to all or a proportionate share of one-third of its 10.2% undivided ownership interest in certain common facilities] to third party investors, who simultaneously leased the assets back to PNM under one or more leases. Case No. 2019, Phase I, Order (7-8-86). These investors purchased their respective interests through an Owner Trust. The Trust, in turn, holds legal title to the Leased Interests. The evidence showed that the then-present value of the ratepayer revenue requirement of the facilities would be significantly lower under the Lease Transactions than under PNM ownership. *Id.*, FOF ¶ 7.

In its final orders issued in Case Nos. 1995 and 2019, Phase I, the Commission approved the terms of the leases and modified the terms of the CCN to reflect approval of the lease transactions. Case No. 1995, Order, Decretal ¶¶ G, J; Case No. 2019, Phase I, Order, Decretal ¶¶ 8, 10.

Under each of the PVNGS sale/leaseback agreements, PNM had three options upon expiration of the initial lease period:

1. Allow the lease to expire at the end of the initial lease term and relinquish control of the Leased Interests;
2. Renew the Leased Interests with a 50% reduction in lease payments (some leases could be extended for two years and some for eight years); or
3. Repurchase the Lease Interests for fair market value (FMV) at end of the initial lease term.

Case No. 15-00261-UT, Corrected Recommended Decision at 79 (8-15-16).

Under the sale/leaseback agreements, PNM was to provide each Lessor with two notices before the initial lease terms expired. The first notice was due three years before expiration and the second notice was due two years before expiration. In the first notice, PNM was required to irrevocably elect to terminate or continue its use of the PVNGS plant. The second notice only

applied if PNM committed in the first notice to continue to use the PVNGS plant. In any second notice, PNM was required to state how it wanted to continue to use the PVNGS plant: either (1) extend the Leased Interest; or (2) repurchase the Leased Interest and own the PVNGS plant. Both the first and second notices are irrevocable to PNM. If PNM elected to purchase the plant, the Lessor and PNM had a period of time in which to negotiate a FMV, or, if they could not agree, an appraisal process would determine the FMV. *Id.* at 79-80.

The initial terms of PVNGS Unit 1 Leased Interests expired in January 2015. On January 6, 2012, PNM gave irrevocable notice to four PVNGS Unit 1 Lessors that it would continue to use four PVNGS Unit 1 Leased Interests. This meant that PNM relinquished its opportunity to terminate its relationship to these PVNGS Unit 1 Leased Interests at that time. On January 9, 2013, PNM gave irrevocable notice to the Unit 1 Lessors that it would renew the leases for an additional eight years at 50% of then-current lease payments, until January 2023. *Id.* at 80.

On December 30, 2013, PNM notified JPMorgan Chase that it would extend its PVNGS Unit 2 Leased Interest at 50% of then-current lease payment for eight years, until January 2024. *Id.*

4. PNM'S RESPONSIBILITIES FOR OPERATION AND MAINTENANCE EXPENSES, LEASEHOLD IMPROVEMENTS AND DECOMMISSIONING EXPENSE

Several documents govern PNM's participation in PVNGS. These include, among others:

a. The Arizona Nuclear Power Project Participation Agreement, as amended, entered into among the PVNGS Participants. The original Participants were PNM, Arizona Public Service Company, Salt River Project Agricultural Improvement and Power District, Tucson Gas and Electric Company and El Paso Electric Company. The Arizona Nuclear Project Participation Agreement establishes the rights and duties of the various owners of interests in

PVNGS. PNM is a party to the Agreement through its ownership interests in PVNGS Units 1, 2, and 3.

b. The sale/leaseback agreements applicable to each of the Leased Interests, as amended. Under the sale/leaseback agreements, PNM as Lessee is solely responsible for all costs associated with the underlying assets, including lease payments, capital investments, operation and maintenance (O&M) expenses, and decommissioning liabilities. When a lease expires, PNM continues to be responsible for decommissioning expenses and any capital project costs for projects pending at the date of the lease expiration.

During the periods of time when PNM has been a Lessee under the sale/leaseback agreements, PNM has not included the value of the Leased Interests (excluding improvements) in rate base but has treated the amount of its lease payments as an O&M expense.

PNM, as Lessee, is and was responsible for all O&M expenses of the Leased Assets in proportion to its Generation Entitlement Share, which was 10.2%. Case No. 2019, Phase I, Final Order 3, ¶ 6.

PNM, as Lessee, was and is responsible for the cost of leasehold improvements to the Leased Interests and associated Common Plant in proportion to its Generation Entitlement Share.

For all of the leasehold improvements paid for in part by PNM, title or ownership to the improvements has belonged to the Lessors when such improvements were installed. If PNM did not extend a lease or repurchase Leased Interests at the end of the initial lease term, title to and possession of improvements remained with the Lessor.

