BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATING STATION UNITS 1 AND 4	)	**Case No. 19-00018-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	
Applicant.	)	

PUBLIC SERVICE COMPANY OF NEW MEXICO'S LEGAL MEMORANDUM IN RESPONSE TO APRIL 1, 2022 PROCEDURAL ORDER

APRIL 20, 2022

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Public Service Company of New Mexico ("PNM") files this legal memorandum in accordance with the Procedural Order of April 1, 2022 ("Procedural Order").

The Hearing Examiners issued a Procedural Order, which instructed that PNM should file direct testimony by April 20, 2022, addressing a list of enumerated questions set forth in Attachment 1 to the Procedural Order. The twentieth question in Attachment 1 asked parties to address "the reasonableness of the Commission potentially requiring an interim rate reduction/rate credit effective July 1, 2022 pursuant to 1.2.2.27 NMAC to remove the costs of San Juan from customer rates."[1] In that question, the Procedural Order contemplated a legal pleading by providing that PNM may address the issue "in testimony and/or legal brief."[2] As such, this Legal Memorandum addresses the Question posed in the Procedural Order in the broader context of the legal issues in this proceeding, explaining why the relief requested there should be rejected.

For the reasons stated herein and in the accompany PNM direct testimonies, the New Mexico Public Regulation Commission ("NMPRC" or "Commission") should deny the relief requested by the Joint Motion.

I. INTRODUCTION

The Joint Motion filed by Western Resource Advocates ("WRA"), Coalition for Clean Affordable Energy ("CCAE"), and Prosperity Works (collectively, "Joint Movants") requests that the Commission order PNM to show cause why its rates should not be reduced at the time San Juan Generating Station Units 1 and 4 ("San Juan") are abandoned pursuant to the Energy

[1] Procedural Order, Attachment 1, at 4 ¶ 20 (citing *Pennsylvania Public Utility Commission et al. v. Metropolitan Edison Company*, Docket No. I-79040308, 1979 WL 462104, 29 P.U.R.4th 502 (Pa. P.U.C. June 15, 1979) ("*Pennsylvania Order*"); *Pennsylvania Public Utility Commission v. Metropolitan Edison Company*, Docket No. I-79040308, 1980 WL 642586, 37 P.U.R.4th 77 (Pa. P.U.C. May 23, 1980))..

[2] *Id.*

Transition Act ("ETA")[3] and to otherwise enforce the April 1, 2020, Final Order on Request for Issuance of a Financing Order ("Financing Order") in this case.[4] PNM filed its Verified Response to the Joint Motion on March 14, 2022. Joint Movants and New Mexico Affordable Reliable Energy Alliance and Bernalillo County (filing jointly) replied to PNM's Response. The Office of the New Mexico Attorney General ("NMAG"), New Energy Economy ("NEE"), and the Utility Division Staff ("Staff") of the Commission filed motions to file replies out of time, but were accepted for filing.

The principal reason to reject the argument of the Joint Motion is that removal of the costs of San Juan from customer rates through an interim rate reduction/rate credit would violate the terms of the ETA and the Financing Order. In addition, removing San Juan from rates outside of a general rate case would also contravene established New Mexico law and past Commission precedent.

Before turning to PNM's legal responses, it is helpful to identify the Joint Motion's factual inaccuracies and unsupported assertions. These inaccuracies are discussed in more detail by the witness testimony being filed concurrently with this legal memorandum.

First, the Joint Motion claims that PNM is denying customers, through purposeful delay, the benefit of bond financing for paying San Juan's abandonment costs as opposed to a rate of return at the Company's weighted average cost of capital ("WACC").[5] This is incorrect. There has been no "delay" because there was never a date certain timeframe for issuing energy transition

[3] NMSA 1978, §§ 62-18-1 to 62-18-23 (2019).

[4] *See Final Order on Request for Issuance of a Financing Order*, Case No. 19-00018-UT (April 1, 2020), approving and adopting *Recommended Decision on PNM's Request for Issuance of a Financing Order*, Case No. 19-00018-UT (Feb. 21, 2020) ("Financing RD").

[5] Joint Motion at 2, 4-5.

bonds. Indeed, PNM has consistently stated that the bonds would be issued to coincide with PNM's next rate case. Neither the ETA nor the Financing RD provide any specific time period by which PNM must issue bonds after retirement of a qualifying generating facility. The Commission has recognized this fact.[6] Additionally, PNM has made substantial capital investments since its most recent rate case that have not yet been reflected in rates. Consequently, customers have benefitted from lower rates resulting from any purported delay estimated to result in annual customer savings of between $23 million and $36 million.

Moreover, PNM never claimed that energy transition bonds would be issued by a date certain.[7] Although PNM stated that it intended to issue energy transition bonds near in time to the abandonment of San Juan, PNM also stated that it intended to issue the bonds to coincide with its next rate case such that San Juan costs would be removed from rates at the same time energy transition charges would begin.[8] However, PNM's planned rate case filings have ultimately been pushed back in light of the COVID-19 pandemic and its attendant economic impacts and in accordance with a proposed regulatory commitment in Case No. 20-00222-UT, whereby PNM agreed through the settlement process that PNM would delay its next rate case until December 1,

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[6] *Order on PNM Notice and Request for Modification to or Variance From Abandonment Date of San Juan Generating Station Unit 4* ("Order on Notice"), ¶ 26 at 9, Case No. 19-00018-UT (Feb. 23, 2022) (noting that Financing Order "does not require that PNM issue the Energy Transition Bonds . . . by any specific date.").

