BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL TO ABANDON SAN JUAN GENERATING STATION UNITS 2 AND 3, ISSUANCE OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR REPLACEMENT POWER RESOURCES, ISSUANCE OF ACCOUNTING ORDERS AND DETERMINATION OF RELATED RATEMAKING PRINCIPLES AND TREATMENT	)	**Case No. 13-00390-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO, **Applicant.**	)	

MOTION TO FILE NEW ENERGY ECONOMY'S EXCEPTIONS TO CERTIFICATION OF STIPULATION INSTANTER

Comes Now New Energy Economy (NEE) and moves this Commission to accept the filing of Exceptions to the Hearing Examiner's April 8, 2015 Certification of Stipulation attached hereto.

1. There appears to be two Rules on Exceptions to Certifications of Contested Stipulations, §12.2.20.B.5(b) and to "Recommended Decisions" in §12.2.2.37.C.

2. The former contains no page limitations or "summary" requirement. The latter contains a 40-page limit and a summary requirement, "except by leave of the Commission."

3. New Energy Economy is unaware if the NM PRC has ever interpreted the latter to apply to Certifications of Contested Stipulations.

4. Therefore, in abundance of caution, New Energy Economy, is requesting a variance for the 40-page limit and summary, if it applies, based on the complexity of issues addressed in the case herein and the Hearing Examiner's recommended decision.

WHERFORE, New Energy Economy prays that our Exceptions to the Certification of Stipulation are accepted instanter as filed on April 20, 2015.

Respectfully Submitted,

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL TO ABANDON SAN JUAN GENERATION STATION UNITS 2 AND 3, ISSUANCE OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR REPLACEMENT POWER RESOURCES, ISSUANCE OF ACCOUNTING ORDERS AND DETERMINATION OF RELATED RATE-MAKING PRINCIPLES AND TREATMENT	)	**Case No. 13-00390-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO, **Applicant**	)	

NEW ENERGY ECONOMY'S EXCEPTIONS TO CERTIFICATION OF STIPULATION

New Energy Economy ("NEE"), pursuant to Rule 1.2.2.20.B(5)(b) NMAC, sets forth below its exceptions to the Hearing Examiner's findings and conclusions (F&C) and recommendations, including the Examiner's Discussion sections in his April 8, 2015 Certification of Stipulation in this case ("Certification") as follows.[1] In providing the following exceptions, NEE states that it agrees with the Hearing Officer's findings and conclusions, discussion and recommendations in many respects but respectfully submits that there are significant, additional grounds on which to reject the Stipulation that are not addressed or adopted by the Hearing Examiner. New Energy Economy wishes to preserve these issues and grounds in the event that the PRC were to accept all or any part of the Stipulation and/or in the event that PNM attempted to "cure" the defects identified by the Hearing Examiner.

[1] *See* Certification, p. 146, F&C no. 1 recommending that "All findings and conclusions of law contained in the Statement of the Case and Discussion above are adopted as Findings of Fact and Conclusions of Law of the Commission."

1. Recommended F&C in Section II. ("The Stipulation as a whole is *not* fair, just and reasonable and in the public interest"), pp. 65-111:

New Energy Economy appreciates the Hearing Examiner's meticulous and incisive rejection of the Stipulation on the grounds that PNM has failed, after more than two years, to obtain a SJGS partnership agreement or fuel supply and coal price certainty for SJGS post 2017. He rightfully concludes that "[t]he stipulating parties are asking the Commission to approve an acquisition that the San Juan owners are not ready and willing to approve."[2] He understands that PNM's SJGS coal share "ownership and responsibility for the capacity that remains will be increasing"[3] and that those unwanted coal share risks outweigh the benefits.[4] This is true even if PNM manages to secure a future coal supply agreement and SJGS partnership agreement.

NEE takes exception that the denial of a CCN for SJGS unit 4 coal is limited to the lack of a SJGS restructuring agreement or fuel supply or coal price certainty post-2017. PNM has failed to abide by the requirement of New Mexico's Public Utility Act, which requires PNM to deliver "reasonable and proper services" "at fair, just and reasonable rates." §62-3-1B NMSA. It is also clear that PNM's CCN for SJ 4 fails because it is not financially beneficial for ratepayers[5], is not a reliably performing plant[6], it has enormous exposure to anticipated

[2] Certification of Stipulation, p. 87
[3] Ibid, p. 91
[4] Ibid, pp. 104 – 110 "If the San Juan owners are not willing to accept the risks of a restructuring agreement for San Juan without knowledge of the terms of a post-2017 fuel supply, it is not reasonable to ask the Commission to act with even less knowledge – about the post-2017 fuel supply and restructuring agreement. It is also unreasonable to assign those risks to ratepayers based on such a record." At p. 110.
[5] The levelized cost is $0.090/kWh, which is almost the highest cost/kWh in PNM's system (NEE Exhibit #72); The cost of coal in 2013 was the highest in the Southwest (NEE Exhibit #69, DVW Supplemental Testimony Redacted, Exhibit #1) - coal price will likely increase post-2017 (NEE Exhibit #67, DVW Direct Testimony, Exhibit #21, PNM response to CCAE 12-9).
[6] San Juan Equivalent Forced Outage Rate (EFOR) is 70% higher than national average. Over the past seven years, the EFOR at San Juan has been 13.2%. The national average for coal-fired power plants of similar capacity is 7.6%. Further, San Juan is not a reliable contributor to meeting peak demands. For the five years 2009-13, the San Juan output for June through September in the afternoon hours (noon-6pm) has been 15% below capacity. Instead of San Juan generating electricity at full capacity, PNM gas plants (or market off-system purchases) have had to produce energy that should have come from San Juan. PNM's actual gas plant output during July/August 2013 noon to 6 pm was 350 MW to 450 MW. As the cost of natural gas fuel and/or off-system purchases is presently greater than coal

environmental regulations[7], is a water hog[8], it pollutes and causes tremendous externalized health problems[9], and is the single greatest source of carbon emissions in NM, that contribute to disruptive climate change, including drought and mega wild fires. A CCN for SJ4 is inconsistent with the Renewable Energy Act.[10] Furthermore, the risks and liabilities from decommissioning, including but not limited to the cost of on-site contamination, coal-ash groundwater contamination and landfill contamination[11], outstanding exposure to litigation[12], and more are potentially wrought with such great financial exposure that it would be reckless to wed ratepayers to more coal. Lastly, and perhaps most importantly of all, the burning of coal is the single greatest driver of global warming and climatic changes[13]that has begun to wreak havoc all over the world and it is our responsibility to shift away from this dangerous energy source as quickly as possible. We have an opportunity to shift to renewable energy resources for our power and create a new energy economy.

2. Recommended F&C in Section III.G.3.b ("Violations of Regulatory Principles; Evaluation of alternative resources and cost-effectiveness"), pp. 114-115:

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fuel, ratepayers were forced to pay for the unreliable output at San Juan through the fuel clause. (NEE Exhibit #72, Direct Testimony and Exhibits in Opposition to the Stipulation of David Van Winkle, Exhibit #2). FEUS also confirmed this problem by citing reliability as one of their reasons to not add the 65 MW in their January 2015 letter to PNM: "significant degradation in SJGS Unit 4 reliability performance." (PNM Ex. 52, Olson Supplemental Testimony (Jan. 14, 2015), CMO-1) Actual EAF for 2013/14 has been only 76% for the entire plant. (NEE Exhibit #59)

[7] Greenhouse gas, methane, ozone, and coal ash regulation. See, also NEE Exhibits #34; #35; #41; NEE Exhibit #72, at p. 14 (PNM has comprehended carbon costs of $68 million in 2020 and growing to $297 million in 2033, which will increase ratepayers' bills.)

[8] At PNM's planned level of production for 2018-33, PNM's share of SJGS will consume more than 30 billion gallons of water for the time period 2018-33. (NEE Exhibit #72, Direct Testimony and Exhibits in Opposition to the Stipulation of David Van Winkle, p. 15)

[9] See, testimony of Ron Darnell Testimony in Support of the Stipulation, pp. 21 – 23 (The reductions of sulfur dioxide, nitrogen oxides, greenhouse gas emissions, volatile organic compounds, particulate matter, water consumption and more will be reduced with the retirement of units 2 & 3); NEE Exhibit # 8

[10] The Renewable Energy Act states that "the generation of electricity through the use of renewable energy presents *opportunities* to promote energy *self-sufficiency*, preserve the state's *natural resources* and pursue an *improved environment* in New Mexico" and can bring "*significant economic development and environmental benefits* to New Mexico." (Emphasis supplied.)

[11] NEE Exhibit #41.

[12] *WildEarth Guardian* (WEG) *v. Office of Surface Mining* (OSM) lawsuit (NEE Exhibit #72, p. 19, 20; PNM 10Q report, 10/31/14, page 57); Sierra Club v. San Juan Coal Company lawsuit (NEE Exhibit #41)

[13] NEE Exhibit #61.

NEE takes exception to the recommended F&C in Section III.G.3.b of the Certification that "[t]he alternatives analysis presented in support of the CCN requests in the Stipulation does not violate regulatory principles." That F&C should not be accepted or adopted by the Commission because: (i) there is no substantial evidence in the record showing that the "alternatives analysis" by PNM, or by any of the other Signatories to the Stipulation, upon which the selection of the replacement resources proposed in the Stipulation are based complied with the requirements in Commission Rule 17.7.3 NMAC applicable to utility resource selections and applications for certificates of public convenience and necessity ("CCNs")[14]; and (ii) the discussion in the Certification justifying this F&C improperly conflates, contrary to applicable law and Commission precedent, the distinct "alternatives analysis" requirements in Rule 17.7.3 applicable to utility CCN requests with the additional "net benefit" tests applicable to such requests and settlement stipulations, and is otherwise internally inconsistent, arbitrary and unreasonable.

NEE also takes exception to the recommended F&C in Section III.G.3.b of the Certification that, based on the record, there was no need for PNM to issue competitive RFPs to justify the reasonableness of the particular replacement resources proposed in PNM's Application and the Stipulation in order for the Commission to reasonably and properly determine if those resource selections complied with the "alternatives analysis" requirements in Rule 17.7.3 NMAC and satisfy the requirements in NMSA 1978, §§ 62-9-1.A and B and Commission precedent applicable to Commission approval of utility CCN requests. The

[14] "Substantial evidence" is "'evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.'" *See also In Re Commission's Investigation of PNMGS*, 2000-NMSC-008, ¶ 3, 998 P.2d 1198, 1200; *In Re Petition of PNM Gas Services*, 2000-NMSC-012, ¶¶ 88. 99, 1 P.3d 383, 415 (Commission reliance on speculative evidence offered by utility would have been improper; "the Commission cannot rely on its own expert judgment, regardless of the source of that judgment, as a substitute for evidence in the record").

Commission should not accept or adopt that F&C because it: (i) is not supported by substantial evidence; (ii) "puts the cart before the horse" and unreasonably abdicates the Commission's regulatory oversight authority under §§ 62-9-1.A and B by recommending that the Commission find and conclude that "an RFP process is appropriate" only "once a particular type of resource is identified" by a utility, and is otherwise not well-reasoned or justified in Section III.G.3.b of the Certification; and (iii) is based on speculative and irrelevant testimony by PNM witness O'Connell, and by Attorney General witness Crane, who acknowledged at the hearing that she has no resource selection process expertise or experience.

The "Alternative Analysis" Issue

The Certification (p. 114) correctly finds that "[t]he opponents [of the Stipulation] are correct that the analysis performed for a CCN should show the proposed project's cost-effectiveness in comparison to other feasible alternatives." Both PNM's and Staff's witnesses confirmed that burden of proof requirement.[15] That finding in the Certification, however, does not go far enough to explain or apply the substance of the Commission's requirements in Rule 17.7.3 NMAC for satisfying that "cost effectiveness" showing.

Section 10 of the New Mexico Efficient Use of Energy Act, NMSA 1978, § 62-17-10, provides that "[p]ursuant to the commission's ratemaking authority," electric public utilities are required to file periodic IRPs to evaluate "renewable energy, energy efficiency, load management, distributed generation and conventional supply-side resources on a consistent and comparable basis and take into consideration risk and uncertainty of fuel supply, price volatility and cost of anticipated environmental regulations in order to identify the most cost-effective

[15] *See, e.g.*, Ortiz Supporting Direct, pp. 38-39; Gunter Prior Direct, p. 16, citing Certification of Stipulation in Case No. 08-00305-UT.

portfolio of resources to supply the energy needs of customers." Consistent with that statute, the "Objective" section of the Commission's IRP Rule, 17.7.3.6 NMAC, provides:

> The purpose of this rule is to set forth the commission's requirements for the preparation, filing, review and acceptance of integrated resource plans by public utilities supplying electric service in New Mexico in order *to identify the most cost-effective portfolio of resources to supply the energy needs of customers. For resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts.* (Emphasis added).

Rule 17.7.3.7.I NMAC defines "most cost effective resource portfolio" as "those supply-side resources and demand-side resources that minimize the net present value of revenue requirements proposed by the utility to meet electric system demand during the [20-year] planning period consistent with reliability and risk considerations." Further, Rule 17.7.3.9.G(1) addressing "Determination of the Most Cost Effective Resource Portfolio and Alternative Portfolios" provides:

> To identify the most cost-effective resource portfolio, utilities shall evaluate all *feasible* supply and demand-side resource options *on a consistent and comparable basis,* and take into consideration risk and uncertainty (*including but not limited to financial, competitive, reliability operational, fuel supply, price volatility and anticipated environmental regulation*). The utility shall evaluate the cost of each resource through its projected life with a life-cycle or similar analysis. The utility shall also consider and describe ways to mitigate ratepayer risk. (Emphasis added).