PNM has always included improvements to its Leased Interests in rate base (including improvements to its share of common plant), has earned a return of and on these assets, and has depreciated these assets according to Commission-approved depreciation rates for each respective time period. PNM has used the length of the Nuclear Regulatory Commission's (NRC's) operating licenses as the service life of the PVNGS improvements for purposes of

calculating depreciation rates. The depreciation rates in effect in 1985 and 1986 were based on a 40-year remaining life. In Case No. 08-00273-UT, the Commission approved new PVNGS depreciation rates incorporating a life extension to 2046 to coincide with the NRC's extension of the operating licenses.

Under the sale/leaseback agreements, PNM is responsible for paying decommissioning costs of PVNGS in proportion to its Generation Entitlement Share even if PNM relinquishes its interests in the Leased Interests. Therefore, PNM is already obligated for decommissioning PVNGS Units 1 and 2 whether it continues its participation in PVNGS.

Case No. 15-00261-UT, Corrected Recommended Decision at 82-84.

5. PNM'S DECISION TO RETURN TO THE LESSORS THE FIVE PVNGS LEASED INTERESTS THAT ARE THE SUBJECT OF THIS CASE

Under the sale/leaseback agreements, PNM cannot further extend the PVNGS Unit 1 and 2 lease terms once the renewed lease terms expire: it can only repurchase the Leased Interests at FMV or return the Leased Interests to the Lessors. Eden Direct at 7.

PNM was required to notify the Unit 1 Lessors by June 5, 2020 of its irrevocable decision to either repurchase or return the Unit 1 Leased Interests. PNM was required to notify the Unit 2 Lessor by January 15, 2021 of its irrevocable decision to either repurchase or return the Unit 2 Leased Interest. On June 11, 2020, PNM informed the Unit 1 Lessors and the Unit 2 Lessor of its decision to return the Unit 1 Leased Interests and the Unit 2 Leased Interest to the Lessors. Eden Direct at 8; Fenton Direct at 13.

The tables below show PNM’s current Leased Interests in PVNGS Units 1 and 2, which it has irrevocably decided it will return to the Lessors on the expiration of the lease terms.

PVNGS UNIT 1 – 104 MW of LEASEHOLD INTERESTS

Lessor	MW	Expiration Date of Initial Lease Term	Expiration Date of Renewed Lease Term
Daimler Capital Services LLC	49.03	January 15, 2015	January 15, 2023
Access Energy Investors II	17.83	January 15, 2015	January 15, 2023
Chase Manhattan Realty Leasing Corporation	14.86	January 15, 2015	January 15, 2023
Chase Manhattan Realty Leasing Corporation	22.29	January 15, 2015	January 15, 2023
Total MW of Leased Interests in PVNGS Unit 1	104.01		

Eden Direct at 7.

PVNGS UNIT 2 -- 10.4 MW OF LEASEHOLD INTEREST

Lessor	MW	Expiration Date of Initial Lease Term	Expiration Date of Renewed Lease Term
Chase Manhattan Realty Leasing Corporation	10.42	January 15, 2016	January 15, 2024

Id. at 9.

6. PRC STANDARDS REGARDING REVIEW OF MOTIONS TO DISMISS

The Intervenors seek partial dismissal of PNM’s Application under 1.2.2.12(B) NMAC, which states:

Staff or a party to a proceeding may at any time move to dismiss a portion or all of a proceeding for lack of jurisdiction, failure to meet the burden of proof, failure to comply with the rules of the commission, or for other good cause shown. The presiding officer may recommend dismissal or the commission may dismiss a proceeding on their own motion.

The New Mexico Supreme Court has recognized this Commission’s authority to dismiss deficient applications. In doing so, the Court stated that cases that support such authority “limit that authority to situations where the filing is patently defective in substance or form.” *US West Commc’ns v. New Mexico State Corp. Comm’n*, 1993-NMCA-074, ¶ 13, 116 N.M. 548. The Commission stated, in denying a motion to dismiss in Case No. 12-00019-UT, that “the appropriate test to be utilized by an administrative agency considering a motion to dismiss a filing is: whether the filing is either patently deficient in form or a nullity in substance.” Case No. 12-00019-UT, Order Denying Motion to Dismiss 7 (12-11-12) (citing Case No. 1429, Order (4-12-78)).

