IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v. S-1-SC-39440

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

WESTERN RESOURCE ADVOCATES, COUNTY OF BERNALILLO, NEW MEXICO OFFICE OF THE ATTORNEY GENERAL, NEW ENERGY ECONOMY, NEW MEXICO AFFORDABLE RELIABLE ENERGY ALLIANCE, COALITION FOR CLEAN AND AFFORDABLE ENERGY, and PROSPERITY WORKS

Intervenors-Appellees.

In The Matter of Public Service Company of New Mexico's Abandonment of San Juan Generating Station Units 1 and 4, NMPRC Case No. 19-00018-UT

RESPONSE BRIEF OF APPELLEE NEW MEXICO PUBLIC REGULATION COMMISSION

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I. INTRODUCTION

Appellee the New Mexico Public Regulation Commission ("Commission," "PRC," or "Appellee") is charged by the New Mexico Constitution with regulating public utilities. *See* N.M. Const., art XI, §2 (as amended 2020) ("The public regulation commission shall have responsibility for regulating public utilities as provided by law."). To that end, the New Mexico Legislature accorded the Commission with general supervisory authority over utility costs in the ratemaking process. To achieve this, this Court has held the Commission is "vested with considerable discretion in determining the justness and reasonableness of utility rates." *Attorney General v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶12, 101 N.M. 549, 553, 685 P.2d 957, 961.

Appellant the Public Service Company of New Mexico ("PNM") is one such regulated public utility. *See* NMSA 1978, § 62-3-3(G) (2009). As a regulated utility, PNM is subject to the Commission's regulation, so long as such regulation is "just and reasonable." *See* NMSA 1978, § 62-3-1(B) (2008) ("It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of public utilities to the end that reasonable and proper services shall be

available at fair, just, and reasonable rates…"). The PRC's task, then, is to balance the public interest with the interests of utility investors such that the utilities' rates "are neither unreasonably high so as to unjustly burden ratepayers with excessive rates nor unreasonably low so as to constitute a taking of property without just compensation or a violation of due process . . ." *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶8, 129 N.M. 1, 9, 1 P.3d 383, 391.

The Energy Transition Act ("ETA"), NMSA 1978, Section 62-18-1 through -23 (2019), was adopted to facilitate the transition of New Mexico's coal-fired generating resources to cleaner renewable energy resources. NMSA 1978, §62-18-2(H), (S); *Citizens for Fair Rates & the Env't v. New Mexico Pub. Regul. Comm'n*, 2022-NMSC-010, ¶ 6, 503 P.3d 1138, 1146. It provides a securitization process that enables utilities to recover previously unrecovered costs of abandoning these plants. *See* NMSA 1978, § 62-18-2(H) The securitization process is conducted with low-interest bonds that provide savings to ratepayers when compared with the traditional ratemaking methods of recovering those costs. These energy transition costs also include anticipated payments into three state-administered funds that will assist various

communities affected by the facility's abandonment. *See* NMSA 1978, § 62-18-16; *Citizens for Fair Rates*, 2022-NMSC-010 at ¶ 6.

Now, PNM seeks to circumvent the PRC's regulatory authority by reneging on the promises PNM made to the Commission and upon which the Commission based the Financing Order regarding PNM's abandonment of San Juan Generating Station ("SJGS") Units 1 and 4 and the common plant.

PNM represented to the NMPRC that abandonment and securitization would occur at about the same time. Based upon PNM's assurances, and in reliance upon those assurances, the Commission issued its Financing Order. The Commission therefore did not foresee a scenario in which abandonment and securitization would be de-linked and securitization would occur more than 18 months after abandonment (the current anticipated end of PNM's rate case). It is now one entire year from Unit 1's abandonment and PNM is still collecting Operation and Maintenance on Unit 1 that has neither Operation nor Maintenance because it is closed. In deciding to de-link these two events, PNM has collected approximately $22 million in additional depreciation expense, and approximately $75 million in operation and management expenses on a plant that is abandoned. This outcome is one that was not presented as an outcome by PNM in its Application for the Financing Order,

and therefore was not contemplated by the Commission. The result, however, is deeply unjust to the ratepayer.