The Commission is required to enforce these IRP laws and regulations in this case. Based on protests of the IRP PNM filed in July 2014, the Commission's August 13, 2014 Initial Order in Case No. 14-00028-UT deferred any determination whether PNM's 2014 IRP was compliant with Rule 17.7.3 NMAC and did not accept that IRP. Instead, that Order provided that the Commission's review of PNM's 2014 IRP be "held in abeyance until final, non-appealable

orders in Case Nos. 13-00390-UT and Case No. 14-00158-UT,[16] have been issued by the Commission."

It therefore appears that the Commission decided in its Initial Order in Case No. 14-00228-UT to rely on the evidentiary record and its final order *in this case* to determine whether the replacement resources described in the "Four Year Action Plan" in PNM's 2014 IRP (and, prior to that filing, in the Revised State Implementation Plan or "RSIP") satisfy the "most cost-effective resource portfolio" requirements and criteria in Rule 17.7.3 NMAC. Moreover, PNM and the other Signatories to the Stipulation expressly relied on PNM's claims that the replacement resources proposed in PNM's Application and the Stipulation satisfied "the most cost effective resource portfolio" standards in Rule 17.7.3 NMAC.[17]

In this regard, the Commission should note that no language <u>in the Stipulation</u> agrees or asserts that the Palo Verde ("PV") 3 or San Juan ("SJ") 4 replacement resources for which PNM is requesting CCNs are PNM's "most cost-effective" replacement resources considering "all feasible supply and demand-side resource options on a consistent and comparable basis," or otherwise satisfy the resource alternative evaluation requirements in Rule 17.7.3. The reason for that is shown by the record: they simply lacked "substantial evidence" to demonstrate that.

[16] The Commission's Final Order Adopting Certification of Stipulation with Modification in Case No. 14-00158-UT addressed, *inter alia*, the Commission's approval of a stipulation there providing that PNM should be issued a CCN for an additional 40 MW of utility-scale solar resources as "system resources," rather than as renewable resources necessary for PNM to satisfy its Renewable Portfolio Standard in 2015 as provided in the New Mexico Renewable Energy Act.

[17] *See, e.g.*, Ortiz Supporting Direct, p. 38 and Darnell Supporting Direct, p. 17 (relying on demonstration in O'Connell Supporting Direct to show replacement resources proposed in Stipulation are "the most cost-effective"); O'Connell Supporting Direct, pp. 17-22, 27-39 (asserting the same based on the criteria in the Commission's IRP Rule 17.7.3 NMAC); Gunter Prior Direct, p. 16 (observing that, in the Certification of Stipulation in Case No. 08-00305-UT, the Hearing Examiner found that, to satisfy the requirements for a CCN, its proponents must show not only that "the requested resource is consistent with the Commission <u>accepted</u> IRP," but also that "[t]he facility is <u>the most economical choice among the feasible alternatives</u>") (Emphasis added).

Ignoring that record, the Certification (p. 114) improperly conflates the Signatories' burden of satisfying the resource alternative evaluation requirements in Rules 17.7.3.9 F and G with the "net benefit" requirements for CCN requests and settlement stipulations, stating:

> The Hearing Examiner, however, does not find that it was improper for PNM to subtract the cost savings resulting from the Stipulation from the costs of the replacement portfolio encompassed in the Stipulation. If a utility decides not to seek the recovery of a portion of the costs of the resources being added, a utility's modeling should not be required to assume the costs will be recovered.

As stated in its Final Order in Case No. 08-00305-UT, the Commission's requirement that utilities requesting CCNs for new resources satisfy their burden of showing that those resources satisfy the "most cost-effective" resource requirements in Rule 17.7.3 by showing that they have reasonably considered "all feasible supply and demand-side resource options on a consistent and comparable basis," taking into consideration "risk and uncertainty (including but not limited to financial, competitive, reliability, operational, fuel supply, price volatility and anticipated environmental regulation") is distinct from, and in addition to, the Commission's requirement that those resource selections provide a "net benefit" to a utility's customers. (Emphasis added). Any other interpretation of those requirements would effectively negate a utility's satisfaction of the feasible resource "options" analysis requirement in Rule 17.7.3 by allowing utilities to conduct flawed resource alternatives analyses that fail to consider all "feasible" alternatives, including "competitive" options and associated risks and uncertainty, as the record in this case shows PNM did.

The fact that PNM did not perform a reasonable and unbiased evaluation of "feasible" alternatives" to select the PV 3 or SJ 4 replacement resources proposed in its Application and the Stipulation was shown not only by NEE witness Lehr,[18] but also by Staff witness Rode who was

[18] Direct Testimony of Ronald L. Lehr in Opposition to the Stipulation, Exhibit #50, pp. 3,4. "The utility has an incentive to favor generation it owns and on which it can earn an equity return, rather than resources provided by

retained by Staff and paid by the Commission at public expense specifically to provide his specialized expertise regarding PNM's resource modeling and selection process, which the Commission's Staff otherwise does not have.[19] With respect to this critical fact-finding issue, even if the record showed that PNM's or any of the other Signatories' witnesses had effectively rebutted NEE witness Lehr testimony showing that PNM's analysis of its feasible replacement resource options was not reasonable or in compliance with Commission Rule 17.7.3, which is not shown by the record, or if the Commission has any concerns about Mr. Lehr's qualifications or credibility in this regard, there is no basis in the record for the Commission to conclude that Mr. Rode was not qualified to address this critical resource alternative evaluation issue, did not perform his analysis of PNM's economic modeling independently of any NEE or other intervenor interests or influence in this case, or that Mr. Rode's testimony regarding this issue was not credible or reliable for any reason. Indeed, neither witness was impeached in any respect.

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third parties, on which it does not earn an equity return. Unless required by this commission to do so, the utility will try to ignore potential for acquiring least cost resources from third parties through power purchase agreements in favor of acquiring resources it owns, puts in rate base, and on which it earns a return. Unless it is required to test its settlement resources against competitive market resources, PNM will not be able to pass the test of having considered all alternatives fully. This means that New Mexico consumers cannot be assured that the most cost effective resources that might be available in the market have been fully explored." Also, at p. 7 "Unless the commission orders such a competitive market test of these resources, nobody will know—not the commission, nor PNM, nor the stipulating or objecting parties, and certainly not consumers, who could end up paying more than they should to acquire resources that are riskier than they need to be."

[19] Rode Prior Direct (addressing the applicability of Rule 17.7.3 NMAC and PNM's "obligation under the IRP Rule to consider 'all feasible supply and demand-side options"; noting the inappropriateness of PNM's failure to consider any other feasible "base load capacity" replacement options to its proposed addition of PV 3, including "entering into a power purchase agreement ('PPA') with a base load capacity owner," considering that PNM "is taking both sides of these transactions," making that resource proposal "worthy of heightened scrutiny" by the Commission; explaining why PNM's claim that its proposed PV 3 and SJ 4 replacement resources without considering "other options" that "are clearly available" was "unreasonable"; addressing the manner in which PNM's economic modeling "potentially biases…[its] risk analysis conclusions" in a manner that not only "most likely understate the actual level of risk to ratepayers," but also "may unreasonably bias the presentation of risks in favor of the options being advocated by PNM," and so forth). *See also* Commission Professional Services Contract with Staff witness Rode (describing the specific scope of his services as "PNM's risk analysis and optimal portfolio selection, with specific emphasis on" PNM's compliance with Rules 17.7.3.9(D)(2) and 17.7.3.9.G(1) NMAC).

To the contrary, Mr. Rode was retained by the Commission's Utility Division Staff, which is required by NMSA 1978, § 8-8-12.C to "present to the commission its beliefs on how the commission should fulfill its responsibility to balance the public interest, consumer interest and investor interest." Mr. Rode provided the Commission with his analysis entirely independently from any PNM or intervenor interests or influence in this case and independently of Staff's subsequent decision, nevertheless, to agree to the Stipulation. Those facts demonstrate, that Mr. Rode's opinion that PNM did not provide the Commission with a reasonable evaluation of its feasible alternatives to the PV 3 and SJ 4 replacement resources proposed in PNM's Application and the Stipulation is not only credible and persuasive, but also more credible and persuasive than testimony or legal arguments to the contrary by PNM and the other few remaining supporters of the Stipulation.

From Commission precedent, public policy and ratepayer protection perspectives, the importance of Commission rejection of the resource alternative evaluation F&C in Section III.G.3.b of the Certification cannot be understated. If accepted by the Commission, that F&C would simply encourage PNM and other investor-owned utilities in New Mexico to circumvent the Commission's "most cost-effective" resource selection criteria in Rule 17.7.3 by performing similarly deficient economic modeling of their resource options, masking the deficiencies in that modeling with claims that the resources selected resulted from unbiased "proprietary" modeling software, such as Strategist®, unavailable to the Commission, its Staff and most parties, and then justifying the costs and benefits of those resource selections by offering to "compromise" on other matters in a broader settlement stipulation, as occurred in this case. That interpretation of the Commission's responsibilities regarding the granting of CCN requests would hardly ensure

that the interests of the utility's ratepayers or the public interest are protected with respect to a utility selections of proposed new generation resources.

Such an interpretation of the Commission's responsibilities regarding utility CCN requests is particularly inappropriate in this case where the very reason for PNM's proposed retirements of SJ 2 and 3 is that it is no longer economic for PNM to continue to operate those coal plants in a manner consistent with acceptable environmental and public health standards. Moreover, consistent with the findings in and purposes of the New Mexico Renewable Energy Act, NMSA 1978, § 62-16-2, the Commission's IRP Rule, 17.7.3.G, provides that "[f]or resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts." (Emphasis added). As the record shows, PNM did not present a reasonable replacement resource alternatives evaluation, compliant with Rules 17.7.3.9.F and G NMAC, to the Commission in this case. PNM and the other remaining supporters of the Stipulation therefore also failed to demonstrate satisfaction of the distinct resource selection regulatory requirement in Rule 17.7.3.G.

The discussion of the F&C's in Section III.G.3.b of the Certification demonstrates the foregoing flaws in the Hearing Examiner's analysis of this issue. The Certification (p. 114) recommends that the Commission find and conclude "[i]n this case, at least for the purpose of reviewing the reasonableness of the compromises made in the Stipulation, the alternatives analysis appears to have been performed in general conformance with regulatory principles." (Emphasis added). This is incorrect.

There are several problems with that recommended F&C, which shows the Hearing Examiner's grudging acceptance of the sufficiency of PNM's "alternatives analysis" and the reasonableness of the replacement resources proposed in the Stipulation. First, as noted earlier,

it improperly conflates the requirement that utilities comply with the "most cost-effective resource" and "alternatives analysis" requirements in Rule 17.7.3, regardless of whether a utility enters into compromises in a broader settlement stipulation, with "the reasonableness" of such settlement compromises. The fact that a utility agrees to such compromises on other matters addressed in a broader settlement (e.g., using the examples in the Certification, PNM's agreement to seek recovery of 50% of the undepreciated net book value of SJ 2 and 3 and to pass through to its customers U.S. Department of Energy refunds associated with its operation of PV 3 prior to its proposed inclusion of that resource in its rate base) does not magically cure a utility's resource alternatives evaluation that is deficient and not fully compliant with the Commission's resource selection requirements in its IRP Rule.

Moreover, to the extent the Certification indicates that savings or benefits to PNM's customers resulting from "the value PNM was foregoing by agreeing to seek recovery of 50% of the undepreciated costs of San Juan Units 2 and 3" are relevant to the distinct issue of whether the Stipulation is reasonable and would provide a "net benefit" to PNM's customers, there is no substantial evidence in the record showing that PNM is legally entitled to recover 100% of those costs, or any of those costs for that matter, establishing or quantifying the real amount of "benefit" to customers from that alleged "compromise." Again, such a finding by the Commission would only encourage future resource proposals by PNM and other utilities that are not the most cost-effective resource options available to it that could saddle ratepayers with unreasonable costs and uneconomic resources for the long, remaining useful lives of those resources.

Second, this proposed F&C suggests the Commission should apply a relaxed "general conformance" standard, rather than a "full compliance" standard, for satisfaction of the legal

requirements in Rule 17.7.3. This too would establish both an unwise Commission compliance and public interest protection standard for PNM, and possibly other utilities, in the future.

No variance from the resource alternative evaluation requirements in Rule 17.7.3 was requested by PNM, or any of the other remaining Signatories, in this case. Nor does the record show any circumstances that would justify such a variance request. The Commission therefore should not accept or adopt the Certification's proposed lax compliance standard, which would have the legal effect of granting PNM such a variance.

