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

**NO. S-1-SC-39440**

**PUBLIC SERVICE COMPANY OF NEW MEXICO,**

**Appellant,**

**v.**

**NEW MEXICO PUBLIC REGULATION COMMISSION,**

**Appellee.**

**and**

**WESTERN RESOURCES ADVOCATES, COUNTY OF BERNALILLO, NEW MEXICO OFFICE OF THE ATTORNEY GENERAL, NEW ENERGY ECONOMY, NEW MEXICO AFFORDABLE RELIABLE ENERGY ALLIANCE, COALITION FOR CLEAN 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***

# BRIEF IN CHIEF OF APPELLANT PUBLIC SERVICE COMPANY OF NEW MEXICO

**ORAL ARGUMENT REQUESTED**

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## I. INTRODUCTION

Appellant Public Service Company of New Mexico ("PNM") respectfully requests that the New Mexico Supreme Court vacate the *Final Order Adopting Recommended Decision with Additions* ("Final Order") **[26 RP 4575-4593]** issued by Appellee New Mexico Public Regulation Commission ("Commission") on June 29, 2022.

This is the third time that the application of the Energy Transition Act[1] ("ETA") to PNM's abandonment of Units 1 and 4 of the San Juan Generating Station ("SJGS") is before this Court.[2] In *Egolf*, the Court ruled that "the Commission has a nondiscretionary duty to apply the ETA to San Juan abandonment proceedings" and directed the Commission to apply the ETA.[3] In *CFRE*, the Court upheld the Financing Order[4] issued by the Commission and confirmed that the ETA provides a comprehensive statutory scheme for "permitting a public utility to finance the energy

[1] NMSA 1978, §§ 62-18-1 to -23 (2019, as amended through 2023).

[2] *State ex rel. Egolf v. N.M. Pub. Regul. Comm'n* ("*Egolf*"), 2020-NMSC-018; *Citizens for Fair Rates & the Env't v. N.M. Pub. Regul. Comm'n* ("*CFRE*"), 2022-NMSC-010.

[3] *Egolf*, 2020-NMSC-018, ¶¶ 22 33.

[4] *See Final Order on Request for Issuance of a Financing Order*, Case No. 19-00018-UT (April 1, 2020) ("Financing Final Order"), and *Recommended Decision on PNM's Request for Issuance of a Financing Order*, Case No. 19-00018-UT (Feb. 21, 2020) ("Financing RD"). The Financing Final Order and Financing RD are sometimes collectively referred to as the "Financing Order."

transition costs associated with abandoning a coal-fired generating facility,"[5] The Commission now attempts to bypass the ETA and rewrite the irrevocable Financing Order previously upheld by this Court by ordering PNM to implement a piecemeal rate credit for SJGS costs at the time of abandonment, and before issuance of the securitized bonds and implementation of an energy transition charge ("ETC").

The Final Order is unlawful, arbitrary and capricious. Notwithstanding the plain language of the ETA and the Financing Order, the Commission engages in contrived legislative analysis to create artificial time constraints for issuing the ETA bonds in order to impose the rate credit. The Commission also violates the well-established regulatory principle against piecemeal ratemaking in favor of a newly created and unfounded regulatory principle the Commission refers to as "moral hazard." These actions are contrary to the ETA and the Financing Order which, both provide that SJGS costs are to be removed from rates only after PNM begins collecting the ETC from its customers.[6]

Despite its prior ruling that there is no specific deadline for issuing the ETA bonds under the Financing Order or the ETA, the Commission compounds its errors by subjecting PNM to a hindsight prudence review for not issuing the bonds at the

[5] *CFRE*, 2022-NMSC-010, ¶¶ 42, 72.

[6] *See* § 62-18-4(B)(11) and § 62-18-5(F)(8); Financing RD, at 84-85.

time of SJGS abandonment. The Commission calls into question whether PNM continues to have the authority to issue the ETA bond, ignoring the ETA and the Financing Order which both provide the Financing Order is irrevocable and not subject to unilateral amendment by the Commission. Because of this, the marketability of the ETA bonds is now impaired.

The principal legal questions before the Court are (1) whether the ETA and the Financing Order require PNM to implement a rate credit upon the abandonment of SJGS and outside of a full rate case review; and (2) whether the Commission has authority to bypass the ETA and Financing Order and order rate credits by imputing a *post hoc* temporal requirement for issuance of the ETA bonds.