A test used by the Commission in reviewing a motion to dismiss is akin to the test used by New Mexico courts in reviewing a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 1-012(B)(6) NMRA. Under Rule 1-012(B)(6), a complaint is subject to dismissal only if under no state of facts provable would a plaintiff be entitled to relief. Under this test, only the law applicable to a claim is tested, not the factual allegations of the pleadings, which, for purposes of ruling on the motion, the court must accept as true. *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 10, 144 N.M. 636; *Healthsource, Inc. v. X-Ray Assoc’s*, 2005-NMCA-097, ¶ 16, 138 N.M. 70.

However, 1.2.2.12(B) NMAC also allows the Commission to dismiss a request “for other good cause shown.”

7. MOTION TO DISMISS PNM’S REQUEST FOR APPROVAL TO ABANDON AND DECERTIFY ITS PVNGS LEASED INTERESTS

The Joint Motion to Dismiss asks the Commission to dismiss with prejudice PNM’s request to decertify and abandon its PVNGS Leased Interests. The Joint Movants argue that the Commission’s previous decisions granted PNM the option to allow the leases to expire by their own terms without advance Commission approval and that abandonment approval is not

necessary nor permissible because PNM has given irrevocable notice of its decision to return the PVNGS Leased Interests to the Lessors. Joint Motion to Dismiss at 9-13.

Section 62-9-5 (2005) of the Public Utility Act (PUA), titled “Abandonment of service,” states: “No utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission, or any service rendered by means of such facilities, without *first* obtaining the permission and approval of the commission.” (Emphasis added).

The Joint Movants cite the prefiled testimony of PNM witness Mark Fenton, who said, “By the terms of the leases approved by the Commission in the 1980s, the Leased Interests revert to the control of the lessors when the leases terminate, unless PNM purchases them from the lessors.” Joint Motion to Dismiss at 9 (citing Fenton Direct at 5). Mr. Fenton further said that the Commission confirmed in its Final Order issued in Case No. 15-00261-UT that PNM did not need to obtain advance Commission approval to either repurchase PVNGS Leased Interests or extend the Leased Interests. *Id.* at 10 (citing Fenton Direct at 14). Additionally, in its Order denying a petition requesting a Commission investigation into PNM’s presumed repurchase of its PVNGS Leased Interests, the Commission said, “Because the leased capacity was already a certificated resource, PNM was not required to provide special notice or seek advance approval before taking these actions [extending the lease terms and purchasing the 64.1 MW].” Case No. 19-00102-UT, Order on Petition for Investigation, ¶ 12 (1-8-20).

ABCWUA and Bernalillo County support dismissal of PNM’s request for approval to abandon and decertify the PVNGS Leased Interests. They additionally argue that, per the Commission’s orders in Case Nos. 1995 and 2019, Phase I, the Commission approved termination of the Leased Interests if PNM did not exercise its right to repurchase them. ABCWUA/Bernalillo County’s Response at 4. WRA agrees and points out that PNM would be in violation of the PUA if abandonment approval is required before PNM returns the PVNGS Leased Interests to the Lessors because PNM has already irrevocably decided to “abandon” the PVNGS Leased Interests. WRA’s Response at 2-3. If PNM had believed that abandonment

authority was required before the PVNGS Leased Interests expired, it surely would have filed an abandonment application before providing irrevocable notice to the Lessors that it would not exercise its right to repurchase the Leased Interests. ABCWUA/Bernalillo County's Response at 4.

PNM concedes in its Response Brief that “[b]ased on prior Commission holdings, it is reasonable to conclude that PNM was granted the necessary authority to return the leases at the end of the lease extension period as part of the Leaseback Orders and no further approval is required for PNM to allow the PVNGS leases to expire and for PNM to return the Leased Interests.” PNM's Response at 11. PNM says that it sought abandonment approval “out of an abundance of caution” *Id.* at 12.

PNM says that it does not object to the Commission summarily determining that abandonment approval is not required, but argues that the Commission should do so by issuing a declaratory order to that effect, not by dismissing with prejudice PNM's request for approval to abandon and decertify the PVNGS Leased Interests. PNM argues that its Application is neither “patently deficient in form” nor “a nullity in substance” and that there was a lack of certainty as to whether Commission authorization of abandonment of the PVNGS Leased Interests was necessary. *Id.* at 10-13.

PNM incorrectly claims that the Joint Motion to Dismiss does not challenge the Commission's jurisdiction. *Id.* at 16. The Joint Movants in fact correctly argue that because PNM has already decided to terminate its PVNGS Leased Interests as authorized in previous Commission orders, “PNM's after-the-fact . . . application for abandonment is a nullity, and not authorized by statute.” Joint Motion to Dismiss at 10. PNM implicitly agrees by saying, “It is PNM's position that whether abandonment approval is required, under the facts of this case, the Commission could not properly deny abandonment because to do so would contravene the Commission's previous approval of the notice and return provisions under the PVNGS leases.” *Id.* at 12. Accordingly, PNM's request for abandonment fails to state a claim upon which relief

can be granted because the Commission has effectively already granted PNM authority to abandon the PVNGS Leased Interests when they terminate.