The "No RFPs" Issue

There also are a number of reasons why it would be unreasonable and contrary to public policy and the Commission's regulatory oversight responsibilities to accept or adopt the F&C in Section III.G.3.b of the Certification (p. 115) that, based on the record in this case, PNM was not obligated to issue one or more reasonable RFPs and present their results to the Commission to demonstrate that the replacement resources proposed in the Stipulation satisfy the requirements in Rule 17.7.3 and the requirements for the CCNs requested by PNM. First, the record is undisputed that PNM "selected" the PV 3 and SJ 4 replacement resources proposed in its Application and the Stipulation, as well as its proposal, not addressed in the Stipulation, to install a PNM-owned 177 MW gas-fired peaking plant at the San Juan site, in the fall of 2012, as part of the RSIP, prior to filing its latest (July 2014) IRP.[20] It also is undisputed that PNM made those resource selections without first conducting any competitive RFP process to determine what, if any, cost-effective resource alternatives to those selections were feasible to satisfy its replacement power needs if the Commission approved PNM's proposal to abandon SJ Units 2 and 3, i.e., in the 2014-2018 (four-year "Action Plan") time-frame to be addressed in its next IRP, due 18 months later.

[20] *See, e.g.*, Darnell Supporting Direct, p.11and PNM Ex. RND-6-Stip.

There also is nothing in the record to suggest that PNM could not have issued such competitive RFPs, either before or after it agreed to the RSIP, to test the cost-effectiveness of its replacement resource selections and the feasibility of alternatives to those selections, including (to use the language in the Certification) the "type of resource" needed to meet its future resource and reliability needs. Nor is there any evidence in the record showing, or even suggesting, that if PNM had done so, such competitive RFPs would have demonstrated that there are no feasible, more cost-effective replacement resource options currently available to PNM than the replacement resource selections proposed in the RSIP, or that PNM would not be able to acquire such alternative replacement resources in time to satisfy its replacement power and service reliability needs.

Neither NEE, nor any other party as far as it is aware, argued or suggested that, in all cases, a utility's "alternatives analysis for a CCN must be accomplished by a competitive Request for Proposals," as the Certification suggests. As the Certification notes, even PNM witness O'Connell testified that, "in most circumstances, an RFP process is appropriate once a particular type of resource need is appropriate." (Emphasis added).

It may be that, under some unusual circumstances, a competitive RFP process to ensure that utility resource selections are the most cost-effective among feasible alternatives is not appropriate. The record, here, however, supports no such determination by PNM or conclusion by the Commission.

Nevertheless, contrary to the record, and relying on pure speculation by PNM witness O'Connell, the Certification (p. 115) recommends that the Commission find that PNM did not need to issue timely competitive RFPs for the replacement resources necessary to satisfy its replacement power needs because (i) "an all-source RFP can be undesirable because of the lack

of specificity associated with such an RFP," (ii) "[p]reparing a bid is expensive," (iii) "[i]f a need for a dispatchable resource of approximately 177 MW has been identified or a base load unit of 134 MW that has low or zero CO_2 emissions is required, issuing an all-source RFP would discourage high-quality bids for the needed resources," and (iv) "the cost of preparing bids could range from 'in excess of $100,000' for the 177 MW natural gas plant being studied for San Juan to 'close to a million dollars' for bids for the SCR project under the FIP." One obvious vice of such an analysis, however, is that if PNM is relieved of any responsibility to actually determine and state the cost of available resources, there is no way that it can comply with the requirement in Rule 17.7.3 that it "prefer" resources that "minimize environmental impacts" over polluting resources such as coal, where the costs are equivalent. In fact, allowing PNM to avoid any actual comparisons of resource costs would effectively and henceforth relieve PNM from the IRP requirement that it prefer non-polluting resources where the costs are reasonably equivalent.

There are so many obvious problems with that proposed justification for PNM's failure to issue competitive RFPs for the replacement resources proposed in the Stipulation, it is hard to know where to begin, or end. First, Mr. O'Connell's testimony about the potential costs to bidders of participating in a properly designed and focused competitive RFP is not only purely speculative, but not an issue in this case. PNM is not seeking to recover RFP bidder costs from its customers in this case. Nor is the cost of such bidder participation at issue here. To re-state what should be obvious, at issue in this case is whether the replacement resources proposed in the Stipulation (either at the cost proposed in the Stipulation or at the lower cost for the PV 3 resource recommended in the Certification) are the "most cost-effective resource" options currently "feasible" for PNM to meet its replacement power needs and the future, long-term (20-year) cost impacts of those replacement resource selections on PNM's customers.

Second, PNM witness O'Connell's speculative fears that a single, poorly-designed "all-resources" RFP would not be useful to test the cost-effectiveness of PNM's preferred replacement resource selections based on his additional speculation that "bidders may not participate due to a perceived low probability of success" give little credit to his, and PNM's, or an independent examiner's ability to properly design one or more competitive RFPs that would not have created such bidder perceptions and could have attracted sufficient bidders[21] to test the cost-effectiveness of the replacement resource selections preferred by PNM's management (for increased earnings, or for any other reasons aligned with what its management perceives is its fiduciary obligation to PNM's shareholders). While that claimed inability by PNM should concern the Commission, if that testimony supports anything from a regulatory perspective, it is the need for the Commission to adopt an independent evaluation or monitoring process for PNM's RFPs, as exists in other states and the Commission was petitioned to do by numerous parties, nearly a year ago, in May of 2014 in Case No. 14-00152-UT, to help solve that problem.[22] Furthermore, if the excuse that bidders will not bid because they will see (correctly) that PNM has its mind set on acquiring the resources that ***it*** wants is sufficient to justify PNM's refusal to issue an RFP, then PNM's choices will always trump the requirement that it assess relative costs of resources and select least cost.

Moreover, if, as PNM witness O'Connell suggested at the hearing, the Commission should be concerned about competitive bidder perceptions of a "low probability of success" with respect to new resource RFPs by PNM, NEE submits such bidder perceptions are more likely to

[21] Mr. Lehr stated in both his written and oral testimony that there have many credible responses to RFPs in Colorado that has resulted in "low cost renewable renewable energy" that "save consumers money." NEE, Exhibit 50, p.7; Transcript 1/16/2015 pp. 2140, 2193, 2198, 2231, 2232 Lehr testified that if it can be done in Colorado the result could be similar in New Mexico. The best proof of what's possible is that it has been accomplished elsewhere.
[22] *See* 5/29/14 Joint Petition by NEE, the New Mexico Attorney General ("AG"), NMIEC and other parties in Case No. 14-00152-UT. To NEE's knowledge, the Commission has never publicly discussed that Petition or acted on it.

be created by cases such as this where, as the record shows, PNM decided to pursue Commission CCN approval of the PNM-owned PV 3 and SJ 4 replacement resources proposed in its Application in "the latter half of 2012," more than a year before it prepared and filed its July 2014 IRP and five months before it filed its December 2013 Application, without issuing any RFPs to determine if any more cost-effective alternatives were available.[23] Indeed, it is difficult to imagine a PNM course of action that could dampen potential RFP bidder expectations about success, and thereby limit the potential benefits of resource competition to PNM's customers, more than the self-interested resource selection course PNM pursued from the get-go in the RSIP and in this case. That said, this sort of double-layered speculation about the competitive RFP process by PNM witness O'Connell hardly satisfies our Supreme Court's definition of "substantial evidence," addressed earlier.

The example of PNM's alleged identified "need for a dispatchable resource of approximately 177 MW" relied on in the Certification's rationale for recommending that the Commission conclude PNM did not need to issue any competitive RFPs to satisfy the requirements for a CCN for its proposed PV 3 and SJ 4 replacement resources is particularly unreasonable and does not constitute "substantial evidence" supporting that recommended F&C. Again, the record is undisputed that PNM "identified" that dispatchable 177 MW replacement resource "need" and agreed to satisfy it by building a new, 177 MW, PNM-owned gas peaking plant at the San Juan Generating Station site in the course of its negotiation of the RSIP to allegedly mitigate the potential adverse economic impacts of its proposed retirements of SJ 2 and 3 on "the economy in the four corners region."[24] PNM's "need" identification and "resource" selection was <u>not</u> based on any reasonable or proper evaluation of the cost-effectiveness, type,

[23] *See also* TR 381(Darnell), cited in n. 19 at p. 51 of the Certification, ignored in the discussion section of Section III.G.3.b of the Certification.
[24] Darnell Supporting Direct, pp. 12, 23-24.

regulatory risk, size, location, ownership (e.g., PNM-owned or PPA provider) of the "feasible" replacement resource options available to PNM, in accordance with the requirements in Rule 17.7.3.

PNM's alleged mitigation of the economic consequences of its proposed retirements of SJ 2 and 3 on the economy in the Four Corners region may be one, public interest consideration, for the Commission to consider when assessing whether the Stipulation "as a whole" provides a "net benefit" to PNM's customers and is otherwise in the public interest. Such economic impact mitigation claims[25], however, are not relevant to the "most cost-effective" resource criteria and feasible resource option analysis requirements in Rule 17.7.3.

Further, as shown in PNM's July 2014 IRP (e.g., pp. i-iii, 75, 107) filed with the Commission, PNM simply grafted that negotiated, management-preferred, PNM-owned (rate based) gas-fired peaking replacement resource selection (for service in 2016) into that IRP to provide bootstrap support for that selection in this case. As discussed earlier, the record shows that PNM attempted to support that selection by identifying a possible need for that type and size of dispatchable capacity in its economic modeling process, which it implemented in an unreasonable, biased and non-compliant (with Rule 17.7.3) manner to support its preferred resource selections.

As noted earlier, however, the Commission has not accepted that 2014 PNM IRP to date precisely because challenges to the resource selections proposed in it were timely filed with the Commission in 2014 and the Commission wisely decided to defer ruling on its acceptability based, in part, on the developing record and outcome of this case. The Certification's reliance on the PNM "dispatchable resource" of approximately 177 MW "need" testimony by PNM witness

[25] There will be no jobs created by PNM's transfer of 134 MWs from PV3 into rate base or PNM's acquisition of 132 MWs in SJ4. 1/7/15 TR Darnell p. 362.

O'Connell at the hearing to support this proposed F&C regarding the need for competitive RFPs in Section III.G.3.b of the Certification also is irrelevant and inappropriate and does not constitute "substantial evidence" supporting that F&C because neither PNM nor the other remaining Signatories to the Stipulation has requested Commission approval of that alleged replacement resource "need" or for any specific resource to satisfy that, need in this case. Further, the Certification's reliance on PNM witness O'Connell's speculation about the irrelevant cost of preparing "bids for the SCR project under the FIP" is not reasonable because there is no record in this case that PNM ever completed such an RFP process for an SCR project under the Federal Implementation Plan ("FIP"), which the negotiated RSIP is intended to replace.

The reasonableness of the Hearing Examiner's reliance on testimony by witnesses for PNM and the AG to support this RFP F&C in the Certification also is contradicted by those witnesses' and parties' support for the future, competitive RFP in 2015 for "cost-effective" renewables and an "all-source RFP…for conventional supply resources and renewable energy resources, for additional resources consistent with the resources determined to be necessary in the 2020-2022 timeframe as identified in the four year action plan in PNM's 2017 IRP" in paragraphs 31 and 32 of the Stipulation, respectively. If, as PNM witness O'Connell testified, it was neither necessary nor reasonable for PNM to issue any competitive RFPs to assess the cost-effectiveness of the replacement resources proposed in the Stipulation and thereby protect its customers' interests and the public interest, why are those RFP provisions in the Stipulation reasonable? And why do those RFP proposals provide "benefits" to PNM's customers, as PNM and the remaining supporters of the Stipulation continue to maintain? The inconsistency of their positions in this regard is glaring.

Finally, the Hearing Examiner's reliance on the additional testimony by AG witness Crane regarding the appropriateness of and necessity for a competitive RFP process to satisfy the "most cost-effective" resource test and resource alternative evaluation requirements in Rule 17.7.3 also is not reasonable and should not be adopted by the Commission, not only because it likewise is purely speculative, but also because Ms. Crane acknowledged at the hearing that her expertise, and the scope of her analysis for the AG in this case, do not extend to utility resource selection processes, the appropriateness of utility use of competitive RFPs or selection matters, or the application of the Commission's IRP Rule, which are at issue here.

Specifically, Ms. Crane acknowledged at the hearing that:

(i) she is not familiar with the Commission's IRP Rule;

(ii) she did not review that Rule in the course of her preparation of her testimony in this case;

(iii) due to her unfamiliarity with that Rule, she could not provide the Commission with any opinion as to whether it applies to the replacement resources proposed in the Stipulation, which she believed is a legal issue for the Commission to decide, together with the issue whether the Commission should order that PNM's "entire Application" be "withdrawn" for its failure to comply with that Rule; (iv) she nevertheless agreed that, "subject to check," PNM witness O'Connell's Direct Testimony in support of the Stipulation did claim that the replacement resources proposed in the Stipulation satisfied the "most cost-effective criteria" and feasible resource alternatives analysis requirements in that Rule; and

(v) her expertise and past work for her clients concerning utility resource selections has not focused on the resource selectin process and has usually been limited to analysis of whatever resource alternatives "are presented to her."