The PRC has the authority and, indeed, the obligation under the Public Utility Act and the ETA to protect the ratepayer and remedy this situation. The remedy chosen—that of an immediate rate credit—is a just and reasonable remedy. PNM's delay in issuing the bonds has denied ratepayers the deserved and promised rate reductions under the ETA. PNM's testimony that was the basis of the Financing Order and its testimony at the Show Cause hearing constitute substantial evidence for this Court to uphold the Commission's decision to provide these rate reductions to customers at the time of abandonment of SJGS.

The question before this Court is whether the ETA and the Financing Order permit the Commission to issue an Order of a temporary rate credit to PNM's ratepayers to protect them in response to PNM changing its original plan and deciding not to issue the bonds upon abandonment of Units 1 and 4 of the SJGS.

The ETA provides the PRC with the ability to enforce its own orders by enacting a just and reasonable remedial order upon PNM not only to ensure that PNM complies with its obligations under the ETA and the Financing

Order, but also to ensure just and reasonable outcomes for New Mexicans. The ETA not only provides the PRC with the mechanism to enforce its orders, but also with the mechanism to conduct investigations into utilities' actions to ensure they are complying with these orders, and to issue further orders if necessary. The Commission's new lawful order protects ratepayers from paying for the abandoned SJGS Units (which remain in PNM's rate base to this day) from the time each was abandoned as intended by the ETA.

The PRC respectfully requests this Court to continue to provide the PRC with the regulatory authority to ensure regulated utilities abide by not only the financing orders but also the plans and statements made to the Commission in the development of such orders and to allow the PRC to issue subsequent orders in response to changed circumstances.

II. SUMMARY OF PROCEEDINGS

This case stems from PNM's abandonment of the SJGS Units 1 and 4 and the common plant, the details of which are discussed in Appellant's briefing. **[BIC at 1-2]** While this is an appeal of the Recommended Decision and Order to Show Cause relating to the Financing Order issued to PNM, the Financing Order and the related testimony is of central importance. [**41 RPS 14674**]

In testimony for the Financing Order, PNM witness Henry Monroy testified "upon abandonment, the SPE will issue the energy transition bonds," and that "if there is a timing difference between commencement of the collection of the energy transition charge from customers when *bonds are issued upon the abandonment* and the time that base rates are adjusted to reflect the abandonment of the San Juan coal plant, then a regulatory liability will protect customers from double recovery of the undepreciated investments." (emphasis added). **[25 RP 4347]**

The Commission issued the Financing Order based upon PNM's assertion that five events would occur around the same time: 1) the abandonment of the plants; 2) the issuance of the bonds and utilities' receipt of the bond proceeds; 3) the charges to be paid by ratepayers for the debt service on the bonds; 4) the removal of the plants' costs from rates; and 5) the distribution of the portion of the bond proceeds to benefit the displaced workers and affected communities. **[25 RP 4339-4340]**

On February 28, 2022, Intervenors Western Resource Advocates ("WRA"), Coalition for Clean Affordable Energy ("CCAE"), and Prosperity Works ("PW") filed a Joint Motion for Order to Show Cause and Enforce Financing Order and Supporting Brief ("Joint Motion"). **[3 RP 229]** In the Joint

Motion, Intervenors alleged that the Financing Order required PNM to issue the bonds at the time PNM abandoned Units 1 and 4 of the SJGS, and that the Financing Order required PNM to reduce its rates to remove the costs of the Units upon issuance of the bonds. [**3 RP 245**] Intervenors further alleged PNM was unlawfully delaying issuing the bonds to avoid reducing its rates until after the Commission ruled on a separate rate case, filed with the Commission in December 2022.[1] [**3 RP 233-234**]