Issuance of a declaratory order stating that PNM does not need approval under Section 62-9-5 to abandon its PVNGS Leased Interests is inappropriate for two reasons. First, the purpose of a declaratory order proceeding is to “terminate a controversy or to remove an uncertainty with respect to the applicability to the petitioner of any statute” 1.2.2.21(A) NMAC. There is no controversy as to the applicability of Section 62-9-5 in light of PNM’s statement that it does not object to the Commission summarily determining that abandonment approval is not required and, contrary to PNM’s arguments, there is no uncertainty that it does not apply. Second, no party nor Staff has filed a petition for a declaratory order and an accompanying brief and affidavit, as required by 1.2.2.21(A) NMAC.

Therefore, the motion to dismiss with prejudice PNM’s request for approval to abandon and decertify the PVNGS Leased Interests should be granted.

8. MOTION TO DISMISS REQUEST FOR APPROVAL OF SALE OF PVNGS ASSETS

WRA, ABCWUA and Bernalillo County, in their Responses, argue that PNM’s request for approval to sell certain PVNGS assets should also be dismissed with prejudice. WRA’s Response at 3; ABCWUA/Bernalillo County’s Response at 5.

PNM seeks approval to sell “PNM-owned assets” which include related PVNGS switchyard facilities, transmission facilities, common or excluded assets under the PVNGS Units 1 and 2 Leased Interests, common facilities necessary for the operation of the Leased Interests and nuclear fuel associated with the Leased Interests (referred to by PNM as “the PVNGS Assets”). PNM seeks approval to sell the PVNGS Assets to the Salt River Project Agriculture Improvement and Power District, a current co-owner of PVNGS who will purchase the Leased Interests from the Lessors when the leases terminate. Fenton Direct at 4.

PNM seeks approval to sell the PVNGS Assets under Sections 62-6-12 and 62-6-13 of the PUA. Section 62-6-12(A)(4) (1989) requires advance Commission approval for a public utility to sell “any public utility plant or property constituting an operating unit or system or any substantial part thereof[.]” Section 62-6-13 (1953) states that, unless the Commission finds that the proposed transaction is unlawful or is inconsistent with the public interest, the Commission shall approve the proposed transaction.

PNM witness Fenton said that it is “not completely clear” that Commission approval of the sale of the PVNGS Assets is necessary, for two reasons. First, he said that transfer of the PVNGS Assets is a condition of the leases when Leased Interests are returned, and PNM will not need the PVNGS Assets to maintain its remaining ownership interests in PVNGS. Second, he said that “*the PNM-owned PVNGS Assets associated with the Leased Interests do not constitute an operating unit or system and represent a portion of PNM’s interests in PVNGS Units 1 and 2, as opposed to a substantial part thereof.*” Fenton Direct at 24 (emphasis added). PNM seeks approval of the sale of the PVNGS Assets “as a precautionary measure in order to avoid a void transaction with SFP . . . to the extent deemed necessary by the Commission.” PNM’s Consolidated Reply at 10.

WRA argues that the statutory language makes it clear that Commission approval is not necessary for PNM to sell the PVNGS Assets because the Assets are not an operating unit or system and do not represent a substantial part of one. According to WRA, the PVNGS Assets are mainly only a percentage of interests in assets in which PNM will continue to retain a level of ownership that is commensurate with its new generation entitlement share. Thus, WRA argues, “The PVNGS Assets are incidental to the Leased Interests.” WRA’s Response at 4-5.

PNM does not object to the Commission summarily determining that sale approval is not required, but, once again, argues that the Commission should do so by issuing a declaratory order to that effect, not by dismissing with prejudice PNM’s request for approval of the sale of the PVNGS assets. PNM’s Consolidated Reply at 9-10.

PNM, as the operator of a public utility, is probably in the best position to offer an opinion on whether the PVNGS Assets constitute “an operating unit or system or any substantial part thereof.” Mr. Fenton, PNM’s Executive Director of Regulatory Policy and Case Management, unequivocally states that the PVNGS Assets do not constitute an operating unit or system or any substantial part thereof. Fenton Direct at 24 (quoted above). WRA, ABCWUA and Bernalillo County agree, as does the Hearing Examiner. Additionally, as PNM acknowledges, the Commission approved the transfer of the PVNGS Assets when it approved the sale/leaseback agreements. PNM’s Consolidated Reply at 10. Therefore, the Commission lacks jurisdiction to approve the proposed sale under Section 62-6-12, and PNM’s request for approval of the sale of the PVNGS Assets fails to state a claim upon which relief can be granted.