[7] *See, e.g.*, Hr. Tr. Vol I (12/10/2019), at 254:4-8 ("My high-level understanding of this I-- and, again, these are -- if we go into depth, it's probably questions for Elisabeth Eden -- but the bonds would be issued *around* June 30, 2022, which is the abandonment date." (emphasis added)) (Ronald Darnell); Hr. Tr. Vol. IV (12/13/2019), at 1030:15-18 ("***I also want to say that the plant can shut down even though the bond issuance hasn't happened. They don't have to correspond at the same time or happen at the same time.***" (*emphasis added)*) (Elisabeth Eden).

[8] Financing RD at 71 ("In PNM's original filing, PNM stated that it intends to file a general rate case to reflect the abandonment of the San Juan coal plant for rates to go into effect at the same time as the Energy Transition Charge are collected from customers.").

2022. Prior to the merger commitment, PNM would likely have filed its planned 2022 rate case at the conclusion of the merger case.

The Joint Motion's claim that PNM is acting illegally is also unfounded.[9] The Joint Motion contends that energy transition bonds *must* be issued at the time of abandonment.[10] But PNM never committed to a specific time when energy transition bonds would be issued or when PNM would file a rate case that would reflect the San Juan abandonment. Tellingly, the Joint Motion's only support for its position is reference to the definition of "energy transition cost" in Section 62-18-2(H)(2)(c), which says that energy transition costs include undepreciated investments "at the time of abandonment." But that definition says *nothing* about *when* energy transition *bonds* should be issued—it merely specifies the amount of energy transition costs to be securitized. Moreover, the Joint Motion acknowledges that Section 62-18-11(C) prohibits the Commission from requiring that a qualifying utility issue any energy transition bonds at all. If the Commission does not have authority to even require a utility to issue energy transition bonds, then it surely cannot dictate the specifics of when energy transition bonds will be issued. And while the Joint Motion cites PNM witness Lisa Eden's statement that "PNM expects to cause the issuance of the Energy Transition Bonds as promptly as possible,"[11] the Joint Motion completely ignores that this was what PNM "expect[ed]"[12] rather than "promised," "guaranteed," "pledged," or some other word conveying more certainty, much less an outright legal obligation. The Commission cannot base a decision on what PNM expected to happen in 2019 and early 2020 to impose a new requirement not contained in the Financing Order now, in 2022.

[9] Joint Motion at 3, 7-12.

[10] *Id.* at 8.

[11] *Id.* at 10.

[12] Eden Direct at 15:9.

The Joint Motion is also incorrect in claiming that PNM will delay providing energy transition benefits to displaced workers and impacted communities.[13] In reality, PNM has fully funded the benefits for the Westmoreland coal mine workers through the deposit of funds in an escrow account administered by a third-party trustee as described in the Financing Order. Moreover, PNM has been providing job training benefits for San Juan workers. Workers impacted by the closure of San Juan will receive their severance benefits at the time of their separation. For the state-administered funds provided under the ETA, PNM has been working with the state agencies with respect to the funding authorized under the ETA and Financing Order. PNM offered to provide 25% of the authorized funds to the agencies, but each agency requested that PNM provide all the funding at the time of the abandonment of San Juan. PNM will honor that request. PNM witness Henry E. Monroy's Direct Testimony discusses these issues in more detail.

Finally, the Joint Motion's arguments about bond market pricing[14] are speculative and wholly lacking in proper evidentiary support. Joint Movants' arguments are based on an article in *The Economist* about forecasted rate increases in 2022 by the Federal Reserve.[15] That article is not evidence and cannot be relied on for evidentiary support.[16] In any event, the factual assertions about future interest rates are not supported by an affidavit as required by Rule 1.2.2.12(A)(4) NMAC. Moreover, as reflected in the testimony of PNM's securitized financing expert, Charles N. Atkins II, Moody's forecasts a generally lowering trend of forecasted Aaa corporate bond yields

[13] Joint Motion at 6-7.

[14] *Id.* at 7, 17.

[15] *Id.* at 7.

[16] *Recommended Decision* at 114, Case No. 17-00174-UT (Oct. 26, 2018) (holding that article that was not sponsored by any witness or offered into evidence or used in the examination of any witness was not proper evidence and could not be considered or allowed into the record) approved and accepted by *Final Order*, Case No. 17-00174-UT (Dec. 19, 2018).

such that bonds issued in 2023 will have lower rates compared to bond issued in 2022. More fundamentally, the Commission's authority to conduct a prudence review tied to the bond issuance is explicitly foreclosed by Section 62-18-11(B), which provides that reasonable actions taken by PNM to comply with the Financing Order "shall be deemed just and reasonable for ratemaking purposes."

II. REMOVING THE COSTS OF SAN JUAN BETWEEN RATE CASES WOULD RUN COUNTER TO THE ETA, THE FINANCING ORDER, AND THIS COMMISSION'S OWN PRECEDENTS

The ETA and the Financing Order issued in this case prohibit the potential relief being examined under the Procedural Order. Even in the absence of the ETA, removing San Juan from rates outside of a general rate case would constitute piecemeal ratemaking, a disfavored approach in New Mexico. Further, the out-of-jurisdiction order cited by the Procedural Order does not overcome on-point New Mexico law and the Financing Order's provisions, and it is inapt in any event.