The issues presented in this Brief-in-Chief were raised and preserved in PNM's prehearing and post-hearing briefing. *See* **[3 RP 0255-0291], [18 RP 2058-2065], [23 RP 4041-4085], [24 RP 4247-4296], [25 RP 4458-4490]** and **[25 RP 4491-4501].**

## II. REQUEST FOR RELIEF

PNM respectfully requests that the Final Order be vacated and the Court remand with instructions to properly apply the ETA and Financing Order to PNM's issuance of the ETA bonds. PNM further respectfully requests that the Court reject the provisions of the Final Order calling for an investigation into PNM's authority to issue the ETA bonds and confirm that the Commission's actions cannot affect the

validity of the bonds, or reduce, impair, postpone or terminate the energy transition property or the ETCs authorized under the Financing Order.

## III. SUMMARY PROCEDURAL BACKGROUND

In the initial proceedings in NMPRC Case No. 19-00018-UT, PNM sought a Financing Order to issue ETA bonds to recover PNM's estimated SJGS abandonment costs. The Commission issued the requested Financing Order, authorizing PNM to issue and sell ETA bonds through a special purpose entity in an amount not to exceed $361.0 million.[7] PNM is also authorized to collect the ETC from PNM's customers upon issuing the ETA bonds, to pay the debt service on the bonds.[8] The Financing Order establishes the ratemaking method to account for any necessary reduction to PNM's cost of service associated with SJGS costs being recovered by the ETC once it goes into effect.[9]

### A. Show Cause Proceeding.

The proceeding below was initiated by a Joint Motion[10] for an order to show cause why PNM should not be required to: (1) implement a customer rate credit for

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[7] Financing RD, ¶ 18 at 116-117, ¶ 24, 119-129.

[8] *Id.*, ¶ 41 at 125-126.

[9] *Id.*, at 84-85, ¶ 34 at 141, ¶ 33 at 157.

[10] *Joint Motion for Order to Show Cause and Enforce Financing Order and Supporting Brief* ("Joint Motion") filed on February 28, 2022, by Western Resource Advocates ("WRA"), Coalition for Clean Affordable Energy ("CCAE"), and Prosperity Works (collectively "Movants") **[3 RP 0229-0249]**.

SJGS costs at the time of abandonment; (2) report to the Commission on the status of obtaining necessary approvals to issue ETA bonds; and (3) explain the prudence in delaying the issuance of the ETA bonds beyond the SJGS abandonment dates. Mere days before the Joint Motion was filed, the Commission had ruled that the Financing Order "does not require that PNM issue the Energy Transition Bonds . . . by any specific date."[11] PNM filed its Verified Response[12] opposing the Joint Motion and responding that neither the Financing Order nor the ETA require the issuance of the ETA bonds at the time SJGS is abandoned, and that both the Financing Order and the ETA provide that SJGS costs are to be removed from PNM's rates at the time the ETC is implemented, if these costs have not already been removed from rates through a general rate case. Movants, along with other parties, filed replies supporting the requested relief in the Joint Motion. *See* Replies at **[3 RP 0297-0326, 4 RP 0336-0354, 0371-0379, 0380-0409]**

An evidentiary hearing was conducted before hearing examiners May 23 - 26, 2022. **[25 RP 4338]** Henry Monroy, Vice President, Corporate Controller for PNM,

[11] *Order on PNM Notice and Request for Modification to or Variance From Abandonment Date of San Juan Generating Station Unit 4* ("Variance Order"), ¶ 26 at 9, Case No. 19-00018-UT (Feb. 23, 2022). **[2 RP 0193-0211]**

[12] *Verified Response of Public Service Company of New Mexico to Joint Motion for Order to Show Cause and Enforce Financing Order and Supporting Brief* ("Verified Response"). **[3 RP 0255-0291]**

testified that PNM was in compliance with the Financing Order and the ETA, which provide that any rate credit to reduce PNM's cost of service for SJGS costs is to commence at the time PNM starts collecting the ETC from customers after issuance of the ETA bonds. **[20 RP 2634, 2641-2643]**

Monroy acknowledged that PNM's Financing Order application anticipated issuing the ETA bonds near the time of the abandonment of SJGS, but also testified that PNM was clear from the start that it planned to time the bond issuance to coincide with the implementation of new rates from a general rate case so that the SJGS costs were removed from rates at the same time the ETC became effective. **[20 RP 2637]** Anticipated rate cases that were to follow the Financing Order were deferred to avoid a rate hike in the midst of negative economic impacts on customers from the COVID-19 pandemic; and because PNM agreed to a request to delay filing a new rate case until December 1, 2022, made by parties to the proposed merger proceeding between PNM Resources, Inc. ("PNMR") and Avangrid, Inc. ("Avangrid"). **[20 RP 2643-2646]** Monroy detailed the nearly $2 billion in investments made by PNM to serve its customers since current rates became effective (which include investments through 2018). **[20 RP 2648-2649]** Because none of those investments are in rates, the delay in the anticipated rate cases saved customers an estimated $23 million to $36 million. **[20 RP 2646-2649]**