In its response to the Joint Motion, PNM described a "new plan" that changed the order of these events. PNM did so without notifying the Commission or seeking its approval, in direct contravention of well-established law that requires utilities to seek and obtain PRC approval prior to implementing a plan that changes rates. *See* NMSA 1978, § 62-8-7 (B) (2011). [**25 RP 4340**] PNM's new plan separates the abandonment from the other four aspects of PNM's original plan—a significant change. [***Id.***] That is, PNM stated it would abandon San Juan Unit 1 on June 30, 2022 and Unit 4 and the Common Plant on September 30, 2022, and would then issue the bonds 15 to 18 months later and delay the removal of the units' costs from rates until the

[1] This case will not be concluded until the beginning of 2024 at the earliest.

conclusion of a rate case PNM stated it would file (and was filed) in December 2022. **[3 RP 277-278]**

After a hearing, the Hearing Examiner determined PNM's new plan would result in double recovery of costs by PNM. **[25 RP 4340-4341]** The Hearing Examiner determined that PNM is earning depreciation on the San Juan Units after abandonment as the plant is still part of PNM's rate base, yet the Financing Order issued allows it to securitize the undepreciated balance of the San Juan Units *as of the date of abandonment*. In other words, in the period post-abandonment and prior to securitization, PNM has been earning depreciation on the San Juan Units—but is able to collect this amount of depreciation again by securitizing the undepreciated balance as of the date of abandonment. This will amount to approximately $22 million[2] unjustly taken from ratepayers. In addition, because the San Juan Units remain in PNM's rate base, ratepayers are paying for the salary of workers who are no longer at the plant, and for maintenance on a plant that is not operational, the result of

[2] Depreciation for the San Juan Units is $14.8 million/year in PNM's rate base. **[25 RP 4400-4401]** If we assume that PNM will receive this amount for for PNM"s own projection of approximately 18 months post-abandonment, this will amount to roughly $22 million.

which will be approximately $75 million[3] unjustly and unreasonably taken from ratepayers.

If PNM issued the bonds at that time, the Hearing Examiner reasoned, "PNM ratepayers would pay and PNM shareholders would also recover the full amount of the abandoned plants at their value on the dates of their abandonment in June and September 2022, without a credit from ratepayers' payment of costs for these units for the intervening 18 months." **[*Id.*]**

The Recommended Decision ("RD") did not accept that a regulatory liability was a sufficient alternative to a rate credit because the ETA promises "ratepayers, not PNM shareholders, [] receive the benefit of the abandonment and securitization measures in the Act." **[25 RP 4425-4426]** The RD also found that PNM's "new plan" severed the fundamental linkage in the ETA between a qualifying generating facility's abandonment and the securitization of energy transition costs and the imposition of ETCs." **[25 RP 4441]** Citing "materially changed circumstances" in PNM's plans, the RD recommended the Commission issue an Order that "addresses the de-linked scenario and

[3] Operations and Maintenance (O&M) for the San Juan Units is $48.4 million/year in PNM's rate base. **[25 RP 4400-4401]** If we assume that PNM will receive this amount for about 18 months post-abandonment, this will amount to roughly $75 million.

establishes a remedial mechanism that ensures the rates charged to PNM customers are fair, just, and reasonable and [which] protects customers from the double recovery and other potential harms resulting from the de-linkage PNM conceived and opted to execute without the Commission's prior authorization." [**25 RP 4441-4442**]

Based upon those findings, the Commission ordered PNM to file an advice notice revising PNM's rates using the allocation and rate design methodology approved for the ETCs in the Financing Order, and that PNM transfer the payments due to the Indian Affairs Fund, the Economic Development Assistance Find, and the Displaced Workers Assistance Fund within thirty days of abandonment of Unit 1, as contemplated by NMSA 1978, §62-18-16. [**25 RP 4443**]

This appeal followed.

III. STANDARD OF REVIEW

The Court reviews a final order of the Commission for whether the Commission's decision is "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n* ("*Dona Ana*"), 2006-NMSC-032, ¶ 9, 140 N.M.