A. The ETA and the Financing Order Do Not Provide for A Rate Adjustment During the Period Between Abandonment and Issuance of Energy Transition Bonds

The Financing Order and the ETA specify that removal of San Juan costs from base rates occurs only when the energy transition charge is implemented, not when the plant is abandoned.[17] The ETA specifies precisely *when* a reduction in the cost-of-service is to be implemented. And that moment does not occur until PNM begins collecting energy transition charges. Importantly,

[17] *See* Section 62-18-4(B)(11) (providing that the utility's application must include "a proposed ratemaking method to account for the reduction in the qualifying utility's cost-of-service associated with the amount of undepreciated investments being recovered by the energy transition charge ***at the time that charge becomes effective***" (emphasis added)); Section 62-18-5(F)(8) (requiring a financing order to implement Section 62-18-4(B)(11)); Financing RD at 84 ("If PNM has not adjusted its base rates charged to customers in a general rate case to reflect the abandonment of the remaining San Juan plant before the start date of the [energy transition] charges, PNM shall be required to implement an immediate credit to ratepayers as an interim rate adjustment mechanism upon the start date of the [energy transition] charges.").

the ETA does not dictate when energy transition bonds should be issued, and in doing so, the ETA provided flexibility in this regard. As the New Mexico Supreme Court explained in *Citizens for Fair Rates & the Environment v. N.M. Pub. Regulation Comm'n* ("*CFRE*"), "the Legislature decided that permitting a public utility to finance the energy transition costs associated with abandoning a coal-fired generating facility *in the manner therein provided* would promote the legitimate interests reflected in Section 62-3-1(B)."[18] The imposition of remedies under consideration in the Procedural Order would improperly alter the "manner therein provided" by inventing requirements that never existed, and therefore its requested relief is impermissible.

Section 62-18-4(B)(11) provides that a utility applying for a financing order must include "a proposed ratemaking method to account for the reduction in the qualifying utility's cost of service associated with the amount of undepreciated investments being recovered by the energy transition charge ***at the time that charge becomes effective***." (Emphasis added). In turn, Section 62-18-5(F)(8) requires that a financing order approve a ratemaking process and methodology under Section 62-18-4(B)(11) to account for the reduction in the qualifying utility's cost-of-service associated with the amount of undepreciated investments being recovered by the energy transition charge at the time the charge becomes effective. Accordingly, the Commission's Financing Order adopted the Financing RD's approval of an interim customer rate credit to account for San Juan's cost-of-service in rates to be applied *only after an energy transition charge is implemented*.[19] The Commission itself has already recognized that the Financing Order "does not require that PNM

[18] 2022-NMSC-010, ¶ 42 (emphasis added).

[19] Financing Order at 10 ¶ A; Financing RD at 141 ¶ 34 ("Pursuant to Section 5(F)(8) of the ETA, this Financing Order approves . . . a proposed ratemaking method to account for the reduction in PNM's cost-of-service associated with the amount of undepreciated investments being recovered through the Energy Transition Charges ***at the time the Energy Transition Charges become effective***." (emphasis added)).

issue the Energy Transition Bonds . . . by any specific date."[20] Moreover, Section 62-18-7(A) provides that the Financing Order is irrevocable and that the Commission shall not "reduce, impair, postpone or terminate" the rights of the utility under the Financing Order.[21] The Commission is thus barred from impairing PNM's rights by setting a date certain for issuing energy transition bonds that is not contained in the Financing Order or by imposing a rate credit on a date not consistent with the Financing Order.

In fact, with no timing requirement for issuing bonds in either the ETA or the Financing Order, Section 62-18-4(B)(11)'s provision for a ratemaking treatment when energy transition charges become effective makes abundantly clear the fact that the ETA *does not* provide for a ratemaking treatment after abandonment but prior to the point when energy transition bonds are issued.[22] And PNM never committed to a specific timeframe for when it would issue the energy transition bonds.[23] PNM witness Henry E. Monroy discusses PNM's intention to time the issuance of the energy transition bonds with the effective date of rates from a general rate case so that San

[20] Order on Notice at 9, ¶ 26.

[21] *See also* Financing RD at 147 ¶ 56 ("Pursuant to Section 7(A) of the ETA, this Financing Order is irrevocable, and the Commission shall not reduce, impair, postpone or terminate the Energy Transition Charges approved in this Financing Order.").

[22] *See Patterson v. Globe American Casualty Co.*, 1984-NMCA-076, ¶ 10, 101 N.M. 541 ("negative inference" interpretive canon suggests that when the legislature includes a statutory provision but does not provide an analogous approach elsewhere in statute, the omission is intentional); *Reynolds v. Landau*, 2020-NMCA-036, ¶ 23 ("When there are provisions in analogous statutes that a party contends should be present in the statute at issue in the case, we utilize the process of negative inference to reason that the absence of such provisions in the statute at issue is intentional." (quoting *State v. Lucero*, 1992-NMCA-103, ¶ 6, 114 N.M. 460)); *State v. White*, 2010-NMCA-043, ¶ 16, 148 N.M. 214 ("It is axiomatic that a party may not do indirectly that which the law does not permit directly.").

[23] *See, e.g.*, Hr. Tr. Vol I (12/10/2019), at 254:4-8 ("My high-level understanding of this I-- and, again, these are -- if we go into depth, it's probably questions for Elisabeth Eden -- but the bonds would be issued *around* June 30, 2022, which is the abandonment date." (emphasis added)) (Ronald Darnell); Hr. Tr. Vol. IV (12/13/2019), at 1030:15-18 ("***I also want to say that the plant can shut down even though the bond issuance hasn't happened. They don't have to correspond at the same time or happen at the same time.***" (emphasis added)) (Elisabeth Eden).

Juan costs were removed from rates at the same time the energy transition charges became effective in his testimony filed concurrently with this Legal Memorandum.