Monroy explained that PNM would not reap a "double recovery" if approximately $98 million in SJGS costs remain in rates following abandonment because the ETC was not being charged to customers; further, PNM is subject to an earnings test with customer refunds if PNM exceeds its allowed return on equity by more than 50 basis points. **[20 RP 2652-2656]** Monroy testified that PNM would be financially harmed if a SJGS rate credit was imposed because PNM would be subject to a non-fuel revenue deficiency between $121 million and $143 million, which would preclude PNM from any opportunity to earn its authorized rate of return -- by approximately 500 basis points -- and harm PNM's credit metrics used by credit rating agencies. **[20 RP 2662-2663]**

Monroy confirmed that PNM had already fully funded the employee job training and severance benefits authorized by the Financing Order for workers impacted by the closure of SJGS and the associated coal mine and was working with state agencies to pre-fund the state agency funds pursuant to Section 62-18-16 of the ETA. **[20 RP 2664-2665]** Monroy testified that PNM planned to issue the ETA bonds to coincide with the effective dates for new rates from a rate case to be filed in December 2022. **[20 RP 2665-2666]**

Charles Atkins, an expert in utility securitization financing, explained that numerous factors can impact bond interest rates and expressed his opinion that utilities should not try to time the issuance of bonds based on future transaction

interest rate projections. **[21 RP 3221-3224, 3228-3229]** Pursuant to the directives of the Commission, Atkins provided interest rate projections which showed that bond interest rates were expected to be lower at the end of 2023 (2.80%), compared to issuing the bonds at the time of SJGS abandonment in June 2022 (3.81%) and September 2022 (3.46%). **[21 RP 3232-3234]**

Laura Sanchez, Chief Policy & Legal Advisor for PNMR, testified to her involvement in the drafting and passage of the ETA and opined that neither the ETA nor the Financing Order require the ETA bonds be issued at the time of abandonment and that both afford PNM flexibility in the timing and manner of the bond issuance. **[21 RP 3284-3297, 3300-3302]** Sanchez testified that imposition of a rate credit in isolation from an assessment of PNM's full cost of service violated the regulatory compact and well-established regulatory principles. **[21 RP 3304-3309]**

Stella Chan,[13] PNM's Director of Pricing, provided estimates of the impact on residential rates if a rate credit for the full SJGS costs was implemented following abandonment; the average monthly residential customer credit would be $8.19. **[23 RP 3986]**

Response testimony was filed on behalf of the New Mexico Attorney General ("NMAG"), CCAE and Prosperity Works, New Energy Economy ("NEE"), New

[13] Chan adopted the testimony of PNM witness Michael Settlage. **[25 RP 4338]**

Mexico Affordable Reliable Energy Alliance ("NM AREA"), WRA and Commission Utility Division Staff ("Staff"). Parties argued that PNM's original estimate of the timing of the issuance of the ETA bonds meant that the Financing Order and the ETA required the bonds to be issued at the time of abandonment or rate credit be implemented. **[22 RP 3346-3354, 3634-3648, 3712-3717, 3720-3724, 3727-3729, 3764-3773]** Parties claimed that PNM would be subject to double recovery if a rate adjustment was not made at the time of SJGS abandonment and that this justified the use of piecemeal ratemaking. **[21 RP 3200-3203, 3210-3211] [22 RP 3357-3360, 3630, 3646, 3718-3720, 3724-3727, 3745-3748, 3774-3776, 3779-3781] [23 RP 4017-4024, 4029-4030]** Parties expressed doubt about PNM's estimated benefits to customers due to the delays in the rate cases and asserted that these benefits were not material to the analysis of whether to impose a rate adjustment for SJGS costs. [**21 RP 3206-3208] [22 RP 3748-3749, 3778-3779, 3782] [23 RP 4024-4029]** Some parties recommended that the prudence of PNM's actions be reviewed and that sanctions be considered. **[22 RP 3648-3649, 3776]**

**B. RD and Final Order.**

The Hearing Examiners issued their *Recommended Decision in Show Cause Proceeding* ("RD") on June 17, 2022. **[25 RP 4328-4447]** The RD found that while the ETA provides flexibility with respect to the issuance of the ETA bonds, Section 62-18-16 places limits on this flexibility because it requires utilities to transfer

specified percentages of the ETA bond proceeds to the state administered funds within thirty days of receipt of the proceeds. The RD reasoned that because these state-administered funds are intended to mitigate the impacts from the abandonment of coal power plants, the ETA necessarily contemplated that the ETA bonds be issued at or near the time of abandonment because that is when the funding is needed. The RD indicated that PNM's prepayments to the state agencies from its own funds prior to issuance of the ETA bonds did not alter this interpretation of the ETA.[14] **[25 RP 4377-4380]**