Issuance of a declaratory order stating that PNM does not need approval under Section 62-6-12 to sell the PVNGS Assets is inappropriate for the reasons stated above in Section 7 in connection with PNM’s request for approval to abandon and decertify its PVNGS Leased Interests.

Therefore, the motion to dismiss with prejudice PNM’s request for approval to sell the PVNGS Assets should be granted.

9. MOTION TO DISMISS REQUEST FOR APPROVAL TO CREATE REGULATORY ASSETS

PNM seeks approval to create the following four regulatory assets:

1. For PNM’s undepreciated investment for improvements to its 104.01 MW Leased Interests in PVNGS Unit 1, in the estimated amount of \$87,861,281, to be amortized over 20 years;
2. For PNM’s undepreciated investment for improvements to its 10.42 MW Unit 2 Leased Interest in PVNGS Unit 2, in the estimated amount of \$7,389,674, to be amortized over 20 years;

3. For PNM's costs to obtain an order authorizing abandonment of the Leased Interests, in the estimated amount of \$2,293,881, to be amortized over 20 years; and
 4. For any cost differences in the proceeds received from SRP for the sale of the PVNGS Assets and the actual book value of the PVNGS Assets, to be amortized over 20 years.⁵
- PNM currently does not have an estimate for any such difference.

Sanders Direct at 11, 26-28; Sanders Supp. at 5-6.

More specifically:

PNM is requesting the Commission approve an accounting order to allow PNM to record the regulatory assets and to recover the regulatory assets through base rates. PNM is proposing to include the unamortized balance of the regulatory assets in rate base which will earn a return on rate base equal to PNM's WACC [weighted average cost of capital]. PNM also proposes to recover the annual amortization expense on the regulatory assets as a component of operating expenses in its cost of service studies.

Sanders Direct at 18-19.

Whether to grant a request to create a regulatory asset for ratemaking purposes is within the Commission's discretion. There is little legal authority in the PUA to approve ratemaking treatment to recover a utility's costs before the costs are incurred and outside the context of a rate case. Case No. 18-00261-UT, Recommended Decision at 6 (3-18-18). While this Commission does not oppose the creation of regulatory assets, they should be the exception, not the norm. Case No. 15-00261-UT, Recommended Decision at 131. This is consistent with Generally Accepted Accounting Principles (GAAP), which permit a public utility to defer, through creation of a regulatory asset, "unusual" or "infrequently occurring" costs. *See* https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176164695031&acceptedDisclaimer=true. An "infrequently occurring cost" should be of the type that would not reasonably be expected to recur in the foreseeable future. An "unusual cost" should be related to

⁵ If the proceeds received from the SRP exceed the book value of the PVNGS Assets, PNM would create a regulatory liability to return the excess funds to customers. If the proceeds received from the SRP are less than the book value of the PVNGS Assets, PNM would establish a regulatory asset to collect the shortfall from customers. Sanders Direct at 9.

an underlying event or transaction that possesses a high degree of abnormality and be of a type clearly unrelated to, or only incidentally related to, the ordinary and typical activities of the public utility. See <https://asc.fasb.org/glossarysection&trid=114868822&id=SL114882060-224228>.

In Case No. 15-00261-UT, the Commission stated that utility requests for regulatory assets and liabilities are becoming more frequent and that it shares the concerns expressed in that case by Attorney General witness Andrea Crane. Ms. Crane said that the Attorney General opposes the creation of regulatory assets in principle because they insulate shareholders from risk and shift risk to ratepayers. She said a utility's incentive to manage its business gets lost when regulatory assets are permitted:

But I do find it ironic that you would go out and execute a buy-back of Palo Verde leases for \$150 million or something without batting an eye, and yet you want to come in and have a regulatory asset for a couple of hundred thousand dollars in credit card fees. I mean, you are at risk, you should be at risk, and guess what? That's why you get a rate of return that's more than a risk-free rate. If you didn't have any risk, then we should be talking about a treasury rate of return for the company. We're not. Even Dr. Woolridge is not recommending that. And so, you know, there's risk. You're going to be compensated for that risk, and you need to take that risk instead of pushing everything off on ratepayers, you know, and trying to get — trying to get the Commission to guarantee recovery of costs that you haven't even incurred yet.

Case No. 15-00261-UT, Corrected Recommended Decision at 131.