Because the ETA does not direct a specific time for issuing energy transition bonds, the ETA necessarily contemplates a situation where abandonment will occur before bonds are issued. Yet the ETA did not provide any specific ratemaking treatment in that situation, as opposed to the inclusion of Section 62-18-4(B)(11), which provides for ratemaking treatment once energy transition charges are implemented. The legislature, therefore, did not intend for any such ratemaking approach until energy transition bonds are issued.[24] Indeed, as discussed below, implementation of a ratemaking mechanism post-abandonment but before the issuance of bonds would be inconsistent with the prohibition against piecemeal ratemaking. In short, the Commission may not remove San Juan from rates after abandonment but before energy transition bonds are issued because the ETA and the Financing Order do not provide for such relief. If the Legislature had intended a mechanism for such relief, then it would have said so in the statute.[25]

Moreover, because the ETA provides a comprehensive statutory scheme for "permitting a public utility to finance the energy transition costs associated with abandoning a coal-fired generating facility,"[26] it should be interpreted to occupy the field of the Commission's authority regarding ratemaking approaches for coal plant abandonments pursuant to the ETA.[27] The New

[24] *See State v. Rivera*, 2004-NMSC-001, ¶ 16, 134 N.M. 769 ("[W]e look not only to what is explicitly stated by the language of [the statute] but we also take special notice of what has been omitted from the purview of the statute."); *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11 (court uses plain language of statute as primary indicator of legislative intent); *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583 (When language in a statute is clear and unambiguous, courts must give effect to that language and refrain from further statutory interpretation.).

[25] *See Patterson*, 1984-NMCA-076, ¶ 10.

[26] *CFRE*, 2022-NMSC-010, ¶ 42.

[27] *Cf. Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, ¶ 9, 145 N.M. 372 (noting that when federal law provides a comprehensive statutory scheme that occupies the field, state law is preempted). Just like

Mexico Supreme Court in *CFRE* specifically concluded that ETA's approach "would promote the legitimate interests reflected in Section 62-3-1(B)."[28] The Commission should not disrupt the balance the Legislature struck by implementing relief not provided for under the ETA, especially where the ETA comprehensively addresses all aspects of coal plant abandonments and cost recovery.[29] "Allowing the Commission the discretion to select which statutory scheme does or does not apply would impermissibly invade the province of the Legislature, thus violating the carefully balanced separation of powers established by our state constitution."[30]

B. Removing San Juan from Rates Between Rate Cases Would Constitute Single-Issue or Piecemeal Ratemaking

The relief requested by the Joint Motion is also inconsistent with the Commission's long-held policy against piecemeal ratemaking. "Changing rates for one item and ignoring all the other cost-of-service elements amounts to piecemeal ratemaking."[31] Although piecemeal ratemaking is not necessarily unlawful, the Commission nevertheless "frown[s] upon using selective items to either increase or decrease rates."[32] The Commission has cogently explained why:

> The reason for this policy against piecemeal ratemaking is obvious. It would be completely unfair to ratepayers to allow a utility to selectively pick a few expense

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state law can be preempted, ratemaking approaches not in the ETA should be preempted by the ETA's comprehensive statutory scheme.

[28] *CFRE*, 2022-NMSC-010, ¶ 42.

[29] *See State ex re. Egolf v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-018, ¶ 33("[T]he ETA serves as the statutory scheme that the Legislature provided for abandonment proceedings.").

[30] *Id.* ¶ 17 (citing N.M. Const. art. III, § 1).

[31] *Final Order* at 149, Case No. 2262 (April 12, 1990). *See also Final Order* at 43, Case No. 15-00166-UT (Nov. 18, 2015) ("Piecemeal ratemaking involves changing rates for one item and ignoring all of the other cost of service elements.").

[32] *Final Order Approving Recommended Decision to Dismiss Proceeding* at 24, Case No. 2361 (Feb. 6, 1992). *See also Final Order Adopting Rules* at 17-18 ¶ 31, Case Nos. 06-00119-UT & 06-00120-PL (Feb. 1, 2007) (concluding that a tariff for one-time costs "amounts to piecemeal ratemaking" and prohibiting a cost recovery tariff); Final Order at ¶ 61, Case No. 09-00092-UT (May 22, 2008) (concluding that piecemeal ratemaking approach was permissible where the Legislature "created a statutory exception to the general prohibition against piecemeal ratemaking").

> items, which may have increased over what had previously been allowed in rates, to justify a rate increase. Other expense items may have decreased or revenues may have increased over their respective allowances in current rates. The end-result, *after reviewing the utility's complete cost of service*, may indicate that just and reasonable rates are something less than what the increases in the selective items would otherwise indicate. *Likewise, it would be unfair to the utility to use selective items, that may have decreased from what was previously allowed, to lower rates*.[33]

Importantly, as the emphasized text demonstrates, the prohibition against piecemeal ratemaking is a neutral principle, meaning that "[t]he Commission has applied its policy against piecemeal ratemaking to both increases and decreases in expenses or revenues."[34] The Commission has adhered to this approach going back decades.[35] In fact, in a more recent case addressing piecemeal ratemaking, WRA was on the other side of the piecemeal ratemaking argument. In Case No. 12-00007-UT, WRA argued that a rider implemented specifically for recovery of renewable energy costs would violate piecemeal ratemaking.[36] Although the Recommended Decision concluded the prohibition against piecemeal ratemaking did not apply, that determination was based on a statutory exception.[37] And even more recently, the Commission "decline[d] to depart from the principles against retroactive ratemaking and piecemeal ratemaking

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[33] *Id.* (emphasis added). *See also id.* at 25 ("Unless a complete picture is presented, the Commission cannot possibly fulfill its duty to determine just and reasonable rates").