6, 9, 139 P.3d 166, 169. The burden to make this showing is on the party challenging the agency order. *Att'y Gen. v. New Mexico Pub. Regul. Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174, 258 P.3d 453, 456.

A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in the light of the whole record. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 104, 61 P.3d 806, 61. When reviewing a question of fact, the Court defers "to the decision of an agency if it is supported by substantial evidence." *Dona Ana*, 2006-NMSC-032 at ¶ 11. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rinker v. State Corp. Comm'n*, 1973-NMSC-021, ¶ 5, 84 N.M. 626, 627, 506 P.2d 783, 784. The Court views the evidence in the light most favorable to the decision made by the Commission. *Petition of PNM Gas*, 2000-NMSC-012 at ¶ 4. Although "the evidence may support inconsistent findings," the Court "will not disturb an agency's finding if supported by substantial evidence on the record as a whole." *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 111 N.M. 550, 552, 807 P.2d 734, 736.

The Court reviews statutory interpretation, which is a question of law, de novo. *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Util. Comm'n*, 1999-

NMSC-040, ¶ 14, 128 N.M. 309, 312, 992 P.2d 860, 863 (internal quotations and citations omitted). While it is the function of the Court to interpret the law, and the Court is not bound by an agency's interpretation of the law, the Court is more likely to defer to an agency's interpretation if the relevant statute is unclear or ambiguous, the legal questions presented implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function, and it appears that the agency has been delegated policy-making authority in the area. *Dona Ana*, 2006-NMSC-032, ¶ 10 (quotations omitted); *but see Pub. Serv. Co. of New Mexico,* 1999-NMSC-040 at¶ 14 ("Because statutory construction is 'outside the realm of the Commission's expertise,' we afford little, if any, deference to the Commission on this matter.") Because the Commission is charged with the regulation of public utilities and given the discretion to balance the interests of ratepayers with the interests of utilities, the Court should give greater deference to the Commission in its determination that PNM's "new plan" constitutes a "moral hazard," and, therefore, the Order to Show Cause was necessary.

IV. ARGUMENT

The Commission is authorized under the ETA to enact any reasonable means to protect ratepayers by ensuring utility compliance with a Financing

Order. While the ETA may not contemplate the specific scenario presented here, it does allow the Commission to take necessary measures to ensure just and reasonable outcomes for both ratepayers and utilities.

A. To the Extent That PNM is Attempting to Appeal the Terms of the Original Financing Order, This Appeal is Untimely.

The Financing Order issued on February 21, 2020 approved PNM's application for a financing order, and authorized the issuance of one or more series of Energy Transition Bonds "subject to the terms in the financing order." [**41 RPS 14827**] Those terms outlined the five events after which PNM expected to cause the issuance of the Energy Transition Bonds. [**41 RPS 14800**] PNM did not file any exceptions to this order, nor did it appeal this order; instead, PNM simply deviated from this order. To the extent that the Court might consider this appeal from the Order to Show Cause an extension of the original Financing Order, the appeal therefrom is untimely.

The ETA provides a procedure for appeal from any order issued under the ETA. NMSA 1978, § 62-18-8(B) (2019). The ETA allows a party to file a notice of appeal with this Court no later than ten calendar days after issuance of a financing order. *Id.*

Here, while PNM is appealing the RD and order to show cause, PNM is challenging the Commission's authority to issue such an order and to, essentially, rewrite what PNM argues is an "irrevocable" financing order. But PNM amended the terms of the original financing order on its own, without notice to the PRC, and this could lead to a workaround in not appealing a financing order and then appealing the remedial measures taken. Because PNM is fundamentally seeking an amended financing order—its own amending—through this appeal, the appeal of the financing order is untimely and this appeal should be dismissed.

B. The Commission's Actions Are Permitted Under the ETA and Necessary Due to PNM's Actions.

The ETA authorizes the Commission to act in situations where compliance with a financing order is at issue. In this scenario, which involves not a violation of the PRC's financing order, but a disregard for PNM's own statements made in seeking the financing order, the statute also provides such authorization.