The RD characterized as a "new plan" PNM's explanation in the show cause proceeding that the ETA bonds were still expected to be issued concurrently with implementation of new rates in a general rate proceeding. The RD determined that this "new plan" broke the "fundamental linkage" in the ETA between abandonment, issuance of the ETA bonds and the collection of the ETC. The RD concluded that the Financing Order did not contemplate any remedy for this "de-linkage." **[25 RP 4340, 4381-4382]** Based on the finding that PNM was presenting a "new plan" that created a "de-linkage," the RD concluded that a "moral hazard" was presented which the Commission should eliminate through imposition of a rate credit. **[25 RP 4390-**

[14] To address the desirability of having worker severance and state program monies available prior to the ETA Bonds being issued, the Financing Order authorized PNM to prepay anticipated bond proceeds for these purposes from PNM's own funds. **[25 RP 4382]**

**4395]** The RD also concluded that the ETA did not limit the Commission's authority to address the ratemaking treatment associated with the abandonment of SJGS and that the remedy should be pursued under the Public Utility Act ("PUA"). **[25 RP 4383-4395]**

In addressing the reasonableness of PNM's rates following SJGS abandonment, the RD focused solely on SJGS costs and the estimated amount of rate credits if those cost were removed from PNM's cost of service, which was based on annual revenue requirements for 2018. The RD discounted PNM's evidence concerning its cost increases from post-2018 investments; customer benefits in savings from deferring planned rate cases; and the financial harm that would befall PNM as a result of the rate credit. **[25 RP 4395-4413]** Relying on the Commission's general ratemaking authority under the PUA, the RD concluded that removal of the SJGS costs from PNM's rates through piecemeal ratemaking was justified and that a rate credit upon SJGS abandonment was preferred over a regulatory liability. **[25 RP 4413-4322]** The RD noted that the cumulative effect of removing all SJGS costs would be a monthly rate credit for residential customers of between $8.19 and $21.34, depending on usage. **[25 RP 4429]**

The RD recommended that pursuant to the Financing Order (which authorized voluntary prepayments), PNM should be ordered to pay the funding for the state-administered funds established pursuant to Section 62-18-16 of the ETA from its

own money within thirty days of the June 30, 2022, abandonment date for SJGS Unit 1. **[25 RP 4431-4433]** The RD also recommended that PNM be required to address in its next rate case the prudence of issuing the ETA bonds after the SJGS abandonment. **[25 RP 4433-4439]** The RD indicated that this inquiry should include whether PNM's timing of the issuance of the ETA bonds is outside the authority of the Financing Order and whether the marketability of the bonds may be impaired by this timing. **[25 RP 4442, ¶ 11]**

The Final Order adopted the RD. **[26 RP 4587-4588, ¶ A]** PNM was required to file advice notices removing all SJGS costs from rates through a rate credit to customers, using the allocation and rate design methodology approved for the ETC in the Financing Order. **[26 RP 4588, ¶ B(c)]** The Commission required that PNM track its costs incurred in the show cause proceeding for purposes of a prudence review. **[26 RP 4588, ¶ B(a)]** PNM was also required to make a compliance filing on October 15, 2022, showing what the applicable interest rates for bonds would be thirty days after the abandonment of SJGS Units 1 and 4 so that those proxy rates could be compared to the actual interest rates when the ETA bond are issued. **[26 RP 4588, ¶ B(b)]**

The Commission denied PNM's request for an interim stay of the rate credit under the Final Order. **[27 RP 4764-4811]** PNM obtained a stay from this Court of the ordered rate credits pending this appeal.[15]

## IV. STANDARD OF REVIEW

PNM bears the burden of demonstrating that the Final Order is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority or otherwise inconsistent with law. *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533 ("*NMIEC 2007*"). If PNM meets its burden, the Court must vacate the Commission's decision. *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 6, 115 N.M. 678.

Statutory interpretation is a question of law, which this Court generally reviews *de novo*. *NMIEC 2007*, 2007-NMSC-053, ¶ 19. The Court affords some deference to legal interpretations involving special agency expertise, but reverses the Commission's statutory interpretation "if it is unreasonable or unlawful." *Id.; CFRE*, 2022-NMSC-010, ¶ 14.

Under arbitrary and capricious review, this Court determines whether the decision was unreasonable or without a rational basis, when viewed in light of the whole record. *Pub. Serv, Co. of N.M. v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-

[15] Amended Order, at 3, Case No. S-1-SC-39440 (Nov. 4, 2022).

012, ¶ 16 ("*PNM*"). An agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand. *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-015, ¶ 8.