[34] *Id.* at 25. If the prohibition against piecemeal ratemaking only applied in instances favoring customers, then it would likely violate Section 62-3-1(B)'s policy that "capital and investment may be encouraged and attracted" and promoting a balancing of customer and utility interests.

[35] *See, e.g.*, *Final Order Partially Adopting Certification of Stipulation* at ¶¶ 34-35, Case No. 10-00086-UT (July 28, 2011) ("As the Hearing Examiner recounts, the Commission has denied requests for piecemeal ratemaking in a number of major utility cases. The circumstances of this case do not justify the Commission departing from its general practice and granting the extraordinary relief sought by [the signatories to the stipulation].").

[36] *See Recommended Decision* at 32-33, Case No. 12-00007-UT (June 19, 2012), as corrected by Errata Notice, adopted by *Final Order* at 5-6 (Aug. 14, 2012), as corrected by *Errata Notice* (Aug. 24, 2012), as clarified by *Order On Rehearing* (Oct. 9, 2012).

[37] *See id.* at 46 ("The concern behind the policy against piecemeal ratemaking does not apply in this case because §§ 62-16-6 and 62-16-2 of the [Renewable Energy Act] indicate that a public utility can recover costs incurred under the [Renewable Energy Act] regardless of its other costs and revenues.").

by ordering a refund" when presented with the issue of whether to adjust rates based on federal income tax changes implemented by the Tax Cuts and Jobs Act ("TCJA").[38]

The prohibition against piecemeal ratemaking clearly applies here because removing the costs of San Juan from rates while "ignoring all the other cost-of-service elements"[39] is exactly the type of piecemeal ratemaking that the Commission should not engage in, and "it would be unfair to [PNM] to use selective items, that may have decreased from what was previously allowed, to lower rates."[40] Therefore, the Commission cannot reasonably rely on the out-of-jurisdiction Pennsylvania order cited in the Procedural Order[41] because the Commission's own precedents *repeatedly* caution against the type of relief requested by the Joint Motion. The Joint Motion does not even attempt to explain why its requested relief is appropriate given the prohibition against piecemeal ratemaking.

PNM notes, however, that the prohibition against piecemeal ratemaking is subject to statutory exceptions.[42] The Commission has recognized that fact.[43] Therefore, the ETA displaces

[38] *Final Order* at ¶ 9, Case No. 18-00038-UT (July 17, 2019), affirming *Phase II Recommended Decision* at ¶ 13 (Apr. 8, 2019) ("The Hearing Examiner concludes that ordering a refund of the TCJA from January 1, 2018 to the date of the establishment of new rates in this case would depart from the Commission's general rule against retroactive ratemaking and general policy against piecemeal ratemaking.").

[39] *Final Order* at 149, Case No. 2262 (April 12, 1990).

[40] *Final Order Approving Recommended Decision to Dismiss Proceeding* at 25, Case No. 2361 (Feb. 6, 1992).

[41] Procedural Order, Attachment 1, at 4 ¶ 20 (citing order from the Pennsylvania Public Utility Commission).

[42] *See ABCWUA v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 11, 148 N.M. 21 (recognizing that statutes displace any policy against piecemeal ratemaking); *CFRE*, 2022-NMSC-010, ¶ 45 ("[W]hile the New Mexico Constitution delegates to the Commission the exclusive responsibility for carrying out public utility regulatory policy, the parameters of that policy are, in the first instance, for the Legislature to decide.").

[43] *See Recommended Decision* at 46, Case No. 12-00007-UT (June 19, 2012) ("The concern behind the policy against piecemeal ratemaking does not apply in this case because §§ 62-16-6 and 62-16-2 of the [Renewable Energy Act] indicate that a public utility can recover costs incurred under the [Renewable Energy Act] regardless of its other costs and revenues."), adopted by *Final Order* at 5-6 (Aug. 14, 2012)

the general rule against piecemeal ratemaking but only to the extent specific ratemaking provisions are provided in the ETA. Similarly, to the extent that energy transition charges are piecemeal ratemaking, they are specified directly under the ETA. What the ETA does not provide for, by contrast, is the type of piecemeal ratemaking under consideration in the Procedural Order. As PNM discussed above, Section 62-18-4(B)(11) only applies "at the time that [the energy transition charge] becomes effective."

C. The Commission Should Not Rely on the Pennsylvania Decision Cited in the Procedural Order

PNM now turns to the Pennsylvania decision cited in the Procedural Order.[44] As a threshold issue, the Commission should not rely on out-of-jurisdiction authorities that run counter to New Mexico statute or the Commission's own precedents.[45] That is, the Commission should not give the Pennsylvania decision more weight than the statutory commands provided in the ETA, as implemented through the Financing Order,[46] or the Commission's own precedents on the prohibition against piecemeal ratemaking.

Additionally, the Pennsylvania case is readily distinguishable and inapt. Thus, even if the Commission determined that the preceding legal arguments on the ETA, the Financing Order, and piecemeal ratemaking do not apply, the Commission should not rely on the Pennsylvania case. Importantly, the Pennsylvania case addressed ratemaking treatment for the now-infamous Three

("The law requires that PNM recover these costs, whether by Rider or in a rate case. Other costs and savings are irrelevant.").

[44] *See* Procedural Order, Attachment 1, at 4 ¶ 20 (citing *Metropolitan Edison Company*, Docket No. I-79040308, 1979 WL 462104, 29 P.U.R.4th 502 (Pa. P.U.C. June 15, 1979); *Metropolitan Edison Company*, Docket No. I-79040308, 1980 WL 642586, 37 P.U.R.4th 77 (Pa. P.U.C. May 23, 1980)).