PNM's request for approval to create a regulatory asset for the cost of an abandonment proceeding fails to state a claim upon which relief can be granted because PNM's request for approval to abandon its PVNGS Leased Interests should be dismissed with prejudice, as stated above in Section 7. If there is no abandonment proceeding, there is no basis to claim recovery of costs of an abandonment proceeding. Therefore, the motion to dismiss with prejudice PNM's request for approval to create a regulatory asset for the cost of an abandonment proceeding should be granted.

In its Response, WRA argues for dismissal of PNM's requests for approval to create two regulatory assets for the costs of PNM's undepreciated investment for improvements to its Units

1 and 2 PVNGS Leased Interests *without prejudice*, thereby preserving PNM's ability to seek recovery of the costs comprising the regulatory assets in a future general rate case. WRA's Response at 5; Consolidated Joint Reply at 4 (emphasis in original). WRA argues that dismissal of PNM's request for approval to create the two regulatory assets would not deprive PNM of its opportunity to recover its undepreciated investments in PVNGS because PNM is not required to obtain Commission approval of a regulatory asset for ratemaking purposes before seeking recovery of the regulatory asset in a rate case. In support of this assertion, WRA cites to the testimony of PNM witness Henry Monroy in Case No. 15-00261-UT. WRA argues that it would be administratively efficient and would conserve the Commission's and parties' resources to limit the scope of this case to consideration of PNM's request for approval of replacement resources. WRA's Response at 5-6.

WRA's assertion that PNM does not have to obtain approval of a regulatory asset for ratemaking purposes before seeking recovery of a regulatory asset in a rate case is incorrect. PNM is required to follow Generally Accepted Accounting Principles (GAAP), which include the provisions of the Financial Accounting Standard Board's (FASB's) Accounting Standards Codification (ASC) 980 ("Regulated Operations") (FASB ASC 980). Under FASB ASC 980, a rate-regulated utility may capitalize as a regulatory asset an incurred cost that would otherwise be charged to expense if future recovery in rates is "probable." Robert L. Hahne & Gregory Aliff, *Accounting for Pub. Utils.*, § 12.02[2] (2020); PNM's Consolidated Reply at 12. A Commission order authorizing creation of a regulatory asset is one basis for a utility's conclusion that future recovery in rates of an incurred cost is probable. *Id.* If a utility is not allowed to create a regulatory asset for ratemaking purposes, the costs incurred have to be expensed in the year incurred. If incurred outside the Test Year Period in a utility's next rate case, the utility loses the ability to recover the costs from ratepayers. Case No. 15-00261-UT, Corrected Recommended Decision at 130. PNM is correct that this Commission has denied utilities' requests for approval of a regulatory asset based on their failure to obtain pre-approval of the creation of a regulatory

asset. *See, e.g.*, Case No. 15-00261-UT, Corrected Recommended Decision at 132-34 (rejecting PNM’s request to create a regulatory asset for its costs of exiting Alvarado Square because PNM’s request was untimely), adopted in relevant part by Final Order Partially Adopting Recommended Decision (9-28-16); Case No. 07-00319-UT, Corrected Recommended Decision at 104 (rejecting SPS’s request to create a regulatory asset for demand side management costs because SPS’s request was untimely, adopted in relevant part by Final Order Partially Adopting Recommended Decision (9-25-08).

While the Commission has discretion to approve PNM’s creation of a regulatory asset for ratemaking purposes for its undepreciated investment in improvements to its PVNGS Leased Interests, the Commission should dismiss this request with prejudice under 1.2.2.12(B) NMAC, which allows the Commission to dismiss a portion of a proceeding “for other good cause shown.” The “good cause” to dismiss the request with prejudice is comprised of several elements. First, this Commission has said that approval of regulatory assets should be the exception, not the norm. Second, costs of undepreciated investments in generation plant are not “unusual” or “infrequently occurring” costs, especially in light of passage of the Energy Transition Act in New Mexico. PNM just recently received approval to abandon and replace San Juan Units 1 and 4. Case Nos. 19-00018-UT & 19-00195-UT. Undepreciated costs of abandoned plant do not qualify as unusual or infrequently occurring. This is demonstrated by PNM’s request in this case for approval to create a regulatory asset for its undepreciated investment for improvements to its PVNGS Leased Interests on April 2, 2021, well in advance of termination of its PVNGS Unit 1 and 2 Leased Interests. Third, applying the 7.2% after-tax weighted average cost of capital approved in PNM’s last general rate case, PNM estimates that ratepayers would pay \$6.1 million annually in carrying charges for the two regulatory assets for the costs of undepreciated PVNGS improvements. Sanders Direct, Exh. KTS-2 (row 18, column E). Fourth, PNM witness Sanders said that PNM is unwilling to record a regulatory liability for the costs of its PVNGS Leased Interests in the event that PNM’s test year period in its next general rate case does not coincide