This Court affirms the Commission's factual findings if they are supported by substantial evidence, considering the whole record. *CFRE*, 2022-NMSC-010, ¶ 13. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *N.M. Exch. Carrier Grp. v. N.M. Pub. Regul. Comm'n*, 2016-NMSC-015, ¶ 28. However, substantial evidence review does not "ignore[e] evidence unfavorable to the agency decision." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 12, 120 N.M. 579.

## V. ARGUMENTS AND AUTHORITIES

### A. The Commission Acted Arbitrarily and Capriciously and Contrary to Law by Deviating from the ETA and Rewriting the Financing Order With Respect to the Removal of SJGS Costs from PNM's Rates.

In the absence of a prior adjustment to PNM's base rates through a general rate case, the Financing Order and the ETA exclusively govern the timing and method of the removal of SJGS costs from PNM's base rates.

Section 62-18-4(B)(11) requires a utility seeking a financing order to 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." The Financing Final Order approved the Financing RD's recommended ratemaking method under Section 62-18-4(B)(11):

> 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 ETC charges, ***PNM shall be required to implement an immediate credit to ratepayers as an interim rate adjustment mechanism upon the start date of the ETC charges.*** The credit should include the full value of the revenue requirement of the abandoned facilities. The credit should be applied until the conclusion of the first PNM general rate case that includes the full cost impact of the abandonment in PNM's base rates.[16]

By its express terms, the Financing Order authorizes a customer rate credit only upon the start date of the ETC.[17] Thus, both the ETA and Financing Order

[16] Financing RD, at 84-85 (emphasis added).

[17] *See e.g*., *id.* at 21 (stating that "the decision provides that PNM will immediately reduce its base rates to eliminate all of the costs of San Juan Units 1 and 4 at the time it starts charging the ETC"); *id.*, ¶ 17 at 136 ("As discussed above in this Financing Order, pursuant to Section 4(b)(11) of the ETA, the Consolidated Application includes PNM's proposed ratemaking method to account for the reduction in PNM'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."); *id.*, ¶ 33 at 157 ("The ratemaking method addressed in Section III.F.4.f above to account for the reduction in PNM's cost of service associated with the amount of undepreciated investments being recovered in the Energy Transition Charges at the time the charge becomes effective, as described in the Financing Order, is approved."); *id.* , ¶ 34 at 141 ("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

provide that if SJGS costs had not previously been removed from rates through a general rate case, PNM would reduce its base rates to eliminate all of the costs of SJGS only when PNM starts charging the ETC and not upon abandonment as the Commission now requires.

*1. The ETA requires only an estimate of when the ETA bonds will be issued, which PNM provided in good faith.*

The ETA requires that an application for a financing order include an "estimate of timing of the issuance and term of the energy transition bonds, or series of bonds" along with numerous other estimates.[18] This Court in *CFRE* recognized that a utility seeking a financing order pursuant to the ETA must file an application "with several estimates."[19]

In accordance with Section 62-18-4(B)(7), PNM provided a good faith estimate of the timing of the issuance of the ETA bonds at or near the time of SJGS abandonment. **[20 RP 2751]** As confirmed in the Financing RD, PNM stated that it "expects" to issue the ETA bonds as promptly as possible after the last of the following events have occurred: (1) issuance of a final non-appealable Financing

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investments being recovered through the Energy Transition Charges at the time the Energy Transition Charges become effective.").

[18] *See e.g.*, § 62-18-4(B)(2) (an estimate of energy transition costs); § 62-18-4(B)(2)(c) (an estimate of financing costs associated with each series of ETA bonds); and § 62-18-4(B)(3) (an estimate of ETC based on the estimated date of issuance and the estimated principal amount of each series of energy transition bonds).

[19] *CFRE*, 2022-NMSC-010, ¶ 8.

Order; (2) the abandonment of SJGS; (3) delivery of any necessary Securities and Exchange Commission approvals under the Securities Exchange Act of 1933; and (4) completion of the rating agency process."[20]

The use of the word "estimate" in Section 62-18-4(B)(7) confirms that PNM was not required to provide a date certain by which the ETA bonds are to be issued. The Merriam-Webster on-line dictionary defines "estimate" as "a rough or approximate calculation."[21] The plain language of a statute is the primary indicator of legislative intent. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11. Thus, any suggestion that the ETA required PNM to provide a time certain for bond issuance is contrary to the plain terms of Section 62-18-4(B)(7).

At the time PNM filed its Consolidated Application, PNM anticipated it would issue the ETA bonds to generally coincide with the abandonment of SJGS. However, PNM was also clear from the beginning that it intended to time the issuance of the ETA bonds with the effective date of new rates from a general rate case, so that SJGS costs were removed from rates at the same time the ETC became effective. **[20 RP 2637]** In fact, the Financing RD expressly acknowledges PNM's

[20] Financing RD, ¶ 28 at 120-121.