[45] *Cf. Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n (In re Pub. Serv. Co.)*, 1991-NMSC-083, ¶¶ 11-12, 112 N.M. 379 (only permitting use of multi-factor test from out-of-jurisdiction case where the test was not inconsistent with the statute's standard).

[46] *See* Financing RD at 84-86, adopted by Financing Order.

Mile Island nuclear generating station, and the Pennsylvania Public Utilities Commission ("PPUC") was examining a very different factual situation where the generating station was *forced* out of service and where replacement power was more expensive.[47] Here, by contrast, San Juan is not experiencing a forced outage; rather, PNM has received Commission approval to abandon Units 1 and 4, and as discussed below, the analogy to replacement power costs is misplaced. Further, PNM received Commission approval to exit San Juan because doing so will reduce costs for customers by switching to lower-cost (and more environmentally-friendly) generation resources.

Not only was the Pennsylvania order factually distinct, but the statutory scheme in Pennsylvania differs markedly from New Mexico's by providing a statutory exception to the prohibition against piecemeal ratemaking. First, the Pennsylvania order references a statutory provision providing for "temporary rates . . . pursuant to § 1310(d) of the Public Utility Code."[48] Section 1310(d) of the Pennsylvania Public Utility Code explicitly provides for a rate adjustment if the PPUC determines that a public utility is overearning.[49] By contrast, the New Mexico Public

[47] *See Pennsylvania Order*, 1979 Pa. PUC LEXIS 55, at *1 ("A major consequence of that incident has been the loss of more than 1,600 megawatts of generating capacity and the required purchase of tens of millions of dollars of power.").

[48] *Id*. at *3.

[49] Pennsylvania Public Utility Code, § 1310(d) ("Whenever the commission, upon examination of any annual or other report, or of any papers, records, books, or documents, or of the property of any public utility, shall be of opinion that any rates of such public utility are producing a return in excess of a fair return upon the fair value of the property of such public utility, used and useful in its public service, the commission may, by order, prescribe for a trial period of at least six months, which trial period may be extended for one additional period of six months, such temporary rates to be observed by such public utility as, in the opinion of the commission, will produce a fair return upon such fair value, and the rates so prescribed shall become effective upon the date specified in the order of the commission. Such rates, so prescribed, shall become permanent at the end of such trial period, or extension thereof, unless at any time during such trial period, or extension thereof, the public utility involved shall complain to the commission that the rates so prescribed are unjust or unreasonable. Upon such complaint, the commission, after hearing, shall determine the issues involved, and pending final determination the rates so prescribed shall remain in effect.").

Utility Act ("PUA") does not have a statutory mechanism for temporary rates. Second, Section 1310(d) specifically identifies "used and useful" utility property, whereas the "used and useful" test in New Mexico is only one of many factors in determining rate base.[50]

Moreover, even if the PUA had a provision identical to Section 1310(d), it would not apply because the very terms of Section 1310(d) only apply when the PPUC is "of opinion that any rates of such public utility are *producing a return in excess of a fair return* upon the fair value of the property of such public utility."[51] As PNM has emphasized, PNM's delay (resulting from the COVID-19 pandemic and its economic fallout along with its merger commitment) in bringing forward a rate case has *benefitted* customers because PNM is not yet recovering significant capital investments it has made in intervening years.[52] In any event, PNM already has an earnings test implemented in Case No. 12-00007-UT which prevents PNM from earning more than 50 basis points above its approved return on equity. PNM witness Henry E. Monroy discusses the Company's earnings test in more detail.

Even if the Commission were to look to out-of-jurisdiction cases for guidance, other authorities support waiting until PNM's next rate case before removing the costs of San Juan from rates. For example, the Oklahoma Corporation Commission ("OCC") was presented with the question whether to remove a soon-to-be-retired coal generation unit from rate base during an

[50] *See New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 1986-NMSC-059, ¶¶ 28-29, 104 N.M. 565 ("[T]he 'used and useful' concept is but one factor among many to be considered by the Commission in its rate base analysis[.]").

[51] Pennsylvania Public Utility Code, § 1310(d) (emphasis added).

[52] *See, e.g.*, Verified Response at 21-22 ("Contrary to the harm alleged by Movants, PNM's customers have benefited from PNM's delay in filing the rate cases because their rates have not increased."); Direct Testimony of Henry E. Monroy (discussing approximately $1.2 billion in utility projects and system infrastructure that PNM has invested in since 2018).

active rate case.[53] There, the OCC overturned its administrative law judge's ("ALJ") recommendation to remove the retiring coal unit's costs from rate base because the OCC concluded doing so would be inappropriate where the coal unit would not be retired until after the rate case's relevant test year.[54] In overturning the ALJ's recommendation, the OCC explained:

> [I]t is premature for the Commission to rule on the recovery of stranded costs of the Northeastern No. 4 Unit. The determination of stranded cost recovery relating to [the utility]'s Northeastern No. 4 Unit should be addressed in [the utility]'s next rate case, following [the utility]'s retirement of Northeastern No. 4 Unit, after Northeastern No. 4 Unit is no longer providing service to the public and is no longer used and useful.[55]

Similarly, the Arizona Corporation Commission ("ACC") has explained that allowing recovery for a unit after retirement is an appropriate balance of investor and customer interests because the utility is not able to recover for an investment until approved through a rate case.[56] Thus, regulatory lag can balance out between customers and investors.[57] Likewise, the Colorado Public Utility Commission ("CO PUC") authorized Public Service Company of Colorado to accelerate depreciation of retiring coal units and to create a regulatory asset to collect incremental

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[53] *See* Oklahoma Corporation Commission Cause No. PUD 201500208, Final Order at 10 (Ok. Corp. Comm'n Nov. 10, 2016).