"Our interpretation of the statute[s] must be consistent with legislative intent, and our construction must not render the statute[s'] application absurd, unreasonable, or unjust." *United Water New Mexico, Inc. v. New*

Mexico Pub. Util. Comm'n, 1996-NMSC-007, ¶ 12, 121 N.M. 272, 276, 910 P.2d 906, 910 (citing *Aztec Well Servicing Co. v. Property & Casualty Ins. Guar. Ass'n*, 115 N.M. 475, 479, 853 P.2d 726, 730 (1993)).

1. The ETA permits the PRC to enforce the financing order in accordance with the meaning of the statute.

The ETA grants the PRC authority to take reasonable actions to ensure compliance with the financing order. The ETA states, "Nothing in the Energy Transition Act shall . . . prevent or preclude the commission from investigating the compliance of a qualifying utility with the terms and conditions of a financing order and requiring compliance therewith." NMSA 1978, § 62-18-11(B)(1). The original financing order relied upon testimony from PNM that it would issue the Energy Transition Bonds "upon abandonment," [**41 RPS 14808**] or "in 2022." [**25 RP 4409**]

Additionally, the financing order made clear PNM was to issue these bonds "as promptly as possible" after the last of the five events occurred. [**BIC at 17**] PNM claims now that because the statute requires only an estimate, such an estimate can, in PNM's interpretation, stretch from "upon abandonment," or "as promptly as possible," to after the rate case is resolved, which could, here, be 18 months or later after abandonment. If this

interpretation is correct, there is fundamentally no deadline, meaning the bonds could be issued two, four, or even ten years after abandonment. Far from the definition of "estimate" PNM supplied in its brief, this interpretation also contradicts the intent and spirit of the statute. NMSA 1978, § 62-18-4(B). While PNM is correct in that an "estimate" is not a "date certain," PNM's actions stray so far from the original estimate the Commission relied upon when issuing the Financing Order as to render that estimate fundamentally meaningless. The ETA's requirement to include an estimate does not contemplate such a significant deviation from that estimate, nor does it contemplate the utility disregarding its own estimate in favor of another unapproved milestone altogether. **[BIC 16]**

The Legislature could not have intended such an interpretation. The rationale of providing the estimate in the Financing Order Application is to inform the Commission of the approximate date to ensure the securitization is linked with the abandonment. PNM's decision to deviate from its own estimate so greatly, or even to "estimate" it would issue the bonds at the conclusion of the rate case, is contrary to the rationale of this requirement.

Finally, PNM claims that this delay was necessary due to the unforeseen COVID-19 pandemic and PNM's foreseen proposed merger with Avangrid.

[BIC at 18-19] Yet despite the fact that changes in circumstances are contemplated by Section 7(B)(2) and accounted for with a clear procedure for them, PNM did not seek an amended financing order from the Commission. *See* NMSA 1978, § 62-18-7(B)(2) (". . . [A] financing order may be amended at the request of the qualifying utility to commence a proceeding and issue an amended financing order that . . . adjusts the amount of energy transition costs to be financed by energy transition bonds that have not yet been issued to reflect updated estimated or actual costs that differ from costs estimated at the time of the initial financing order or to correct any errors.").

The Commission's determination that a rate credit for the SJGS costs was required is neither arbitrary nor capricious. The record demonstrates PNM disregarded the Financing Order when it inserted its own determination when it would issue the bonds without notifying the Commission or seeking an amendment to the Financing Order. The Commission, in accordance with the power granted it by the ETA and the rationale and intent of Section 11(B)(1), took lawful and appropriate measures to enforce the Financing Order. *See* NMSA 1978, § 62-18-11(B)(1).

2. The PRC's Order does not call into question the irrevocability of the financing order because the statute contemplates amendment and enforcement.