In that last regard, asked about the resource selection criteria in the Commission's IRP Rule, Ms. Crane testified:

> Q [Mr. Throne] In the course of your professional work, do you address any kind of similar criteria regarding resource selection in any other jurisdictions?
>
> A [Ms. Crane] I certainly—I don't know what you mean by similar. I certainly have addressed some resource selection issues, generally for things like build versus buy, you know, build power versus buy power. I am generally not involved with sort of from the ground up saying, okay, let's look at the entire universe of alternatives and deciding what's best. It's usually, my analysis is usually a situation where I am presented with alternatives, and I evaluate the alternatives that are presented to me, rather than taking an engagement where I have to research the entire universe of alternatives from the ground up, if you understand the distinction.
>
> Q I understand the distinction. In any of these other jurisdictions, is there a resource selection criteria that is similar to a most cost-effective criteria?
>
> A I don't know the answer to that.
>
> Q So when you evaluate resource selections by any investor owned utility, what criteria do you apply with regard to protection of ratepayer interests?
>
> A Well, my assignments generally are involved in – most of them are involved in either a rate case process or perhaps – or something more limited, but still with a focus on rates. It could be an energy efficiency case. It could be a renewable case. So that's my focus.
>
> So I am not generally involved in IRP review cases where I am trying to assess the long-term requirements or need for generating capacity and the best way for a company to meet that need. Mine are much more focused, as in this case where there was a more focused situation, where alternatives were presented, and then my assignment was to come in, evaluate the alternatives that were presented, determine whether there were ratemaking implications of those alternatives, and as I believe I stated in my direct testimony, to also consider alternative portfolios that other parties may put forth in their testimony. [26]

[26] NEE also would note that the AG agreed to be a Signatory to and support the Stipulation, as filed, before NEE or any other opponent of the Stipulation "presented" any of the alternatives to the replacement resources proposed in PNM's Application and the Stipulation in their post-Stipulation testimony.

> Q Is it fair to say that resource selection by investor owned utilities is not your particular area of expertise?
>
> A Not initially. Certainly the recovery of costs of the portfolios that are selected is my area of expertise. And again, I have addressed portfolio selection, as I indicated, in limited circumstances where it was generally a limited number of options that were presented that I needed to evaluate. Building a portfolio from the ground up is not something that is really in my area of expertise.[27]

In contrast, the rationale for this recommended F&C in the Certification arbitrarily, without explanation, ignores the testimony of NEE witness Ronald Lehr, a former Colorado Public Utility Commissioner who does have experience and expertise regarding the propriety of using competitive utility RFPs to ensure that all potential resource alternatives are considered by a utility and its regulatory agency and that ratepayers' interests are thereby protected. Mr. Lehr, whose testimony was essentially unchallenged and unimpeached, explained why PNM's failure to issue competitive RFPs before it selected the PV 3 and SJ 4 replacement resources proposed in its Application and the Stipulation makes it impossible for the Commission to find or conclude in this case that PNM reasonably considered all feasible replacement resource options, or that the new resources proposed in the Stipulation are the most cost-effective replacement resources currently available to PNM, as required by Rules 17.7.3.6 and 17.7.3.9.[28]

Considering the disparities between Mr. Lehr's and Ms. Crane's professional experience and expertise regarding this utility resource selection process issue shown in the record, the reliance and weight the Certification gives to Ms. Crane's speculations about this RFP issue also are glaringly inconsistent with the Certification's discussion at page 127, addressed further

[27] 1/21/15 TR 2731-2733 (Crane).

[28] *See* Lehr Direct, p. 5, cited in the Certification only at p. 53; *See also* 1/16/15 TR 2159-60, 2164, 2172-75, 2188-91, 2107-2202, 2206-2209 (Lehr) (testifying, *inter alia*, that: the amount of SJ Units 1 and 2 capacity proposed to be retired is "enough to draw the interest of competitive providers"; utility use of RFPs in Colorado, "where large amounts of renewable energy are being integrated successfully and at very low costs, at costs that are dropping," have identified "interesting alternatives;" and that "the planning [in Colorado] starts with the Company putting its request for proposal and its proposal for bid valuation on the table, so from the get-go, this process is about going out to bid.").

below. There the Certification recommends that the Commission give "greater weight" to "the opinions of PNM's witnesses" than NEE's witnesses regarding PNM's claim, challenged by NEE's witnesses, that its request for CCN for PV 3 is justified, in part, because PNM must replace the San Juan base load capacity being retired with an equivalent amount of "base load" capacity.

NEE disputes the suggestion there (footnote 57) that an expert witness must have "knowledge about critical operational features of PNM's system" in order to persuasively address that distinct issue in this case. Nevertheless, even if the Commission concludes otherwise, the Certification's disregard for Mr. Lehr's competent opinions regarding the need for reasonable competitive RFPs to support PNM's selections of necessary replacement resources and the Commission's inability to find, in the absence of any PNM RFP evidence in this case, that those selections satisfy the "most cost-effective resource portfolio" requirements in Rule 17.7.3, and the Certification's reliance on Ms. Crane's unqualified speculations, devoid of <u>any</u> prior professional experience or expertise in that regard, demonstrate application of an unreasonable and inconsistent evidentiary "double standard" that is un justified and therefore arbitrary and capricious.

There is simply no way to know, based on the present record, whether "Palo Verde Unit 3 is the most cost-effective resource of the alternatives" (at p. 116) because it was not compared to *any* other resource on a "consistent and comparable basis" as required by the IRP rule, and therefore its alleged cost-effectiveness is mere conjecture. For all of these reasons, the Commission should not accept or adopt the F&C recommended in Section III.G.3.b of the Certification. Instead, based on the record, the Commission should find and conclude that, in this case, PNM and the remaining proponents of the Stipulation have not satisfied their burden of

showing the Commission, with any substantial evidence of the results of a fair and reasonable competitive bidding process or otherwise, that the requests for CCNs for the PV 3 and SJ 4 replacement resources proposed in the Stipulation fully comply with Rule 17.7.3 by showing that PNM performed or presented the Commission with a reasonable evaluation of feasible alternative replacement resources or demonstrating that those resources are part of PNM's "most cost-effective resource portfolio."

3. Incorrect Statement of Law Concerning Recommended F&C in Sections III.G.3.d and IV.e ("Violations of Regulatory Principles" Applicable to "Balanced Draft Portion" of PNM's SNCR Project), pp. 118, 138-139:

NEE agrees with and supports the recommended F&C in Section III.G.3.d of the Certification and the modification to the language in paragraph 28 of the Stipulation recommended in "Attachment B" to the Stipulation (¶ 28). NEE takes exception, however, to the F&C recommended in that Section of the Certification that "the Stipulation's treatment of the costs of the balanced draft portion of SNCR project does not violate regulatory principles," and to the following statements in Section IV.e relating to that finding:

> As discussed earlier, utility expenditures are generally presumed reasonable in a rate case until a challenging party presents evidence creating a serious doubt about their reasonableness. After creation of the doubt, the utility then bears the burden of providing [sic] their reasonableness.

The Commission should not adopt or approve those specific statements regarding that recommended F&C because: (i) they are contrary to Commission precedent and applicable law; (ii) they are inconsistent with the modification to paragraph 28 of the Stipulation recommended in "Attachment B" thereto; (iii) under applicable Commission precedent and law, unless modified as recommended in the Certification, the treatment of the "balanced draft" portion of PNM's SNCR project in paragraph 28 of the Stipulation *would* violate regulatory principles by attempting to establish a rebuttable legal presumption that PNM's incurrence of costs associated

with the extraordinary and unusual "balanced draft" portion of that project is prudent and reasonable, in a rate case, or in any other case, unless and until challenged by another party, contrary to Commission precedent and law; and (iv) the Commission's adoption of those incorrect statements of law would establish an improper burden of proof precedent concerning extraordinary and unusual utility costs in PNM's current general rate case (No. 14-00332-UT), and in future rate cases filed by PNM and other utilities.

The Commission has long-recognized that, under the New Mexico Public Utility Act, a utility has the burden of proof to demonstrate that all proposed changes to its rates or charges are just and reasonable, and that "[t]he mere filing of schedules and testimony in support the rate increase is insufficient to meet this burden. The company must support its application by way of substantial evidence." *See, e.g.*, Case No. 1440, *Re Gas Co. of New Mexico*, 28 P.U.R. 4th 20, 23, *citing Alto Village v. New Mexico Pub. Service Comm'n*, 92 N.M. 323, 587 P.2d 1334 (1978).

The Commission has observed that, in a utility rate case, except for "normal and usual" utility expenses, there is no presumption that *any* cost claimed by a utility is reasonable. *See, e.g.*, Case No. 2361, Recommended Decision, p. 35, adopted by February 6, 1992 Final Order Approving Recommended Decision to Dismiss Proceeding (p. 2 and Decretal ¶ B), 1992 WL 503187 (N.M.P.S.C.) ("Case No. 2361 Order") ("in a general rate case, the utility still has the burden to establish that the end result rates are just and reasonable."); Case No. 2662, Recommended Decision of the Hearing Examiner (pp. 35-36), adopted by Final Order (February 13, 1997), 176 P.U.R. 4th 89 ("Case No. 2662 Order"), *citing Duke City Lumber v. NMEIB*, 95 N.M. 401, 402-403, 622 P.2d 706 (1980) (addressing the distinction between a party's *prima facie* burden of "going forward" with evidence, which may shift, and its burden of persuasion regarding its claim, which never shifts).

The Commission also has made it clear that, to satisfy its ultimate burden of proof (i.e., burden of persuasion), a utility must make "a prima facie showing" with its *initial* Application and supporting testimony (i.e., Direct Case) that such claims and proposals are reasonable. Case No. 2662 Order, Recommended Decision, pp. 34-35. *See also* Commission Rule 1.2.2.35.N(1) NMAC (providing, in pertinent part, that "[e]vidence which…could have been more properly offered in the case in chief is not proper rebuttal evidence.").[29]

The Certification explained (e.g., pp. 59-62) that the record shows there is nothing "normal and usual" about the "balanced draft" technology or the substantial cost to PNM and its customers of PNM's decision to install that technology as part of its "SNCR Project" for the remaining San Juan Units PNM wishes to continue to rely on after SJ Units 2 and 3 are abandoned as proposed in the Stipulation. The "balanced draft" portion of that project was only included in the New Mexico air quality permits for San Juan at PNM's request.[30] As noted in the Certification (p. 60), PNM witness Olson acknowledged that balanced draft configuration "was not needed to comply with regional haze requirements, that San Juan was fully compliant with New Mexico and federal air regulations, and that NMED could not enforce compliance beyond what federal and state law requires."[31]

[29] These Commission and judicial discussions of a utility's prima facie and ultimate burdens of proof regarding cost claims in a rate case show that the statements by PNM witness Ortiz and PNM's counsel at the hearing claiming that, "under general regulatory law, whatever costs the company incurs is presumed reasonable in a rate case," cited in the Certification (p. 58, n. 23) were overbroad.

[30] Contrary to the repeated sworn testimony of PNM employees, including Vice President Olson that balanced draft was "required", there is evidence in the record that directly impeaches the necessity of these controls and that they may be considered waste: From Richard Goodyear, Bureau Chief, Air Quality Bureau, NMED: "The balanced draft project is not a requirement of the proposed BART determination (State Alternative) and is not required, in general, by the Regional Haze regulation. … Please note that PNM's assertion that the state of New Mexico required the balanced draft conversion is incorrect. PNM's request to implement the balanced draft project was entirely voluntarily and only appears in the air quality permit because PNM requested the inclusion of the project in the air quality application." *See* NEE Exhibit #1

[31] Citing TR. 2923-2924.

Gregory Smith, PNM's former plant manager of the San Juan Units, also testified that installation of balanced draft technology at those Units was not necessary.[32] It therefore is undisputed in the record that any costs PNM incurs associated with the "balanced draft" portion of its SNCR Project at San Juan are extraordinary and unusual, and thus should not be presumed by the Commission to be prudent or reasonable in amount in this or any other case, including PNM's current general rate case, No. 14-00332-UT.

For all of these reasons, the Commission should adopt the modification to the Stipulation recommended in Section III.G.d.3 of and "Attachment B" (¶ 28) to the Certification but should not accept or adopt the incorrect statement of law or the incorrect recommended F&C in that Section or in Section IV.e of the Certification addressed above.

4. Recommended F&C in Section III.G.4.d(i) (Conditional Approval of CCN for 134 MW of Palo Verde 3 Capacity at NBV), pp. 124-129:

Without waiving its exceptions below, NEE agrees with and supports the recommended F&C in Section III.G.4.d.(ii) of the Certification that it would not be reasonable or in the public interest for the Commission to approve the transfer of 134 MW of PV 3 from PNM's non-jurisdictional "merchant plant" to its New Mexico retail jurisdictional rate base as proposed in the Stipulation unless PNM and the remaining stipulating parties agree that resource may be valued at no more than its PNM-estimated net book value ("NBV") of $1,071 per kW as of the date of such transfer. However, NEE does take exception to the recommended F&C in Section III.G.4.d.(i) that PNM and the remaining supporters of the Stipulation have satisfied their burden of showing that a CCN for that PV 3 resource should be granted, even at that NBV, because it "will produce the net benefits required for issuance of a CCN." The Commission should not

[32] NEE Ex. 32 (Smith deposition), pp. 118-128

accept or adopt that recommended F&C and should not approve a CCN for that PV 3 resource for the following reasons.

First, as addressed above and in the post-hearing briefs filed by NEE and other parties opposing the Stipulation, the record shows that PNM's selection of that PV 3 replacement resource was based on a fatally flawed and un-(competitive) market-tested resource modeling and selection process that failed to comply with Rule 17.7.3, and thus failed to satisfy the "most cost-effective resource" showing requirement for Commission approval of a CCN. Staff witness Rode's Prior Direct Testimony addressing PNM's failure to include and all feasible replacement resource options in its "proprietary" economic (Strategist®) model, including power purchase agreement ("PPA") alternatives, and PNM's failure to reasonably consider all such resource alternatives and their associated long-term cost risks to ratepayers, as well as NEE witness Lehr's testimony addressing PNM's failure to issue appropriate and timely RFPs to test the competitive cost-effectiveness of that resource, are particularly important in this regard. Additionally, Mr. Solomon's unimpeached testimony was that "the company had a predetermined plan to replace power at the San Juan Generating Station (San Juan or SJGS) by bringing nuclear from Palo Verde Nuclear Generating Station unit 3 into rates, and building a 177-megawatt gas plant in Farmington at least as early as February 2013." (NEE Exhibit #33) However, they were given no weight at all by the Hearing Examiner with respect to this recommended F&C.