[54] *Id.*

[55] *Id.*

[56] *See* Arizona Corporation Commission Docket Nos. E-01345A-04-0407 & L-00000W-00-0107, Decision No. 67504 at 30-31 (Jan. 20, 2005) ("Once the prudently incurred costs of the Sundance Plant have been determined in the context of a rate case in which all factors have been considered, APS should certainly be authorized to earn a return on its prudent investment, but it should not earn that return retroactively to the acquisition date. Allowing deferral of a return on the deferred balance in addition to deferral of the costs prior to the plant's inclusion in rate base would unreasonably skew the benefits of regulatory lag in favor of the shareholders to the detriment of the ratepayers. As discussed above, *once the plant is in rate base, APS will continue to earn a return on the plant after the plant's actual retirement but before it is removed from rate base in a rate case*." (emphasis added)).

[57] It should be noted, however, that retiring assets have smaller undepreciated investment balances, meaning that regulatory lag actually tends to benefit customers more than it benefits investors.

depreciation costs with a return calculated using the Company's WACC.[58] The CO PUC rejected the argument that a recovery of and on the regulatory asset would be inappropriate for an asset that is no longer "used or useful."[59] Notably, in that Colorado case, WRA supported the regulatory asset and a WACC return.[60]

If the Commission decides to look to out-of-jurisdiction Commission approaches, then it should follow the reasoned and balanced approaches taken by the OCC, ACC, and CO PUC. In so doing, the Commission would follow normal order and only remove San Juan's costs from base rates as part of PNM's next rate case.

D. The Claim That PNM Will Recover All Purchased Power Costs Is Flawed

The claim that PNM will recover purchased power costs for the San Juan replacement resources in PNM's Fuel and Purchased Power Cost Adjustment Clause ("FPPCAC") before customers receive the rate credit for the removal of San Juan costs from rates is incorrect.[61] Similarly, the Procedural Order frames its discussion of the PPUC order as one where the "utility is fully recovering costs of replacement power."[62]

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[58] *See* Colorado Public Utilities Commission Proceeding No. 17A-0797E, Decision No. C18-0762 at ¶ 2, 2018 Colo. PUC LEXIS 736 (Sept. 10, 2018).

[59] *See id.* at ¶¶ 23, 28. It should be noted that the referenced Colorado decision pertains to a cost recovery mechanism other than securitization for early retirements of coal units. Nonetheless, the Colorado case remains relevant in that state commissions continue to permit cost recovery of retired assets after retirement. Consistent with the ETA and the Financing Order, the Commission must permit PNM to continue recovering San Juan costs in rates until such time as the energy transition charges begin to be collected from customers.

[60] *See id.* at ¶ 26 ("WRA states that it is appropriate for the Commission to make a decision on the rate of return at the WACC for the regulatory assets in this proceeding. WRA contends that Public Service's proposal to voluntarily retire Comanche 1 and 2 aligns with state policy to reduce emissions and to transition to clean energy resources and thus warrants a decision approving the return. WRA also notes that Public Service is lowering its return on Comanche units 1 and 2 by roughly $31 million, because the Company will have fewer years over which it earns on the plants.").

[61] Joint Motion at 3, 6.

[62] Procedural Order, Attachment 1 at 4, ¶ 20.

PNM first responds by noting that its 2022 FPPCAC already accounts for the cessation of San Juan coal supply costs because of the planned abandonment of San Juan Unit 1 on June 30, 2022, and Unit 4 on September 30, 2022. Customers are already benefitting from the elimination of such coal costs. Then, for 2023, no San Juan coal costs will be included in setting PNM's FPPCAC factor.

Next, the only cost for the San Juan replacement resources that will be recovered through PNM's FPPCAC are the energy charges associated with the purchased power agreements ("PPAs") for the solar resources. None of the interconnection costs related to these PPAs will be recovered through the FPPCAC. In addition, a considerable amount of the San Juan replacement resources (300 MW) are comprised of energy storage agreements ("ESAs") for battery storage facilities. The capacity charges under the ESAs are not passed through the FPPCAC to customers. In fact, none of the capacity charges under the ESAs or the needed interconnection investments will be recovered from customers until they are included in PNM's rates following PNM's next general rate case.[63] Therefore, PNM will not be recovering all its replacement costs through the FPPCAC.

Additionally, the FPPCAC only collects actual costs. As such, when the San Juan units are retired, customers will automatically see reductions to charges related to cost of coal supply from the removal of San Juan's fuel costs in the FPPCAC. As the San Juan replacement resources come online, the energy charges of the PPAs for those resources will then be incorporated into the FPPCAC.

[63] This lag in recovery is again reflective of the discussion above explaining that the delay in bringing a rate case has *benefitted* customers.