[21] Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/estimate (last accessed May 21, 2023)

intention to file a rate case so that the new rates would go into effect at the same time as the ETC.[22]

Subsequent events that were not known or anticipated at the time of PNM's financing order application delayed PNM's anticipated rate cases which impacted the timing of the issuance of the ETA bonds. The first event was the onset of the COVID-19 pandemic which caused PNM's customer arrearages to increase more than six-fold compared to pre-COVID numbers. PNM deferred filing its anticipated rate case to avoid increasing rates when customers were suffering the negative financial effects of the COVID-19 pandemic. **[20 RP 2644-2645]** The second event was the proposed merger between PNMR and Avangrid announced in October 2020.

[22] *See e.g.*, Financing RD at 22 ("The overall impact on customer bills is less clear, given PNM's announced intent to file general rate cases in the Spring of 2020 (with new rates to become effective in the Spring of 2021) and the Summer of 2021 (with new rates to become effective in the Summer of 2022)."); *id.* 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."); *id.* at 85 ("PNM has said it intends to time the filing of the rate case to produce a Commission decision that coincides with the effective date of the ETC rider. PNM's rate case filing will be based upon a future test year that incorporates the net effect of the abandonment and replacement resources."); Financing Order at 105-106 ("Mr. Monroy stated at the hearing that PNM intends to file a rate case in June 2021, with rates expected to become effective in July 2022, to reflect the abandonment of the San Juan coal plant and the inclusion of the replacement resources. The rate case, however, will not be limited the abandonment and replacement resource costs. It will be based upon PNM's full estimated cost of service and other PNM costs sought to be recovered at that time could potentially yield a rate increase.").

**[20 RP 2646]** In accordance with a regulatory condition recommended by the Hearing Examiner in the merger case, PNM agreed to further delay filing a rate case until December 1, 2022, if the Commission approved the merger. **[20 RP 2646, 2752]** As explained in the Monroy testimony, PNM's customers benefitted from these delays in filing for new rates in terms of continued lower rates. **[20 RP 2646-2647]**

By providing an estimate of the timing of the bond issuance in the Financing Order proceeding, PNM did not "promise" or "guarantee" that it would issue the bonds at the time of the abandonment of SJGS. Nor did the Financing Order set a time certain for bond issuance. Notwithstanding that PNM's proposed timing to issue bonds was only an estimate, and contrary to the Commission's Variance Order ruling, the RD found PNM's departure from its estimate to be determinative that a rate credit for the SJGS costs was required starting from the dates of SJGS abandonment. **[25 RP 4340, 4381-4382, 4390-4395]** This decision was arbitrary and capricious. *Nat'l Parks Conservation Ass'n v. Envtl. Prot. Agency*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious.") (citations omitted).

*2. The ETA governs the rate credit for costs recovered through ETA bonds.*

Section 62-18-4(B)(11) of the ETA 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." 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 ETC, again specifying the reduction or credit occur at the time the ETC becomes effective. The plain language of both Sections 62-18-4(B)(11) and 62-18-5(F)(8) mandate that any rate adjustment to remove investments for the abandoned coal plant be implemented at the time the ETC becomes effective. *Baker*, 2013-NMSC-043, ¶ 11; *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") (internal quotation marks and citations omitted).

Section 62-18-2(G) of the ETA defines "energy transition charge" to mean "a non-bypassable charge paid by all customers of a qualifying utility for the recovery of energy transition costs," which include plant abandonment costs, worker

severance and state agency funding.[23] Under statutory construction canons, using "energy transition charge" as a defined term reflects specific legislative intent. *State v. Monafo*, 2016-NMCA-092, ¶ 27 ("When a statute specifically defines a term, we interpret the statute according to those definitions, because those definitions reflect legislative intent.") (internal quotation marks and citation omitted). Because the ETC is defined as a charge paid by all customers for recovery of energy transition costs included in ETA bonds, it is clear that the Legislature intended that a utility's rate adjustment mechanism be applied only after customers actually begin paying for recovery of the energy transition costs through the ETC, which does not occur until the ETA bonds are issued. Customers pay for those costs either in rates or through the ETC, but not both.

No other section of the ETA permits an adjustment to a utility's cost of service solely for the abandonment of a qualified coal plant: the only permissible adjustment to a utility's revenues is after a utility begins collecting the ETC. *See 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

[23] *See also*, Section 62-18-2(H) (defining "energy transition cost").

N.M. 460) The Legislature did not intend for any piecemeal ratemaking adjustment to occur until the ETC is implemented. *State v. Rivera*, 2004-NMSC-001, ¶ 16, 134 N.M. 768 ("[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.").