with the termination of the Leased Interests. Sanders Direct at 12. Absent the creation of such a regulatory liability, PNM will continue to recover through rates the costs of its Leased Interests in PVNGS Units 1 and 2 until those costs are removed from PNM's revenue requirement in PNM's next general rate case. PNM admits that it controls the timing of its next rate case. PNM's Consolidated Reply at 6 n.1. PNM has repeatedly refused to state when it will file its next general rate case. Sanders Supp. at 12 (stating that PNM is still evaluating the timing of when it will file a general rate case that will incorporate the abandonment of 104 MW of its PVGNS Unit 1 Leased Interests and 10 MW of its PVNGS Unit 2 Leased Interest along with the replacement power and reliability resources); Case No. 21-00031-UT, Transcript 6-16-21 at 136 (testimony of PNM witness Stella Chan that she did not know when PNM will file its next general rate case and that she didn't believe that any PNM witness testifying in the case could answer that question). The Commission does not need PNM's permission to create a reverse deferral account for any overcollections of the costs of PNM's PVNGS Leased Interests, and PNM is put on notice of this possibility. See Case No. 20-00104-UT, Recommended Decision at 101-05 (4-6-21), adopted in relevant part by Order Adopting Recommended Decision with Modifications (6-23-21). However, PNM's refusal to agree to create such a liability account, while requesting approval of four regulatory asset accounts, shows a disregard for the balancing of investor and ratepayer interests. For all of these reasons, the motion to dismiss with prejudice PNM's requests to create two regulatory assets for its undepreciated investment for improvements to its Leased Interests in PVNGS Units 1 and 2 should be granted.

Denying PNM's requests for approval to create two regulatory assets for recovery of the costs of undepreciated PVNGS improvements does not preclude PNM from otherwise seeking recovery of those costs. *PNM's remedy is to seek recovery of the costs in a general rate case in which the test year period includes the time period in which PNM incurs its so-called "stranded costs."* This is consistent with the Commission's recent statement in its order in EPE's general rate case that "[i]t is true that a general principle of ratemaking is that 'the chips fall where they

will' between rate cases, and this can be a good thing for ratepayers.” *Id.* at 105. It is also consistent with Mr. Sander’s testimony in support of PNM’s refusal to agree to create a regulatory liability for the cost of any overcollection of cost recovery of the PVNGS Leased Interests after those Leased Interests terminate. Mr. Sanders said, “PNM believes a general rate case is the appropriate avenue to address these types of changes where the Commission can completely assess a utility’s cost of service.” Sanders Supp. at 13. As the Intervenors’ Joint Reply aptly states, “PNM’s strategic reasons for not timing the filing of a rate case to preserve its [ability] to recover undepreciated investments from Palo Verde is not the Commission’s emergency.” Intervenors’ Joint Reply at 8.

If the Commission does not adopt the recommendation to deny with prejudice PNM’s request to create regulatory assets for the undepreciated costs of improvements in its Leased Interests in PVNGS Units 1 and 2, the Commission should order the parties to address in posthearing briefs whether PNM is entitled to recover such costs in light of the fact that PNM will no longer own the undepreciated improvements. This issue was not addressed in the Joint Motion to Dismiss or responses to the Joint Motion to Dismiss.

No Intervenor has moved to dismiss PNM’s request for approval to create a regulatory asset for any cost differences in the proceeds received from SRP for the sale of the PVNGS Assets and the actual book value of the PVNGS Assets, to be amortized over 20 years. Therefore, this request for approval to create a regulatory asset should not be dismissed, but determined on the merits.

10. DECRETAL PARAGRAPHS

IT IS THEREFORE ORDERED:

A. PNM’s request for approval to abandon and decertify 114.43 MW of its Leased Interests in PVNGS Units 1 and 2 when the leases expire is dismissed with prejudice.

B. PNM's request for approval to sell the PVNGS Assets to the Salt River Project Agricultural Improvement and Power District is dismissed with prejudice.

C. PNM's request for authority to create a regulatory asset for PNM's costs to obtain an order authorizing abandonment of the Leased Interests is dismissed with prejudice.

D. PNM's request for authority to create a regulatory asset for its undepreciated investment for improvements to its 104.01 MW Leased Interests in PVNGS Unit 1 is dismissed with prejudice.

E. PNM's request for authority to create a regulatory asset for its undepreciated investment for improvements to its 10.42 MW Leased Interest in PVNGS Unit 2 is dismissed with prejudice.