III. REMOVING THE COSTS OF SAN JUAN BETWEEN RATE CASES WOULD ARBITRARILY AND CAPRICIOUSLY PLUCK ONE SET OF COSTS FROM PNM'S RATE BASE WITHOUT CONSIDERING THE INVESTMENTS PNM HAS MADE SINCE ITS LAST RATE CASE

As noted above, the prohibition against piecemeal or single-issue ratemaking is intended to ensure that both sides of the ledger are considered in utility ratemaking and that rates are based on the total cost-of-service. That prohibition has especially strong application here, and it is further buttressed by the appellate standard of review that the Commission's decisions should be reversed if they are arbitrary and capricious. As PNM noted in its Verified Response and in Mr. Monroy's testimony filed concurrently with this legal memorandum, PNM has invested approximately $1.2 billion in utility capital investments since 2018 through 2021. PNM plans to invest approximately $1 billion more by 2023. Despite these large investment amounts, none have been reflected in PNM's current rates, and these costs far exceed any undepreciated investments remaining in San Juan. Thus, while issuing energy transition bonds and filing a rate case immediately after San Juan is retired would remove those costs from rates and recover them through securitization, customers are experiencing a *net benefit* by PNM not filing its next rate case until December 2022.

In sum, not only would removing the costs of San Juan from rates violate the long-held policy against single-issue ratemaking, but it would also be arbitrary and capricious. An agency's action is arbitrary and capricious if it entirely omits consideration of relevant factors or important aspects of the problem at hand.[64] Failing to consider all the other investments PNM has made that would far exceed the undepreciated investments in San Juan would entirely omit consideration of such additional investments. Moreover, failing to adhere to past Commission precedent on

[64] *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-015, ¶ 8, 450 P.3d 393; *See Resolute Wind 1 LLC v. N.M. Pub. Regulation Comm'n*, ¶ 26, 2022-NMSC-011 (S-1-SC-37320, Feb. 9, 2022).

piecemeal ratemaking would also constitute arbitrary and capricious agency action because the Commission may not change its position without good cause and prior notice to affected parties.[65]

IV. A REGULATORY LIABILITY FOR SAN JUAN WOULD ALSO CONSTITUTE INAPPROPRIATE RETROACTIVE RATEMAKING

As discussed above, the Commission should not remove the costs of San Juan from rates at the time the unit is retired. The Commission may not require as an alternative that PNM establish a regulatory liability to refund costs of San Juan collected in rates after San Juan is retired. Such an approach would have the same net effect as removing San Juan's costs from rates concurrent with retirement, and so establishing such a regulatory asset would be inconsistent with the ETA and the prohibition against piecemeal ratemaking. In addition to the prohibition against piecemeal ratemaking, requiring PNM to record a regulatory asset would also violate the prohibition against retroactive ratemaking.[66]

The prohibition against retroactive ratemaking "prevents the use of prospective rates to make up for past losses or excessive profits."[67] The New Mexico Supreme Court has held that "there is no better established rule with regard to the prescription of rates for a public utility than the one that holds that rate fixing may not be accomplished retroactively, unless some specific statutory or constitutional authority permits."[68] This is because "rate-making is legislative in its nature" and "it is axiomatic that legislative action operates prospectively, not retroactively."[69] In addition, the New Mexico Supreme Court has held that retroactive remedies are in the nature of

[65] *Hobbs Gas Co. v. N.M. Pub. Regulation Comm'n,* 1993-NMSC-032, ¶ 12, 115 N.M. 678.

[66] *See* Verified Response at 13-19.

[67] Final Order at 21, Case No. 2662 (Feb. 13, 1997).

[68] *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶ 89, 90 N.M. 325 (internal quotation marks and citations omitted).

[69] *Id.* ¶ 88.

reparations rather than rate-making and are therefore judicial in nature and beyond the authority of the Commission.[70] Consistent with the New Mexico Supreme Court's holdings, this Commission has explained that "[t]he rule against retroactive ratemaking prevents using prospective rates to make up for past losses or excessive profits collected under rates that did not perfectly match expenses."[71] Similarly, Hearing Examiner Schannauer has noted that "[t]he Commission's authority, however, is prospective in nature, unless, pursuant to statutory authority, it conditions its approvals as being subject to refund or unless specific statutory authority authorizes retroactive relief. This is the principle that prohibits retroactive ratemaking."[72] There is no such statutory exception present here.[73] Thus, because "sound ratemaking principles disfavor isolating one item of increased expense incurred between rate case test periods for subsequent rate treatment,"[74] the Commission should not order PNM to record a regulatory liability reflecting the costs of San Juan after its retirement but before new rates are implemented following PNM's next rate case.

V. CONCLUSION

For the foregoing reasons and for the reasons discussed by PNM's witness testimony filed concurrently with this legal memorandum, PNM requests that the Commission deny the relief requested in the Joint Motion as contrary to the ETA, the Financing Order, and well-established regulatory principles in New Mexico.

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[70] *Id. See also Timberon Water Co. v. N.M. PSC (In re Timberon Water Co.)*, 1992-NMSC-047, ¶ 31, 114 N.M. 154 (citing *Mountain States Tel. & Tel. Co.* approvingly and noting "the Commission's function is to set *prospective* rates only" (emphasis in original)).

[71] *Recommended Decision* at 30, Case No. 17-00255-UT, (June 29, 2018).

[72] Recommended Decision at 47, Case No. 11-00123-UT (Oct. 3, 2011).

[73] Rather, as discussed above, the ETA's provisions for other ratemaking approaches dictates the exclusion of a regulatory asset to track San Juan 's costs after retirement but before PNM's next rate case.

[74] Final Order at 21, Case No. 2662 (Feb. 13, 1997).

Respectfully submitted this 20th day of April 2022.

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATING STATION UNITS 1 AND 4	))))	**Case No. 19-00018-UT**

CERTIFICATE OF SERVICE

I hereby certify that **Public Service Company of New Mexico's Legal Memorandum in Response to April 1, 2022 Procedural Order** was emailed to those persons at the email addresses on April 20, 2022 as indicated below:

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