For example, the record is clear that PNM did not include in its economic modeling or even consider the alternative of entering into a PPA with itself to purchase power from PV 3 at a reasonably profitable rate for the period 2018 to 2022, or for some slightly longer period less than the remaining useful life of that nuclear plant, to satisfy its replacement power needs during

that period. Such a PPA approach regarding that PNM-owned resource, rather than the "rate based" approach proposed in the Stipulation, could certainly have provided a way for PNM and the Commission to reasonably balance the interests of PNM's customers and shareholders regarding the cost, risks and benefits of that nuclear resource.

Indeed, Staff witness Rode made exactly that point in his testimony.[33] That PPA alternative could have provided that balancing of interests, which the Commission is required by law to do, by not exposing PNM's customers to the long-term costs and risks associated with that nuclear plant beyond the term of such a PPA, while preserving PNM's opportunity to continue to earn a profit on that resource beginning in 2023, when PNM's expert witness regarding valuation of that resource, Mr. Reed, testified that PNM's current "negative equity return" (losses) on its investment in that resource as merchant plant in the wholesale market is expected to "substantially reverse."[34]

Why did PNM not even consider that PPA option for that nuclear resource, let alone not explain to the Commission why it did not do so in its economic modeling or evaluation of feasible alternatives to transferring that plant into its New Mexico jurisdictional rate base at the $77 million written-up value proposed in the Stipulation? If it is PNM's contention that such a PPA option was not feasible, why did PNM fail to explain in the record why that is so? And more importantly with respect to Stipulation's proponents' burden of proof regarding the requested CCN for PV 3, why is PNM's failure reasonable and consistent with the regulatory requirements, purposes and "most cost-effective" principles in Rule 17.7.3 and the Commission's statutory obligation to consider, balance and protect ratepayers' interests?

[33] PRC Staff Exhibit #10, Rode, p. 16
[34] Reed Supporting Direct, p. 30; 1/14/15 TR 1579.

PNM chose to not even consider, let alone assess, such a more balanced PPA approach to obtaining replacement power from PV 3 because it decided that it was not in its financial interest to do so compared to transferring that plant into its New Mexico jurisdictional rate base. In that way, PNM would be able to end the current "negative equity return trend" for its shareholders (described by PNM witness Reed) beginning in 2018, increase its earnings on its investment in that plant (even at its expected NBV) and limit the long-term (decommissioning, spent fuel disposal and catastrophic failure) risks to its shareholders associated with that nuclear plant for the remainder of its useful life by providing a "captured" New Mexico retail market for that resource. PNM's customers' interests are not consistent with that PNM shareholder self-interest.

There is nothing in the record showing or even suggesting that this sort of PPA alternative to balancing the interests of PNM's customers and shareholders regarding PNM's need for PV 3 as a replacement resource is not "feasible," as required by Rule 17.7.3, other than the fact that PNM simply refused to consider or address it in the RSIP, in its IRP process or in its Application or the Stipulation in this case. But surely, such utility and shareholder self-interest criteria does not satisfy the meaning of "feasible" in Rules 17.7.3.F and G. Otherwise, the very customer-protection objective of Rule 17.7.3 would be defeated by such self-interested criteria.

The record also shows that, to the extent the Commission engages in a balancing of customers' and shareholders' interests when considering the CCN for PV 3 proposed in the Stipulation, the proposed transfer of that nuclear asset to PNM's New Mexico jurisdictional rate base is not in the interests of PNM's shareholders either. Again, PNM's own expert, Mr. Reed, addressed this at the hearing, explaining:

> A [Mr. Reed] Operating in a merchant environment, which is how we've modeled this based upon the wholesale power market prices, if it [PV3] was operating in a merchant scenario, it would have negative earnings. Your question was after it goes into rate base

would it have negative earnings. The answer is no, it's a matter of it being above or below the market price of power at that point.

Q [Mr. Throne] Well, do I understand correctly from that answer that the value of that asset increases considerably once it's put into rate base because then there's basically a regulated reasonable opportunity for the company to earn a reasonable return on that asset from that point going forward?

A That's a good question, and the answer is the exact opposite is true. I think the value goes down significantly because it goes into rate base.

The stipulation calls for it to go into rate base at $1,650 per kW or $221 million. It's our expectation that the fair market value at January 1, '18, will be quite a bit higher. So it's going in at a reduced price, so effectively the value, if you will, goes from the 2500, 2600 dollar range to the 1650 range when it's included in rate base.

Q Well, you understand, do you not, from your experience that you described previously, that PNM management has a fiduciary obligation to protect the interest of investors in that company?

A Among other obligations, yes, I think management has a duty to the shareholder.

Q So given your last statement, why is it prudent – why is it consistent with that obligation for the utility to go ahead and move this plant into rates if, in fact, PNM expects that this will lower the value of that asset compared to what it expects that asset to have if it retains it as an excluded plant and is able to sell that on the wholesale market?

A That's also a good question and one that I asked myself, why has it agreed to what is a below-market value for the inclusion of this asset in rate base. And I think the answer that I would provide is, A, it's part of a stipulation that contains many other provisions. Presumably that is in the entirety of that stipulation value or an outcome that PNM considers to be acceptable.[35]

This is certainly credible PNM testimony to which the Commission should give considerable weight, coming as it does from an expert witness that PNM believed it reasonable to pay $700 per hour for his opinions and appearance at the hearing.[36] This testimony by PNM witness Reed certainly shows that the Commission should not conclude that the proposed transfer of PV 3 into PNM's retail rate base, either at the $77 million written-up value proposed

[35] 1/14/15 TR 1636-1638 (Reed).
[36] 1/14/15 TR 1640 (Reed).

in the Stipulation or the lower NBV recommended in the Certification, is in the interests of PNM's shareholders considering how much more he believes they should expect PNM to earn on their investment in that asset after 2017 if they retain it as "merchant plant" for sales on the wholesale market.

Moreover, that testimony contradicts the proposed F&C in the Certification that, on a stand-alone basis, apart from the alleged cost and benefits of other provisions in the Stipulation, that asset transfer to PNM's rate base will provide a "net benefit" to PNM's customers. Section III.G.3.d(i) of the Certification does not justify its recommended approval of a CCN for PV 3 based on the alleged offsetting benefits to PNM and its shareholders from other provisions in the Stipulation (a number of which it does not recommend approval by the Commission). Rather, the Certification's rationale for supporting that recommendation (at pp. 125-126) is that, since PNM's economic modeling showed PV 3 to be its "most economical alternative" resource to replace the San Juan coal capacity to be abandoned at a value greater than the $1650 per kW value proposed in the Stipulation, that resource "only becomes a more economical resource at the $1650 per price contained in the Stipulation," and thus even more economical at the expected lower NBV recommended by the Hearing Examiner.

i. The fatal flaw in that justification is, as discussed earlier and at length in the post-hearing briefs filed by NEE and other opponents of the Stipulation, the PNM economic modeling that PNM and the other remaining supporters of the Stipulation relied on was itself biased toward PNM's pre-determined (RSIP) outcome and fatally flawed from the get-go. From a regulatory perspective, like a house built on a flawed foundation, that analysis in the Certification cannot stand or withstand reasonable agency scrutiny, cannot satisfy the "feasible" resource comparison analysis and "most cost-effective" resource criteria for Commission CCN approvals, and does

not reasonably consider or protect PNM's customers' interests. PNM proposes to sell energy from PV3 at a levelized cost/kWh of 8.1¢ to New Mexico ratepayers. This is 119% above what PNM sells the energy on the open market (3.7¢/kWh). PNM is proposing to sell the energy from their share of Palo Verde 3 to New Mexico ratepayers at $44 million per year more than the current market price.[37] Currently, PNM loses $6M/year on PV3 because it sells the energy on the open market for less than it costs PNM to generate that energy. 1/7/15 TR Darnell pp. 366, 370. Even if the valuation of PV3 has been reduced from PNM's original, inflated request of $2500/kW to $1650/kW or NBV, this concession will reduce some immediate costs but fails to consider potentially enormous costs of operations and maintenance, capital expenditure costs, decommissioning costs, transmission costs, and fuel costs which are unaffected by this change. It has been shown that new solar plus utilization of existing gas resources is cheaper than the capacity and energy benefits of PNM's nuclear proposal, but the Hearing Examiner's Recommended Decision ignores these short and long term cost savings for customers. (NEE Exhibit #72, Direct Testimony & Exhibits in Opposition to the Stipulation of Van Winkle, 11/25/2014, p 24)

Nor does the Certification's discussion (pp. 125-126) of the alternative replacement portfolios addressed by NEE in its Brief-in-Chief, or the additional replacement portfolio constructed by NEE witness Van Winkle, support the recommendation that the Commission approve a CCN for PV 3 in this case.

The Certification's discussion of the "additional benefits" of allowing PNM to move PV 3 into "jurisdictional service" (pp. 126-129) also does not show any "net benefit" from that nuclear resource to PNM's customers, or otherwise reasonably justify the CCN for that resource

[37] Staff Exhibit #10, Direct Testimony of David C. Rode, on behalf of the New Mexico Public Regulation Commission Staff, pp. 17, 18

requested. As Mr. Van Winkle testified, regardless of what its benefits as a "base load" resource may have been to other entities in the past, PV 3 is not a flexible generation resource that PNM has shown in the record would be one of the most cost-effective resources to satisfy PNM's particular future service needs after SJ 2 and 3 are abandoned.[38]

In this regard, as noted earlier, the Certification (pp. 126-127) acknowledges the testimony of NEE witnesses Van Winkle and Lehr challenging PNM's claim that it needs to replace the San Juan base load coal capacity being retired with "an equivalent amount of base load capacity." The Certification, however, essentially dismisses that challenge based on the "greater qualifications and familiarity with PNM's systems" of PNM's witnesses and the Hearing Examiner's recommendation that the Commission only approve a CCN for PV 3 at this time to satisfy a portion of PNM's alleged "base load" replacement power needs.

Considering the long-term costs and risks to PNM's customers associated with the CCN for PV 3 recommended and the "most cost-effective" resource procurement requirements in Rule 17.7.3, NEE believes it is critical for the Commission to better understand and identify PNM's actual (not just alleged) "base load" replacement power needs going forward and the relative costs and benefits of using nuclear base load power from PV 3 rather than a combination of intermediate, renewable and peaking resources to satisfy PNM's most current, projected service and reliability needs over the next four years and the longer-term 20-year resource planning horizon required by the Commission's IRP Rule. Indeed, NEE witnesses Fisher and Lehr were not the only witnesses who provided testimony demonstrating that.

Staff witness Rode explained how, by using its "definition of base load capacity" in its economic (Strategist®) modeling process, PNM constrained the results of that modeling in a manner that eliminated other feasible replacement resource options and biased those results

[38] NEE Exhibit #72, Direct Testimony & Exhibits in Opposition to the Stipulation of Van Winkle

toward selection of PV 3 as a cost-effective replacement resource.[39] Mr. Rode also explained that PNM's economic modeling did not reasonably address potential existing opportunities for PNM to reduce or defer future capital expenditure costs to its customers associated with its acquisition of new resources by increasing its utilization (generation duty) of its existing combined cycle, gas-fired facilities, which currently are being operated at less than their full capacity.[40]

Even if the Commission chooses, as recommended in the Certification, to give greater weight to PNM's witnesses than to NEE's witnesses regarding this "base load" replacement power issue due to "their greater qualifications and familiarity with PNM's system," that does not justify the Certification's ignoring the qualified and independent testimony by Mr. Rode regarding this issue that was presented, at public expense, for the Commission's benefit and consideration. More importantly, even if the Commission were to conclude that Mr. Rode is not as familiar with "PNM's system" as PNM's witnesses, that does not justify the Commission ignoring Mr. Rode's testimony regarding this issue, as implicitly recommended in the Certification. Nor does it justify PNM's failure to reasonably address those resource options in the flawed economic modeling it used and relied on to justify its selection of PV 3 as one of its own "most cost-effective" resources feasible at this time.

The Certification's further finding that PV 3 "has the advantage of being a resource that is already built and operating," considering "the rapidly approaching deadline of December 31, 2017 for the retirement of San Juan Units 2 and 3 in the Revised SIP" also does not reasonably

[39] Staff Exhibit #10, Rode Prior Direct, pp. 15-16.
[40] Staff Exhibit #10, Rode Direct, pp. 16-20 (addressing, *inter alia*, the inherent conflict of interests between PNM's management and its customers regarding PNM's selection of PV 3 because "PNM itself is taking both sides of these transactions (i.e., 'selling' from the non-regulated side to the regulated side)." In addition, if the Commission does not strike or disregard Staff witness Carrara's testimony in this case as requested by NEE for the reasons addressed below, Mr. Carrara's pre-Stipulation Direct Testimony, which repeatedly referenced Mr. Rode's critical analysis of PNM's economic modeling of alternatives, recognized that same deficiency in PNM's resource modeling and selection process. Carrara Prior Direct, pp. 58, 70.

justify its recommendation that the Commission grant a CCN to PNM for that nuclear resource. The Commission may consider that "advantage" a benefit to PNM's customers when assessing whether that resource addition will provide a "net benefit" to them. Such a "benefit," however, is simply one that PNM could and should have assessed, along with all other benefits and costs of that resource and all "feasible" alternative resources, in a reasonable and unbiased economic modeling and resource selection process that satisfied the requirements in Rule 17.7.3.