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," it occupies the field of the Commission's authority regarding ratemaking approaches for coal plant abandonments pursuant to the ETA. *CFRE*, 2022-NMSC-010, ¶ 42; *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). This Court in *CFRE* specifically concluded that the ETA's approach "would promote the legitimate interests reflected in Section 62-3-1(B)." *CFRE*, 2022-NMSC-010, ¶ 42.

The Commission cannot disrupt the balance the Legislature struck by implementing relief not authorized under the ETA, especially where the ETA comprehensively addresses all aspects of coal plant abandonments and cost recovery. *See Egolf*, 2020-NMSC-018, ¶ 33 ("[T]he ETA serves as the statutory scheme that the Legislature provided for abandonment proceedings."). "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." *Id.* ¶ 17 (citing N.M. Const. art. III, § 1).

Relying on its general ratemaking authority, the Commission unlawfully required PNM to remove SJGS costs from rates after abandonment but before the ETC is implemented as provided in the ETA. If the Legislature had intended a mechanism for such relief, it would have said so in the ETA. *See Patterson v. Globe Am. Cas. Co.*, 1984-NMCA-076, ¶ 10, 101 N.M. 541, *superseded by statute on other grounds as stated in Journal Publ'g Co. v. Am. Home Assurance Co.*, 771 F.Supp. 632, 635 (S.D.N.Y. 1991). Thus, other than through a general rate case, the Commission does not have the authority to remove the SJGS costs from rates upon abandonment but before the issuance of the ETA bonds and the assessment of the ETC.

*3. The Commission misconstrues the ETA to require that the ETA bonds be issued at the time of SJGS abandonment.*

Contrary to the Commission's prior determination in its Variance Order, the RD concludes that the ETA requires the ETA bonds be issued at or around the time of the abandonments to achieve the purposes of Section 62-18-16. **[25 RP 4377-4380]** Section 62-18-16 creates certain state-administered funds and requires a

percentage of ETA bond proceeds be allocated to these funds.[24] However, Section 62-18-16 sets no deadlines for PNM to issue the ETA bonds nor does it create any temporal "link" between the date of abandonment and the securitization of energy transition costs.

The deadline in Section 62-18-16(J) by which a utility must transfer bond proceeds into the state-administered funds does not change this analysis. Section 62-18-16(J) states a utility in receipt of ETA bond proceeds must remit within thirty days the specified percentages of the financed amount to the state-administered funds. Section 62-18-16(J) makes no mention of either the abandonment of a qualifying facility or any timing for the issuance of the energy transition bonds. It is improper to read into a statute any words that are not there, particularly where the statute makes sense as written. *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70; *see also* NMSA 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning.").

The Commission previously analyzed Section 62-18-16 in the Financing RD and did not indicate that the requirement to remit monies to state-administered funds within thirty days of receipt of the bond proceeds meant that PNM was under a duty

[24] *See* §§ 62-18-16(A),(D),(G) and (J).

to issue the ETA bonds at the time of abandonment.[25] Instead, the Financing Order approved PNM's plan to prepay a portion of the monies into the state administered funds in advance of SJGS abandonment, confirming that the timing of bond issuance is not tied to SJGS abandonment.[26] Under the Financing Order, PNM's issuance of the bonds at a time other than SJGS abandonment does not break any "fundamental linkage" in the ETA between a qualifying generating facility's abandonment and the securitization of energy transition costs.

The RD contends that by not issuing the bonds at the time of abandonment, PNM has "broken the fundamental linkage in the Energy Transition Act between a qualifying generating facility's abandonment and the securitization of energy transition costs and collection of energy transition charges." **[25 RP 4382]** Nothing in the ETA, however, refers to or allows a remedy for "de-linkage." The Commission cannot both claim that there is no date by which PNM must issue the ETA bonds and that it does not have authority to order PNM to issue the energy transition bonds, while also finding the ETA contains a "fundamental linkage" between abandonment, securitization, and collection of the energy transition costs. That is a non-sequitur. If there were a "fundamental linkage," the ETA would have mandated the issuance

[25] *See* Financing RD at 99-102.

[26] *Id.* at 102.

of the bonds upon abandonment or provided the Commission with authority to mandate timing of issuance; the ETA does neither.

Further, to the extent there is a "linkage" in the ETA, it is that the ETC, by definition, does not commence until the ETA bonds have been issued.[27] That linkage is not broken here, as the ETC has not commenced, and will not commence, until the bonds are issued.[28] Similarly, the "linkage" in the Financing Order "provides that PNM will immediately reduce its base rates to eliminate all of the costs of San Juan Units 1 and 4 at the time it starts charging the ETC."[29] That "linkage" is also intact, as PNM has not yet begun charging the ETC. To the extent any linkage is broken, it is because the Commission has ordered a premature piecemeal rate credit.