F. The only remaining issues within the scope of this case are:

1. Whether to grant PNM's request to replace the 114.43 MW of the PVNGS Leased Interests with two purchased power agreements and three energy storage agreements;

2. Whether PNM's decisions to renew the five leases and repurchase 64.1 MW of PVNGS Unit 2 capacity (which were found to be imprudent in Case No. 15-00261-UT) exposed ratepayers to additional financial liability beyond that to which ratepayers would have been exposed had PNM chosen to not renew the leases and not to repurchase the 64.1 MW of PVNGS Unit 2 capacity and whether PNM should be denied recovery of any future decommissioning expenses as a remedy for PNM's imprudence; and

3. Whether to grant PNM's request to create a regulatory asset or liability for any cost differences in the proceeds received from SRP for the sale of the PVNGS Assets and the actual book value of the PVNGS Assets, to be amortized over 20 years.

G. This Order is effective immediately.

Issued at Santa Fe, New Mexico on July 28, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Carolyn R. Glick
Carolyn R. Glick, Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE APPLICATION OF)
PUBLIC SERVICE COMPANY OF NEW MEXICO)
FOR DECERTIFICATION AND ABANDONMENT)
OF 114 MW OF LEASED PALO VERDE)
NUCLEAR GENERATING STATION CAPACITY)
AND SALE AND TRANSFER OF RELATED)
ASSETS AND FOR APPROVAL TO PROCURE)
NEW RESOURCES UNDER 17.9.551 NMAC)
)
)
**PUBLIC SERVICE COMPANY OF NEW MEXICO,)
Applicant)****

Case No. 21-00083-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent via email to the parties listed below a true and correct copy of the Recommended Decision on Motions to Dismiss.

Stacey Goodwin Leslie Padilla Richard Alvidrez Mark Fenton Steven Schwebke Raymond Gifford Mariel Nanasi Christopher Sandberg Joan Drake Nann M. Winter Keith Herrmann Jody Garcia Dahl Harris Peter Auh Andrew Harriger Steven S. Michel April Elliott Cydney Beadles Pat O'Connell Cholla Khoury Gideon Elliot Jennifer Van Wiel Keven Gedko Sydney Wright Andrea Crane Doug Gegax	Stacey.Goodwin@pnmresources.com ; Leslie.padilla@pnmresources.com ; Ralvidrez@mstlaw.com ; Mark.Fenton@pnm.com ; Steven.Schwebke@pnm.com ; RGifford@wbklaw.com ; Mariel@seedsbeneaththesnow.com ; cksandberg@me.com ; jdrake@modrall.com ; nwinter@stelznerlaw.com ; kherrmann@stelznerlaw.com ; JGarcia@stelznerlaw.com ; dahlharris@hotmail.com ; pauh@abcwua.org ; akharriger@sawvel.com ; smichel@westernresources.org ; April.elliott@westernresources.org ; Cydney.Beadles@westernresources.org ; pat.oconnell@westernresources.org ; ckhoury@nmag.gov ; gelliot@nmag.gov ; jvanwiel@nmag.gov ; kgedko@nmag.gov ; swright@nmag.gov ; ctcolumbia@aol.com ; dgegax@nmsu.edu ;	Amanda Edwards Jeffrey Albright Michael I. Garcia Bruce C. Throne Joseph Yar Jeffrey Spurgeon Peter J. Gould Kelly Gould Jim Dauphinais Stephanie Dzur April Elliott Don Hancock Michael C. Smith Bradford Borman Naomi Velasquez Elizabeth Jeffreys Peggy Martinez-Rael Elizabeth Ramirez Jack Sidler Elisha Leyba-Tercero Gabriella Dasheno Eli LaSalle Ana Kippenbrock Carolyn Glick	AE@Jalblaw.com ; JA@Jalblaw.com ; mikgarcia@berncogov.gov ; bthronattty@newmexico.com ; joseph@yarlawoffice.com ; spurgeonJ@southwestgen.com ; peter@thegouldlawfirm.com ; Kelly@thegouldlawfirm.com ; jdauphinais@consultbai.com ; Stephanie@Dzur-law.com ; ccae@elliottanalytics.com ; srcidon@earthlink.net ; Michaelc.smith@state.nm.us ; Bradford.Borman@state.nm.us ; Naomi.Velasquez1@state.nm.us ; Elizabeth.jeffreys@state.nm.us ; Peggy.Martinez-Rael@state.nm.us ; Elizabeth.Ramirez@state.nm.us ; Jack.sidler@state.nm.us ; Elisha.Leyba-Tercero@state.nm.us ; Gabriella.Dasheno@state.nm.us ; Eli.Lasalle@state.nm.us ; Ana.Kippenbrock@state.nm.us ; Carolyn.glick@state.nm.us ;
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DATED on July 28, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Carolyn R. Glick
Carolyn R. Glick
Hearing Examiner