Any financing order issued by the commission is "irrevocable," but the ETA makes clear that "irrevocable" does not mean "indelible." *See*, *e.g.*, NMSA 1978, § 62-18-7 (B)(2). The ETA includes several provisions where a financing order can be amended at the request of the utility or by the Commission. As explained in Section IV(A)(1), *supra*, a utility can seek amendment of a financing order if circumstances warrant such an amendment. *See* NMSA 1978, § 62-18-7(B)(2). Additionally, Section 5 of the ETA, which discusses financing orders, issuance and terms of bonds, reports to commission of disbursement of bond proceeds, and reviews and audits of records, specifically states:

> The provisions of this section shall not be construed to limit the authority of the commission to:
>
> (1) investigate the practices of or to audit the books and records of a qualifying utility; or
>
> (2) issue such further orders as may be necessary to effectuate the provisions of the Energy Transition Act.

NMSA 1978, § 62-18-5(M). This section specifically and intentionally provides the Commission with the authority to "issue such further orders as may be necessary" to ensure the ETA's provisions are met. Because the language states

specifically "the ETA" and does not cite a specific section, it is assumed the Commission has the authority to issue further orders to effectuate any provision of the ETA, including those relating to issuing financing orders. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 24, 309 P.3d 1047, 1053 ("[T]he Legislature is presumed not to have used any surplus words in a statute; each word is to be given meaning. . .This Court must interpret a statute so as to avoid rendering the Legislature's language superfluous.") (internal citations omitted).

The Commission acted pursuant to the authority granted it under the ETA to issue the additional order requiring PNM to issue advice notices in an effort to ensure the remaining provisions of the ETA and the financing order were met.

3. <u>The ETA contemplates issuance of bonds upon abandonment which was addressed and issued in the Financing Order.</u>

As discussed *supra*, the ETA was enacted to ensure a smooth transition from coal-fired generating resources to cleaner renewable energy resources. NMSA 1978, §62-18-2(H), (S); *Citizens for Fair Rates & the Env't*, 2022-NMSC-010 at¶ 6. In doing so, the ETA contains several provisions that suggest bonds should be issued upon abandonment, or as soon thereafter as possible. Of

significance, the ETA specifically identifies a mechanism to compensate those communities most affected by a utility's decision to abandon a coal-fired plant. Section 16 of the ETA contains these provisions. *See* NMSA 1978, § 62-18-16; *See also* Fiscal Impact Report CS/489/aSCORC/aSFl#1, March 5, 2019. This section identifies and defines an affected community as a New Mexico County located within 100 miles of a closing facility producing electricity, resulting in at least forty displaced workers, meaning those workers terminated from employment due to the abandonment of that facility. NMSA 1978, § 62-18-16(L).

Section 16(J), specifically, includes a provision directing the proceeds of the bonds to these funds. NMSA 1978, § 62-18-16(J) ("Within thirty days of receipt of energy transition bond proceeds, a qualifying generating facility located in New Mexico shall transfer the following percentages of the financed amount of energy transition bonds as follows: (1) one-half percent to the Indian affairs department for deposit in the energy transition Indian affairs fund; (2) one and sixty-five hundredths percent to the economic development department for deposit in the energy transition economic development assistance fund; and (3) three and thirty-five hundredths percent to the

workforce solutions department for deposit in the energy transition displaced worker assistance fund.").

This section would not be effective unless the bonds are issued close in time to the abandonment of the coal-fired facilities. The clear purpose of this provision is to assist communities affected by abandonment at the time of abandonment when the economic impacts would be most readily felt; those communities would require this funding at the time the plant was abandoned and the workers were displaced. To require otherwise would render this section ineffective at best, and absurd at worst. "Courts will not construe a statute in a manner that leads to an absurd result . . . but it is equally if not more applicable as a ground for insisting on application of the words' plain meaning to avoid an absurdity." *Provisional Gov't of Santa Teresa v. Dona Ana Cnty. Bd. of Cnty. Commissioners*, 2018-NMCA-070, ¶ 27, 429 P.3d 981, 990.