Commission recognition of that "advantage" benefit does not, and cannot, cure the deficiencies in the economic modeling and resource selection processes addressed in these Exceptions and by Staff witness Rode, NEE's witnesses, and other witnesses. Nor does that "advantage" trump or fully satisfy the "net benefit" requirement for Commission approval of CCN requests acknowledged in the Certification.

PNM was aware of the December 31, 2017 "deadline" in the RSIP since of 2012 when it negotiated and agreed to the RSIP. Nothing prevented PNM from thereafter conducting a reasonable analysis of feasible replacement resource alternatives or issuing one or more appropriate competitive RFPs to determine if its selection of PV 3 in the RSIP complied with the resource comparison and selection requirements in Rule 17.7.3. PNM failed to provide such analysis to the Commission and therefore prejudices the outcome to the public. How can the Commission reasonably weigh PV3 if it is devoid of the information necessary to make such an analysis? (Just like the Hearing Examiner discerns: there is "virtually *no evidence* regarding the negotiations for the additional San Juan Unit 4 capacity"[41]; well, there is even less information to evaluate PV 3 *vis a vis* other alternatives and its cost-competitiveness and environmental impact, as required by NM PRC rules.)

[41] Certification of Stipulation, @ p. 112

Were the Commission to rely on that "rapidly approaching" RSIP "deadline" to justify a CCN for PV 3, it would simply be abdicating its responsibility to enforce that Rule and satisfy its CCN review obligations by allowing PNM to use that, and the repeated delays it created in this case by supplementing, revising and correcting its testimony, to improperly leverage the Commission into approving that resource selection despite PNM's failure to show that it satisfies the regulatory requirements in Rule 17.7.3. The Commission could easily rely on a short-term PPA for PV3, until other resources are properly vetted in compliance its own rules, rather than relying on the "crisis" of the RSIP deadline to permit unjustified and risky resources be brought into rates.

The same can be said about the "fuel diversity" benefit of PV 3 noted in the Certification (p. 128). Fuel diversity is certainly a benefit the Commission should consider when evaluating PNM's most cost-effective resource portfolio over the next four years, as well as during the 20-year planning horizon required by its IRP Rule. If the Commission is concerned with fuel diversity, than it should increase solar above PNM's current 1% and wind above PNM's current 5%. PNM already has 20% of its energy portfolio being produced by nuclear. As Mr. Lehr testified the antidote to risk is a diverse portfolio.[42] Right now energy purchases on the market are cheaper for ratepayers than what PNM can produce. NEE does not doubt that, at some point during those periods, perhaps sooner than later, natural gas prices will increase over current levels, perhaps dramatically. We should test ALL the different energy resources against a cost/benefit analysis – requiring the extractive fuels to compete against the renewable resources on the rigorous standards articulated in the law, which hasn't been done in this case.

[42] TR. 1/16/2015, Lehr, p. 2152: "You want to manage risk? You diversify. So we diversified into gas. Now we're diversifying into renewable energy. If you want to manage risk, you diversify."

Reasonable Commission consideration of fuel diversity benefits, however, provides all the more reason for PNM to have reasonably considered and evaluated, in a proper "feasible" replacement resource alternatives analysis, the benefits of adding more solar, wind, distributed generation and/or other renewable supply-side resources—which have no fuel costs, no regulatory risk, no perilous health or environmental risks, little to no water usage —as well as more efficient demand-side response programs, in the mix in its resource portfolio than what PNM first agreed in 2012 to propose in the RSIP, then grafted into its 2014 IRP, and now proposes in the Stipulation.

Similarly, NEE does not contend that it was improper or unreasonable for the Hearing Examiner to characterize other provisions in the Stipulation intended to mitigate the risks associated with PV 3 as providing some benefits compared to possible alternative scenarios. NEE submits, however, that the Certification does not demonstrate that, whatever the magnitude of those unquantified benefits may be, they outweigh the long-term costs and risks to PNM's customers associated with the requested transfer of the PV 3 nuclear asset into PNM's rate base.

Like lobsters entering a lobster trap, once the Commission allows this risk-laden nuclear asset into PNM's rate base, it will be difficult, if not impossible, for PNM's customers to escape paying for their share of the risks of that inclusion, or for this or future Commissions to do anything to protect customers from those toxic assets.[43] This is not a decision that the Commission can easily or ever reverse. It is a decision that will expose PNM's customers to substantial risks for more than twenty years. Those risks include potential future unimaginable

[43] "Toxic assets" was a phrase coined during the 2008 financial crisis when homes were worth less than the mortgages attached to those properties. Basically, those assets were guaranteed to lose money. This led to massive foreclosures, the losses of life savings, a vast number of bankruptcies, and the greatest financial divide in our nation's history. Similarly, PNM is seeking to transfer the coal and nuclear toxic assets at aging plants from shareholders to ratepayers and externalize the risks and liabilities of extreme environmental contamination and degradation, decommissioning costs, capital expenditures, pollution controls, etc.

"stranded asset" cost claims, by PNM prior to the end of PV 3's useful life, potentially in the billions, making the stranded asset claims herein seem *de minimis*. PNM argues unconvincingly that they are entitled to recover 50% (or 100%) of the cost of the undepreciated net book value of SJ 2 and 3 because those resources are no longer economic for PNM to operate considering the cost of addressing their hazardous emissions.

In this regard, the Certifications also finds a "benefit" to customers due to the provisions in the Stipulation providing for "the proration of the responsibility for decommissioning costs based on the time in which the unit has been devoted to jurisdictional versus non-jurisdictional service." That is not much of a benefit to PNM's customers, however, considering that it would be patently unreasonable, unjustified and outrageous for PNM to claim otherwise. In the absence of the Stipulation, and the fact that the Commission's grant of a CCN to PNM for PV 3 will expose PNM's customers to an unquantifiable and unlimited amount of PV decommissioning costs in addition to those to which they already are exposed due to PNM's existing PV resources in its jurisdictional rate base. Will that exposure be $50 million? $500 million? Over a billion dollars? Neither PNM, the Commission nor anyone else can know the scope of that PNM customer exposure at the time the Commission issues a final order in this case.

The alleged "benefit" noted in the Certification (p. 128) that, under the Stipulation, PNM's investors and customers would "share the costs of funding the decommissioning trust if the required annual funding amounts increase" also should provide little comfort to PNM's customers or the Commission. If PNM ends up having to spend a billion or more dollars to do what no electric utility has ever completed to date—fully decommission a nuclear power plant—the impact of its customers' "share" of those costs on their rates for electric service will be considerable, if not entirely unaffordable, for most of them. Unlike PNM's investors and

management that may come and go during the remaining useful life of PV 3, PNM's customers will have no escape from the consequences of the proposed transfer of that nuclear resource into PNM's rate base. They may turn as red with anger as the trapped lobster, but they will be stuck with those costs all the same.[44]

Why, NEE now asks the Commission, is it reasonable or in the interests of PNM's customers or in the public interest, to transfer that nuclear power risk from PNM to its customers when the record in this case demonstrates that other feasible, less risky replacement resource options available to PNM? And, if it remains PNM's position that PV 3 is a cost-effective resource whose long- term risks are acceptable, why is PNM so eager to transfer that asset and its risks to its retail service customers in New Mexico?

Similar observations about the alleged "benefits" of other provisions in the Stipulation that purport to mitigate the risks associated with transferring PV 3 into PNM's rate base are obviously flawed. The provision in the Stipulation prohibiting PNM "from recovering costs associated with the storage and disposal of spent fuel from the operation prior to January 1, 2018" does not provide any more benefit to customers than what they would be entitled to without that stipulation. Can the Commission reasonably conclude that, but for that prohibition in the Stipulation, PNM would be entitled to recover those costs for operations that provided no service or benefits to its New Mexico retail service customers? We do not believe so.

[44] A recent Bloomberg Business article discusses the pathos of coal companies that run coal mines because they prefer losses to the company rather than permanent closure of the coal mine *plus* decommissioning costs, which are more costly than the entire worth of the respective companies. The article explains the bottoming out of the coal market. (While the article focuses on coal and the effects of decommissioning on corporate decision making the argument equally applies to nuclear.) Similarly, PNM seeks to keep their coal and nuclear plants operating, to buy and burn more coal and nuclear, even though there are cheaper alternatives (their own modeling shows that a four unit coal shutdown is cheaper for ratepayers by more than 300 hundred millions of dollars) and transfer those higher costs to ratepayers rather than close the plants out of corporate fear of tremendous liabilities that could drive bankruptcy. PNM's plan is to lock-in ratepayers to pay for their toxic assets and then "holding on to optimism" that it can sell the company.
http://www.bloomberg.com/news/articles/2015-03-30/appalachia-miners-wiped-out-by-coal-glut-thattheycantreverse?utm_source=Sailthru&utm_medium=email&utm_term=Utility%20Dive&utm_campaign=Issue%3A%202015-04-02%20Utility%20Dive%20Newsletter

Though PNM is not prohibited from making such unreasonable and unjustifiable cost recovery requests in rate cases before the Commission, that does transform its agreement in a settlement to not forego making such claims a "benefit" to its customers. Indeed, the specious and unreasonable premise of the Stipulation "as a whole" is that it proposes compromises of claims in PNM's Application that were not reasonable or reasonably justified in the first place and were never tested for reasonableness in the hearing in this case.

Finally, the Certification recommends that the Commission find a benefit to PNM's customers from the $3 million credit for refunds PNM is receiving from the U.S. Department of Energy related to storage of spent fuel for PV that "might arguably belong to shareholders since the refunds are for costs incurred during the period when Palo Verde Unit 3 was in non-jurisdictional service." First, compared to the other long-term costs of the Stipulation to customers, a one-time $3 million credit is not much of a benefit. Moreover, assuming those refunds would otherwise belong to PNM's shareholders because they relate solely to costs incurred while PV 3 was used for non-jurisdictional service, there would be no legitimate reason for any party or the Commission to claim those refunds should be credited to PNM's jurisdictional customers.

Why is PNM so willing to provide a $3 million credit in its jurisdictional customers' rates that it believes rightly belongs to its shareholders? Is that proposal, like PNM's proposal to diminish the value of its investment PV 3 by transferring it from merchant plant to its jurisdictional rate base (as claimed by PNM witness Reed) consistent with PNM management's fiduciary obligations to PNM's shareholders? Or is it this a case, as NEE and other opponents of the Stipulation maintain, of PNM simply disguising the real long-term costs, risks and benefits of

transferring that nuclear resource in into its jurisdictional rate base in order to force its customers to assume those risks by persuading the Commission to grant it the CCN for PV 3 requested?

With respect to this CCN request issue, as well as the SJ 4 CCN request issue that NEE believes the Certification more properly and correctly addresses, the "emperor has no clothes." The Certification fails to demonstrate that PNM and the remaining supporters of the Stipulation have met their burden of satisfying the requirements for a CCN for PV3.

For all of these reasons, the Commission should not accept or adopt the F&Cs in Section III.G.4.d(i) in the Certification. Instead, NEE strongly recommends that the Commission order PNM to issue one or more appropriate all-resource RFPs for the capacity it will need to replace the SJ 2 and 3 coal resources to be retired as soon as possible and to establish an independent evaluation or monitoring process, as requested in the May 29, 2014 Joint Petition by NEE, the AG and other parties in Case No. 14-00152-UT, to ensure that PNM conducts that bidding process and its independent evaluation of the results of that process in a reasonable, fair and unbiased manner that protects its customers.

5. Recommended F&C in Section III.G.5.a ("NEE's challenge to Staff testimony under NMSA 1978, § 8-8-19"), p. 142:

This recommended F&C appears to suggest, if not recommend, that the Commission need not consider the acknowledged violations of NMSA 1978, §§ 8-8-19.A(3) and 8-8-19.D by Staff member Bruno Carrara, who served as Staff's lead negotiator with respect to the Stipulation, because the "Certification does not rely upon Mr. Carrara's testimony for findings made in regard to any of the disputed issues in this case" even though it "does at times refer to Mr. Carrara's testimony for background information on issues for which the Hearing Examiner makes findings adverse to the recommendations in the testimony."[45] In addition, this portion of

[45] Certification of Stipulation @ p.142

the Certification "notes that NEE did not file a motion asking that the testimony [of Staff] be stricken,"[46] suggesting that the Commission may therefore rely on Mr. Carrara's pre-Stipulation testimony or testimony in support of the Stipulation, if it so chooses, because NEE did not file such a motion. This discussion and recommended F&C are unreasonable and deficient and should not be accepted or adopted by the Commission for numerous reasons.