Second, Section 2(H)(2)(c) sets the amount that can be securitized to the undepreciated investment at the time of abandonment. *See* NMSA 1978, § 62-18-2(H)(2)(c) ("undepreciated investments as of the date of abandonment on the qualifying utility's books and records in a qualifying generating facility that were either being recovered in rates as of January 1, 2019 or are otherwise found to be recoverable through a court decision"). The amount left on the

investment is securitized in addition to the other costs of abandonment. PNM received the amount requested to issue the bonds and charge the associated costs to ratepayers, and because ratepayers have continued to pay (because this amount is still in base rates), the amount PNM has not recovered is less than it was when securitized. This is an unjust arrangement for ratepayers.

Finally, Section 4(B)(11) requires the Commission to establish 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. This allows for the costs of the units that are in base rates to be removed at this time so customers are not required to pay twice for these costs. *See* NMSA 1978, § 62-18-4(B)(11).

These provisions clearly show the Legislature did not intend for these bonds to be issued as PNM argues; rather, to ensure the costs of abandonment are mitigated and do not land on the shoulders of the ratepayers or the affected communities when their impact would be felt most strongly—at abandonment.

C. The Commission's Order Remedies a "Moral Hazard"; It Does Not Impose a New Standard.

The Commission is vested not only with the authority to ensure it balances the public interest with the interests of utility investors, but also to ensure it is protecting the public from dubious practices that result in overpayment or in double recovery for the utility. *Attorney General*, 1984-NMSC-081 at ¶12. Here, the Commission issued these orders in an attempt to mitigate the harm to the customer that has resulted from PNM's decision to de-link abandonment and securitization. Because this power has been vested in the Commission, the Commission has the specialized expertise to render decisions to meet these balancing requirements. *See Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2023 WL 4360572, at *6 (N.M. July 6, 2023) ("When the matter before the court is a question of fact, the court will generally defer to the decision of the agency, especially if the factual issues concern matters in which the agency has specialized expertise."). If PNM customers are still paying the same rates without having had bonds issued and without having had a rate case determination, PNM customers are paying for operations and maintenance on a plant that has no workers, is no longer in operation, and is not serving customers. This is both adverse to the ratepayers and a windfall for PNM. While PNM argues a regulatory liability would

mitigate such harm, it is the purview of the Commission to determine the best way for such mitigation. *See, e.g.*, NMSA 1978, § 62-18-11(B)(1).

Moreover, the Financing Order the Commission issued (which again was based on PNM's representations that it intended for the abandonment and securitization to occur simultaneously) allows PNM to securitize the undepreciated balance of SJGS Units 1 and 4 and the common plant as of the date of abandonment; however, PNM has been collecting depreciation on the plant (as that, too, is in the current rates) since abandonment. If the Commission fails to act, PNM will collect this amount of depreciation twice—once now, and then again when PNM issues the bonds.

The Commission is entitled to act where such a hazard exists, both under the enforcement provisions in the ETA as discussed *supra*, and under its general ratemaking authority, as cited in the RD. NMSA 1978, § 62-3-1(B); NMSA 1978, § 62-18-11(B)(1). However, contrary to PNM's argument, the Commission has not created a new standard; it is acting within its authority to mitigate harm where such harm exists, and the term "moral hazard" is merely a term of art describing the impact of PNM's unrequested and unapproved actions. The RD states "PNM's new plan violates the intent of the ETA and constitutes a moral hazard to the substantial and potentially

irremediable detriment of PNM's ratepayers unless a remedy is imposed in this Show Cause Proceeding." **[25 RP 4341]**

PNM's actions resulted in unjust double recovery, and the Commission acted appropriately and within its authority to impose a remedy for the benefit of the people of New Mexico.

D. Piecemeal Ratemaking is Permitted.

The Commission has general authority over utility costs and ratemaking, and, contrary to PNM's argument, is permitted to engage in piecemeal ratemaking, which is contemplated and permitted throughout the Public Utility Act ("PUA"). *See*, *e.g.*, NMSA 1978, § 62-6-4(A) (2003) ("The Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . . and to do all things necessary and convenient in the exercise of its power and jurisdiction."); *Attorney General*, 1984-NMSC-081 at¶ 12 ("[The Commission] is vested with considerable discretion in determining the justness and reasonableness of utility rates."); *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, ¶ 10, 444 P.3d 460, 467 ("The Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. The rate-making function involves the making

of pragmatic adjustments. It is the result reached, not the method employed, which is controlling").