First, as recognized in the Certification, Mr. Carrara played a leading role in negotiating Staff's agreement with PNM to the Stipulation and preparing and filing testimony by Staff not only advocating that the Commission adopt the Stipulation "as filed," with no modifications, but that the Commission also accept PNM's claims that it reasonably and properly evaluated and determined the most cost-effective replacement power resources available to it, considering "all feasible supply and demand-side resource options on a consistent and comparable basis," taking into consideration "risk and uncertainty (including but not limited to financial, competitive, reliability, operational, fuel supply, price volatility and anticipated environmental regulation)," as required by the Commission's Integrated Resource Plan ("IRP") Rule 17.7.3.9.G(1) NMAC. Mr. Carrara did so even though David Rode, an expert witness retained by Staff, at the public's expense, to specifically address the reasonableness and fairness of the process PNM conducted to select the replacement resources proposed in the Stipulation, filed testimony contradicting Mr. Carrara's and other Staff opinions in their prepared and hearing testimony of the reasonableness and prudence of PNM's process and resources, and Staff attempted, on several occasions, to prevent the admission of Mr. Rode's testimony into the record for substantive purposes for the Commission to consider in this case.[47]

[46] *Ibid*
[47] *See* Staff Exhibit #10, Rode Prior Direct Testimony and Staff's pleadings opposing the admission of that testimony, declining to make Mr. Rode available for cross-examination at the hearing and otherwise responding to

Mr. Carrara not only failed to disclose his "pecuniary interest" in PNM by virtue of his ownership of PNM stock in violation of NMSA 1978, § 8-8-19.D(2) until he was cross-examined by counsel for a party opposed to the Stipulation at the hearing, he also repeatedly concealed from intervenors the fact that he previously had been employed for 25 years by PNM until the hearing, in both his prior (pre-Stipulation) Direct Testimony (p. 2) and his Direct Testimony in support of the Stipulation (p. 2). Though NEE understands that Mr. Carrara's prior employment by PNM and his continuing receipt of pension benefits do not constitute violations of § 8-8-19.D(2), NEE submits that his failure to disclose those matters in a timely manner, which bears on the reasonableness and credibility of his negotiations and testimony for Staff in this case, and his ownership of PNM stock in violation of law are particularly serious in this case due to the potential magnitude of the effects of the outcome of this case on PNM's customers and the public interest and the relationship between Mr. Carrara's role as Staff's lead negotiator, the Staff positions addressed in his testimonies and other recommended F&Cs in the Certification. NEE wishes to make this clear: Mr. Carrera's participation in the negotiation of the Stipulation, particularly as the "lead negotiator" violated the law. In addition, the fact that the two other members of the negotiating committee were former PNM employees and, like Mr. Carrara, receive PNM pensions, and repeatedly deferred to Mr. Carrara during their testimony, makes the negotiated Stipulation subject to challenge on that basis.

As discussed above, two of the recommended F&C's in the Certification (pp. 114-115) challenged in these Exceptions are that "[t]he alternatives analysis presented in support of the CCN requests in the Stipulation does not violate regulatory principles" and that, to satisfy the Stipulation's proponents' burden of proof regarding those CCN requests, PNM did not need to

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the Hearing Examiner's repeated rulings finding Mr. Rode's testimony admissible for substantive purposes in this case.

issue a request for competitive proposals for those replacement resources. The record clearly shows that Staff, like PNM and the other two remaining supporters of the Stipulation, relying principally on Mr. Carrara's testimony in support of the Stipulation, relied on *PNM's* evaluation of feasible replacement resource alternatives, using proprietary Strategist® software, that Staff witness Rode and NEE witnesses Fisher, Lehr and VanWinkle on multiple occasions showed was deliberately manipulated and biased toward selection of the nuclear and coal resources proposed in PNM's Application and its 2014 IRP, and did not comply with Commission Rules 17.7.3.9.F and G(1). Simply put, based on the record here, Mr. Carrara's conflict of interest and violation of § 8-8-19.D(2) affected, infected and tainted[48] the entirety of Staff's support for that finding in the Certification and the Stipulation *regardless* of the modifications to it recommended in the Certification.

NEE recognizes that, pursuant to § 8-8-19.F, punitive enforcement of violations of § 8-8-19.D(2) are matters that the Legislature has authorized the Attorney General or a district attorney to address. NEE also recognizes that, other than recommending how the Commission should treat Mr. Carrara's violation of that statute with respect to his and Staff's testimony in this case under applicable law, the manner in which the Commission chooses to address that statutory violation internally is a personnel matter not appropriate for the Hearing Examiner to address in his Certification.

As discussed in NEE's post-hearing brief-in-chief (pp. 44-48), however, § 8-8-19.D(2) makes it clear that if a Commission employee has a "pecuniary interest" in a regulated entity, as Mr. Carrara did when he prepared his testimonies, led Staff's negotiated agreement to the Stipulation and testified at the hearing in this case, he was statutorily <u>required</u> "to recuse himself from the proceeding." Moreover, once that statutory violation by Mr. Carrara

[48] The duty of the Commission to fine a violator of NMSA 1978, § 8-8-19…

became known to the Commission, the Commission itself had a statutory duty under NMSA 1978, §§ 8-8-4.A and B.5[49] by striking and disregarding all of Mr. Carrara's prohibited testimony, as well as any other testimony by other Staff witnesses or witnesses for any other party that relied on Mr. Carrara's prohibited testimony, in this case. Cf. Living Cross Ambulance Services, Inc. v. NMPRC, 2014-NMSC-036, ¶ 22 (Commission committed "plain error" by admitting testimony by party whose counsel had a conflict of interest, requiring reversal of its final order). *See also* Rule 1.2.2.35.L(2) NMAC ("The Commission or presiding officer [in] their discretion either with or without objection may exclude inadmissible, incompetent, cumulative or irrelevant evidence or order the presentation of such evidence discontinued.").

Mr. Carrara's violation of § 8-8-19.D(2) was not disclosed to and was unknown by NEE , and to NEE's knowledge by any of the other parties opposed to the Stipulation, prior to the hearing in this case. Thus, NEE had no basis for asking the Commission to strike his testimony, or any testimony by any other witness based on Mr. Carrara's testimony, prior to the hearing.

NEE's post-hearing Brief-in-Chief (pp. 44-48) addressed the taint to and cloud on the settlement process, the Stipulation and Staff's entire testimony in support of the Stipulation in this case created by Mr. Carrara's unlawful participation in that process in his role as lead negotiator for Staff, and by the testimony he submitted in this case. NEE therefore expressly moved the Commission there (p. 47) to strike and completely disregard not only Mr. Carrara's prohibited testimony, but also the testimony of Staff witnesses Lamberson and Gunter who cited and relied on Mr. Carrara's testimony in their testimonies and who also played major roles in

[49] NMSA 1978, §§ 8-8-4.A and B.5 provide that "[t]he commission shall administer and enforce the laws with which it is charged and has every power confirmed by law" and may "take administrative action by issuing orders not inconsistent with law to assure implementation of and compliance with the provisions of law for which the commission is responsible".

Staff's agreement to the Stipulation and the development of Staff's testimony in support of the Stipulation, as filed.

Based on this record, NEE's request that the Commission strike or disregard those testimonies was timely presented to the Commission in its Brief-in-Chief even if, assuming *arguendo*, such a motion by NEE (or any other party) were required for the Commission to enforce § 8-8-19.D(2), which NEE submits is not consistent with applicable law, or possible beforehand. (There is no reasonable basis for the Hearing Examiner's statement: "NEE did not file a motion asking that the testimony be stricken." Does he shift the burden to New Energy Economy for our failure to have filed a separate motion between the end of the hearing and the date the Brief-in-Chief was due or should he properly hold accountable the offender of the plain and simple rule that a "regulator" cannot have a "pecuniary interest" in the utility he allegedly is regulating?) Moreover, based on the record here, the suggestion in the Certification that NEE waived its right to request that relief, or that the Commission need not provide that relief <u>on its own</u> due to its statutory responsibilities, addressed above, because NEE did not file a separate "motion" requesting that, puts "form over substance" and does not remove the taint and cloud regarding the Stipulation and the Certification created by Mr. Carrara's unlawful participation in this case.

This is so because the Commission remains free to adopt, or not adopt, any or all of the discussion and recommended F&Cs in the Certification. Moreover, even if the Commission adopts and approves the recommendations in the Certification that are "adverse" to the positions and recommendations in Mr. Carrara's testimony and other Staff testimony in support of the Stipulation, or adopts the Certification in its entirety, and the remaining supporters of the

Stipulation agree to the modifications to it recommended in the Certification, the taint and cloud created by Mr. Carrara's unlawful participation in this case will taint that outcome as well.[50]

As explained in NEE's Brief-in-Chief (p. 44), the only way the Commission can remove the taint and cloud regarding the Stipulation and Staff's support for it resulting from Mr. Carrara's prohibited participation and testimony is by striking and disregarding all of his testimony and the testimony by other Staff witnesses relying on Mr. Carrara's testimony, as NEE has appropriately requested. Otherwise, the Commission's final order in this case will itself become tainted by that prohibited testimony and that taint will be an issue on appeal for consideration by the New Mexico Supreme Court, if an appeal of that order is taken.

For these reasons, the issue whether the Commission should strike and totally disregard Mr. Carrara's testimony and any other Staff testimony based on his testimony in this case is not moot, insignificant or unnecessary for the Commission to address simply because the Certification purports to not rely on any of Mr. Carrara's testimony "in regard to any of the disputed issues in this case" and to only refer to his testimony "for background information…on issues for which the Hearing Examiner makes findings adverse to the recommendations in…[his] testimony, as stated in the Certification. Moreover, the Commission needs to further address the effects of Mr. Carrara's statutory violation on his testimony and Staff's support for the Stipulation in this case. The F&C do not comport with what NEE believes are the sort of sound principles of an unbiased and untainted procedural process that the Commission should insist on, in this and all adjudicatory cases before it, to promote public confidence in the conduct of the Commission's proceedings and its deliberations. *See also Bernalillo County Health Care Corp. d/b/a Albuquerque Ambulance Service v, NMPRC,* 2014-NMSC-008, ¶ 14, (February 20, 2014)

[50] In addition, because of this continuing taint on proceedings in this case, it is NEE's position that, due to Mr. Carrara's violation of § 8-8-19.D(2), the Commission should bar him from any further participation in this case, in an official, informal or any other capacity regarding PNM's Application/Stipulation.

(Supreme Court's recently expressed concern "with the consistent mishandling of processes by the Commission"), addressed further below. The parties, of course, have no way of knowing what recommendation the staff would have made had the negotiations not been handled as they were.

For all of these reasons, the Commission should not adopt or approve the discussion and F&Cs recommended in Section 5.a of the Certification, should strike and totally disregard all of Mr. Carrara's testimony and any other Staff testimony based on his testimony in this case, and should prohibit Mr. Carrara from participating any further, in any capacity, in this case. Furthermore, NEE respectfully submits that Mr. Carrara's participation as lead negotiator, as well as the fact that the staff negotiation committee included no one independent of PNM should categorically preclude the PRC from accepting any portion of the Stipulation.

6. Recommended F&C in Section III.G.5.b ("Motions to recuse commissioners"), p. 142:

This recommended F&C erroneously suggests, and apparently recommends, that the Commission find and conclude that Commissioners Lyons and Montoya need not reconsider or further address NEE's motions to disqualify them from participating in a final order in this case, suggesting that NEE has not preserved those issues, or has waived its right to address them on appeal of any final order in this case, because Commission Rule 1.2.2.38.B(2)(c) NMAC provides that a response to a motion to disqualify a commissioner "shall be considered a final order for purposes of appeal" and "NEE has not appealed or sought reconsideration of" the responses to those motions filed by Commissioners Lyons and Montoya on January 7 and 9, 2015, respectively. That suggestion or recommended F&C also is contrary to law and should not be adopted for numerous reasons.

Appeals of actions and "final orders" of the Commission to the New Mexico Supreme Court are governed by statute, NMSA 1978, § 62-11-1, which preempts and invalidates any Commission rules inconsistent therewith. *See, e.g., New Mexico Mining Association v. New Mexico Mining Commission,* 1996-NMCA-098, ¶ 15, 122 N.M. 332 (administrative rules will be upheld if they are in harmony with statutory authority); *Albuquerque Cab. Co. et al. v. NMPRC*, ¶ 18, 317 P.3d 837, 841 (N.M. 2013) (no Commission rule can take away a statutory right); *Tri-State Generation and Transmission Ass'n v, NMPRC,* Slip Op. (filed April 6, 2015), ¶ 24 ("Although…Commission's regulations allow it great latitude in managing its own proceedings, the Commission cannot apply its regulations contrary to" a statute).[51]

The Public Regulation Commission Act, specifically NMSA 1978, § 8-8-4.D, defines what constitutes a "final decision of the commission," providing that a "majority vote of the commission is needed for a final decision of the commission." The Commission likewise has no authority to provide otherwise by rule.

A commissioner's obligation to recuse himself or herself also is addressed by statute. NMSA 1978, § 8-8-18.A provides, in pertinent part, that "[a] commissioner…shall recuse himself in any adjudicatory proceeding in which he is unable to make a fair or impartial decision *or in which there is a reasonable doubt whether he can make a fair and impartial decision*," or "when he has a personal bias or prejudice concerning a party or its representative," including a "predisposition toward a person based on a *previous or ongoing relationship*, including a *professional*, personal, familial or other intimate relationship, that renders the commissioner…unable to exercise his functions impartially." (Emphasis added).

[51] In addition to being contrary to NMSA 1978, § 62-11-1, it appears to NEE that, to the extent it suggests that Rule 1.2.2.38.B(2)(c) NMAC requires parties to appeal commissioner refusals to recuse themselves to the New Mexico Supreme Court prior to the Commission's issuance of a final order in a case, that Rule serves no administrative or judicial efficiency or any other legitimate public policy purpose.

Moreover, a party's obligation in that regard is addressed in NMSA 1978, § 8-8-18.B, providing:

> If a commissioner…fails to recuse himself when it appears that grounds exist, a party shall promptly notify the commissioner…of the apparent grounds for recusal. If the commissioner…declines to recuse himself upon request of a party, he shall provide a full explanation in support of his refusal to recuse himself.

NEE's Motions to recuse Commissioners Lyons and Montoya satisfied those statutory requirements. NEE submits that Commissioners Lyons' and Montoya's previous conclusory responses to those Motions failed to satisfy their obligations under that statute.

NEE addressed these disqualification issues in its post-hearing briefs to preserve them on appeal, if an appeal of the Commission's final order in this case is taken, and to provide Commissioners Lyons and Montoya with an opportunity to reconsider their previous decisions to not recuse themselves from participating in a final Commission order in this case before such an order is issued. Nothing in NMSA 1978, § 8-8-18.B, or in Commission Rule 1.2.2.38.B(2)(c) NMAC for that matter, requires that a party requesting recusal of a commissioner seek reconsideration of his or her response to a motion to recuse in order to preserve that issue, either for subsequent reconsideration by them, or on appeal of a Commission final order, as suggested in the Certification. Nor does any language in that statute require that a party requesting a commissioner's recusal in a case presided over by a hearing examiner "appeal" a commissioner's response to a motion to recuse to the Commission itself, by interlocutory appeal pursuant to Rule 1.2.2.31 NMAC,[52] or to the Supreme Court pursuant to NMSA 1978, § 62-11-1, prior to issuance of a "final" Commission order, as suggested in the Certification.

To the contrary, Commission Rule 1.2.2.38.B(2)(c) NMAC provides: "Unless otherwise provided by law, no commissioner shall rule on a motion to disqualify any other commissioner."

[52] To the contrary, Commission Rule 1.2.2.38.B(2)(c) NMAC provides: "Unless otherwise provided by law, no commissioner shall rule on a motion to disqualify any other commissioner."

That regulation also cannot be interpreted or enforced in a manner inconsistent with NMSA 1978, § 8-8-4.D or 62-11-1 addressing appeals of Commission actions. *Cf. Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956) (action to enjoin commission from enforcing new gas rates and recover amounts paid without waiting for final decision in pending statutory review proceeding dismissed for failure to exhaust administrative remedies). Thus, when a commissioner declines to recuse himself or herself in response to a party's motion in accordance with NMSA 1978, § 8-8-18.B, that party has no administrative remedy remaining to exhaust at the Commission until the Commission issues a final order that can be appealed to the Supreme Court pursuant to § 62-11-1.

NMSA 1978, §8-8-18.B and the second sentence in Commission Rule 1.2.2.38.B(2)(c) NMAC make it clear that the statutory responsibility of commissioners to recuse themselves from participating in a proceeding where proper grounds for recusal have been submitted by a party is an individual one that rests with the commissioner to whom such motions are addressed. *See also* Commission Rule 1.2.2.38.B(3) NMAC ("A commissioner may be disqualified for violation of the code of conduct adopted by the commission."); Rule 1.2.2.39 NMAC ("The conduct of the commission shall be governed by the code of conduct adopted by the commission pursuant to Section 10-16-11 NMSA 1978 of the Governmental Conduct Act unless inconsistent with Sections 8-8-17, 8-8-18 and 8-8-19 NMSA 1978.").

Commission Rule 1.2.2.39 NMAC recognizes that commissioners have a paramount individual, statutory obligation to not engage in and to disclose the sort of prohibited *ex parte* communications addressed in NEE's Motions to recuse Commissioners Lyons and Montoya under NMSA 1978, § 8-8-17 and to recuse themselves from participating in an adjudicatory

proceeding such as this under NMSA 1978, § 8-8-18 when sufficient grounds for such recusal are submitted by a party.

Because Rule 1.2.2.38.B(2)(c) NMAC prohibits any other commissioners from ruling on such recusal motions, the Commission powers delegated to the Hearing Examiner pursuant to 1.2.2.29.C NMAC likewise do not include recommending Commission rulings on such motions or suggesting findings or conclusions regarding such motions addressed to individual commissioners.[53] Moreover, where, as here, the discussion of those motions in the Certification appears to recommend or suggest that the commissioners to whom NEE's motions to recuse were addressed need not reconsider or further address their previous responses to those motions prior to issuance of a final order in this case is contrary to law, that discussion also is inappropriate. That discussion in the Certification also should not be accepted or adopted by the Commission or that additional reason. Regardless, the Hearing Examiner's failure to rule on NEE's Motion to Compel discovery of PNM's communications with Commissioners Jones, Montoya and Lyons remains unexplained by his summary paragraph addressing our motion to recuse. Had the Hearing Examiner granted NEE's Motion to Compel discovery we would have garnered further substantiation of *ex parte*, improper and/or biased communication. The issue of the disqualification of Commissioners Lyons and Montoya cannot be separated from NEE's motion to compel PNM to provide the communications between it and these and other commissioners. NEE intends by this statement to preserve this issue for appeal.

NEE also notes that Commissioners Lyons and Montoya have not yet participated in any discussions of the Certification or voted on any final order in this case. Thus, though NEE has

[53] The Commission did not delegate any authority to address NEE's Motions to recuse to the Hearing Examiner. Moreover, Commission Rule 1.2.2.29.C(9) NMAC only authorizes hearing examiners to discharge their duties "consistent with the statutory authority or other authorities under which the commission functions and with the rules and policies of the commission."

no legal obligation to ask either of them to reconsider their prior responses to NEE's recusal motions, NEE continues to request their recusal, and Commissioners Lyons and Montoya continue to have the opportunity themselves--and NEE believes the obligation—to reconsider their prior responses to NEE's Motions before they participate in such discussions and before the Commission issues a final order in this case.

If Commissioners Lyons and Montoya do reconsider and recuse themselves before the Commission engages in those discussions and votes on a final order in this case, these disqualification issues would become moot and there would be no need for NEE, or any other affected party, to address them on appeal. If, on the other hand, they don't reconsider and do participate in those discussions and/or vote on a final order in this case, or if a motion to reconsider the Commission's final order is filed addressing these pending disqualification issues and they don't reconsider and recuse themselves in response to such a motion, their refusals to recuse themselves will be "final" for the purposes of this case that any party may address in an appeal of that final order, pursuant to NMSA 1978, § 62-11-1.

7. Recommended F&C in Section III.G.5.c ("NEE Motions to for reimbursement of Strategist® costs"), p. 143:

The evidence admitted at the hearing and critical evidence on which the Hearing Examiner relied in determining that the Stipulation was not the "least cost" or "most cost effective" and not in the public interest was based on New Energy Economy's using the computer software Strategist® to disprove PNM's claims. It cost NEE $17,000.00 to purchase a two month lease from the computer program owner.

Prior to paying for Strategist® NEE sought to compel PNM to pay for NEE's licensing and use of Strategist® in their Motion and Supporting Brief of New Energy Economy For Order Compelling Public Service Company of New Mexico to pay for NEE's Licensing and Use of Strategist® Software Program. The Motion made it clear that it was impossible to challenge PNM's computer results without access to the computer software they used, and without seeing the inputs by PNM, which could only be obtained through the lease of the computer software.

At the hearing with the use of Strategist® NEE was able to show that PNM had misrepresented the true cost of its replacement plan by $1.1 BILLION, by rigging input assumptions and costs, by 1) not including the costs of PNM ongoing capital expenditures - $532,000,0000; and 2) inputting false and extravagant costs for wind and solar, in contravention of the costs of wind and solar PNM has used in its testimony in previous NM PRC cases; and 3) artificially limiting wind capacity; and 4) underestimating the costs of coal fuel prices - $367,000,000; and more. This resulted in the incorrect and unsubstantiated feasibility of alternative plans against PNM's intentionally manipulated input on their plans. Further, by using Strategist® with correct input NEE was able to demonstrate that closing all four units was less expensive and more cost effective than PNM's plan by $300 Million over 20 years.

After the proceeding, the hearing examiner acknowledged the importance of access to proprietary software such as Strategist® stating, "Results of computer models are presented in the evidentiary record, but the proprietary software used to generate the results is *not easily* evaluated without access to the software. In such cases parties and the Commission may be unable to thoroughly evaluate the results without access to the proprietary software, which may require the purchase of an expensive license." (Certification of Stipulation, p. 145) Emphasis added. The truth is that its not only "*not easily* evaluated without access to the software" its

impossible. NEE and the other parties, and most importantly, the public are *foreclosed* from evaluating the evidence without access to the software. Nevertheless the Hearing Examiner denied reimbursement because "it was not provided for" in Section 62-13-3 of the public utility act, which states that each party shall bear their own costs. The Hearing Examiner further suggested that NEE propose an amendment to the current statute to allow for costs when one party relies on proprietary software.

NEE takes exception to the Hearing Examiner's recommendation to the extent it understates the penalty on entities that seek to challenge the results of proprietary software. Black box or hidden information[54] is a penalty not a cost for other parties. If this Commission finds that it is a "cost" then Section 62-13-3 of the public utility act, is unconstitutional as applied. (This is not a situation where the party was lacking because it had not propounded adequate discovery, or was not incisive in its cross-examination skills, or failed to hire professional and credible experts.) This is a situation where no matter how skillful, **a party cannot "know"**, **cannot confront the evidence, in fact is barred, unless it pays for access.** This is a penalty, not a cost and therefore adverse to due process guarantees. In fact it is impossible to evaluate the computer software model without access to the proprietary modeling and the results cannot be evaluated *at all* without this access. Thus, denial of access is inherently prejudicial and a denial of the opportunity to see the critical evidence on which PNM relies to make their conclusions and on which they base their arguments for their replacement plan.

The right to know and confront the evidence of the opposing party is the most critical part of due process. It is fundamental to a constitutionally mandated fair hearing. To place an

[54] It's as if PNM has relied on a "decoder ring" to justify its replacement plan. PNM has allegedly validated its plan with a device which allows one party to encrypt a message without any ability to test the secret code, thereby violating our 5th, 6th and 14th Amendment rights to cross-examine evidence against us, due process and access to a fair hearing.

excessive financial burden on parties with substantially less resources than PNM, to be able to confront and cross-examine PNM's evidence is to deny the public due process and a fair hearing. In the present circumstances, where the monopoly utility, will be guaranteed reimbursement for reasonable expenditures it is antithetical to pubic policy to deny access to this information. Either PNM must make monies available to vet their hidden conclusions or not be able to base their claims on the results of their own proprietary software unavailable to opposing parties except at great cost. The mandates of a fair trial with the right to confront critical evidence should prevail. Meaningful access to the PRC hearing should not depend upon the ability to pay for expensive proprietary software.

In the instant case, PNM repeatedly relied on Strategist®, the proprietary software licensed by Ventyx, to substantiate and underscore the alleged cost-effectiveness and feasibility of their replacement power portfolio. In PNM's rate case, 14-00332-UT, PNM also relied on proprietary software license by Ventyx but the Hearing Examiner recently concluded that: "the PROMOD (like Strategist®) modeling cannot be a black box: the assumptions applied and inputs used in the PROMOD ***must*** be disclosed to Staff and Intervenors so that they can determine the validity of the outputs. If PNM has not provided this information to Staff and Intervenors, it has failed to comply with the [Future Test Year] FTY Rule.[55] PNM has not explained, supported and justified the [cost] estimates as required by the FTY Rule.[56] Under these circumstances, it is reasonable to dismiss PNM's Application for failure to comply with the FTY Rule.[57]" (Emphasis Supplied.)

[55] Initial Recommended Decision, 4/17/2015, 14-00332-UT, at p. 17,18
[56] *Ibid*, at p. 19, 20
[57] *Ibid*, at p. 21

WHERFORE, New Energy Economy respectfully requests this Commission approve of the denial of the Stipulation as called for by the Hearing Examiner's Recommended Decision and takes exception with the "Discussion" sections and recommended findings of fact and conclusions for the reasons stated herein from the Hearing Examiner's April 8, 2015 Certification of Stipulation because they are contrary to law and should not be adopted by the Commission. NEE believes the Commission and each of the commissioners should be particularly sensitive to compliance with applicable law in this regard not only because of the public perception and fairness purposes of the *ex parte* communication and recusal statutes in the Public Regulation Commission Act, §§ 8-8-17 and 8-8-18, but also in light of the Supreme Court's recently expressed concern "with the consistent mishandling of processes by the Commission." *Bernalillo County Health Care Corp. d/b/a Albuquerque Ambulance Service v, NMPRC,* 2014-NMSC-008, ¶ 14, *supra*.

Respectfully submitted this 20th day of April, 2015,

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL TO ABANDON SAN JUAN GENERATING STATION UNITS 2 AND 3, ISSUANCE OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR REPLACEMENT POWER RESOURCES, ISSUANCE OF ACCOUNTING ORDERS AND DETERMINATION OF RELATED RATE-MAKING PRINCIPLES AND TREATMENT.	)	**Case No. 13-00390-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO, Applicant	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following
NEW ENERGY ECONOMY'S EXCEPTIONS TO CERTIFICATION OF STIPULATION AND MOTION TO FILE NEW ENERGY ECONOMY'S EXCEPTIONS TO CERTIFICATION OF STIPULATION INSTANTER

was filed today and was emailed as indicated on April 20, 2015 to the parties listed below:

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April 20, 2015