While Commission policy disfavors piecemeal ratemaking, it is not contrary to Commission policy or the law. Commission policy permits a departure from the prohibition under extraordinary circumstances, which was cited in the RD. **[25 RP 4416]** Certainly a utility disregarding an order and changing its plans without first seeking statutorily required PRC approval is just such an extraordinary circumstance. PNM now complains of an action the Commission was forced to take in response to PNM's own unlawful action.

While the Commission must generally follow its rules and regulations with respect to ratemaking, it has the authority to deviate from these when necessary—as here, when there is a change in circumstances—and with proper notice. *See Pub. Serv. Co. of New Mexico,* 2019-NMSC-012 at ¶ 11 ("Despite the Commission's considerable discretion in the setting of just and reasonable rates, "the Commission is not free to disregard its own rules and prior ratemaking decisions or 'to change its position without good cause and prior notice to the affected parties."); *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 8, 115 N.M. 678, 681, 858 P.2d 54, 57 ("The [Commission] is bound by, and limited to, its existing rules and regulations,

proper application of the law, compliance with the constitutional mandate, and by previously established methods of ratemaking, absent a change in circumstances peculiar to the company and the pending case, making it necessary that there be a departure from established method.").

Here, the Commission provided proper notice by noticing and holding a hearing on the Motion to Show Cause and demonstrated both the existence of a change in circumstances for this specific matter and that the change was necessary. The Commission's actions were, therefore, proper.

E. A Future Prudence Review is Within the Commission's Authority to Order.

The Commission was within its authority and was supported by the evidence to require PNM include, in its next rate case, an explanation of the prudence of delaying its bond issuance beyond the San Juan abandonment dates. Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible. *Pub. Serv. Co. of New Mexico*, 2019-NMSC-012 at ¶ 29. Yet the Commission is not

engaging in hindsight review; it is asking PNM to justify its decision to delay the issuance of bonds to determine whether that was a prudent determination. This review is standard for the Commission. *See Citizens for Fair Rates & the Env't*, 2022-NMSC-010 at ¶ 47 ("The prudent investment theory provides that ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith.") (citing *In re Pub. Serv. Co. of N.M.*, 101 P.U.R. 4th 126 (1989)). However, the prudent investment theory is but one of many accepted ratemaking methodologies, and this Court has repeatedly recognized that "[t]he Commission is not bound to the use of any single formula or combination of formulae in determining rates." *Pub. Serv. Co. of New Mexico*, 2019-NMSC-012 at ¶ 10.

This review is authorized for the Commission, and does not amount to a hindsight review, as Appellant suggests. The Commission is asking PNM to justify the rationale for not issuing the bonds when PNM said it would, which constitutes a review of PNM's decisions for prudency, not a "hindsight" review. A review that examines PNM's decisions is not a hindsight review just because it seeks to examine decisions PNM made in the past. The purpose of a prudence review is to hold ratepayers harmless from any amount imprudently

invested. *See Pub. Serv. Co. of New Mexico*, 2019-NMSC-012 at ¶ 40. This is what the Commission requested, and it is reasonable and permissible.

V. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that Appellant's request for relief be denied and for the Commission's Show Cause Recommended Decision and Order be afforded deference and affirmed.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE WITH VOLUME-TYPE LIMITATIONS

Pursuant to Rule of Appellate Procedure 12-318(G), I certify that this contains 5,979 words in the body of the brief, according to a count by Microsoft Word Version 2306.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *New Mexico Public Regulation Commission's Answer Brief* to be served by email through the Court's electronic filing system to all counsel of record on July 27, 2023.

/s/ Erin E. Lecocq
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