### B. The Commission Acted Unlawfully and in an Arbitrary and Capricious Manner by Rewriting the Terms of the Financing Order With Respect to Removing SJGS Costs from PNM's Rates.

The Commission relies on the RD's contrived and statutorily unsupported legislative intent analysis to rewrite the Financing Order and impose new requirements on PNM. The SJGS rate adjustment approved in the Financing Order, to be implemented concurrently with the ETC after the ETA bonds are issued, is

[27] § 62-18-4(B)(11) and § 62-18-5(F)(8).

[28] *See* Financing RD at 125-26 (The ETC will cover, among other things, "timely payment of principal and interest on the Energy Transition Bonds").

[29] *Id.* at 21.

entirely consistent with Sections 62-18-4(B)(11) and 62-18-5(F)(8) of the ETA discussed above. The Final Order requiring PNM to implement customer rate credits upon the abandonment of SJGS, rather than at the time the ETC is effective, constitutes an impermissible amendment to the Financing Order.

The Commission does not have the unilateral authority under the ETA to amend the Financing Order. Section 62-18-7(B) provides that only the utility is allowed to seek an amendment to a financing order. In addition, 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. The Commission cannot do indirectly that which the law does not permit directly and the Final Order's new requirement that PNM must immediately issue rate credits is invalid. *State v. White*, 2010-NMCA-043, ¶ 16 , 148 N.M. 214. As the New Mexico Supreme Court has made clear, "the Commission has a nondiscretionary duty to apply the ETA to San Juan abandonment proceedings." *Egolf*, 2020-NMSC-018, ¶ 22. The Court has affirmed the Commission's Financing Order, and it cannot now be undone. *CFRE*, 2022-NMSC-010, ¶ 4. Therefore, the Final Order must be vacated.

### C. The Final Order Unlawfully Created a "Moral Hazard" Standard not Recognized in the ETA or New Mexico Administrative Law to Justify its Rate Credit Remedy.

As demonstrated in Sections V.A and V.B, neither the ETA nor the Financing Order require PNM to issue the ETA bonds or to implement a rate credit for the SJGS costs at the time of abandonment. To support the rate credit, the Final Order engineers a work-around that sidesteps the ETA by invoking the Commission's general ratemaking authority.[30] Under cannons of statutory construction, because the ETA is the more specific and later-enacted statute, it controls the ratemaking treatment related to the abandonment of a qualified coal plant over the more general and earlier enacted provisions of the PUA relied on by the Commission to implement that rate credits. *State ex rel. State Eng'r v. United States*, 2018-NMCA-053, ¶ 16, *cert. granted*, 2018-NMCERT-008. ("Specific and later-enacted statutes control over general, earlier-enacted laws."). The Commission impermissibly elevates its general supervisory ratemaking authority over the specific cost recovery approach dictated by the ETA.

[30] *See*, e.g., RD at 51 (stating that the rate credit remedy is "grounded in the Commission's rate-setting authority under the Public Utility Act") **[25 RP 4382]**; *id. a*t 110 (Confirming that, in ordering the rate credit, the Commission would be "acting pursuant to its supervisory authority over the rates and service of jurisdictional utilities, to issue an Order that addresses the de-linked scenario and establishes a remedial mechanism that ensures the rates charged to PNM customers are fair, just, and reasonable . . . .") **[25 RP 4441-42, ¶ 8]**; and Final Order (referencing same finding from RD) **[26 RP 4580, ¶8]**.

In invoking its plenary powers, the Commission introduces an entirely new concept in New Mexico administrative law – the "moral hazard" – as the basis to require that PNM issue the customer rate credit at the time of abandonment. According to the Commission, the prospect of a "moral hazard" provides authority to order whatever rate relief it deems appropriate. No such "moral hazard" review authority is conferred upon the Commission by the ETA or any other statute within the PUA.

The ETA sets forth a comprehensive scheme governing securitization of utility assets, issuance of ETA bonds in association with that securitization, and the associated ratemaking requirements in ETA proceedings. *See Egolf*, 2020-NMSC-018, ¶ 33 ("[T]he ETA serves as the statutory scheme that the Legislature provided for abandonment proceedings."); *see also CFRE*, 2022-NMSC-010, ¶ 42 (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."). The Commission is required to adhere to this statutorily specified ratemaking treatment. *See also Landess*, 2008-NMCA-159, ¶ 9.

The ETA does not permit the Commission to sidestep these statutory constraints because it deems it expedient to do so. The Commission is required to implement, not ignore, the plain language of the ETA, as this Court has confirmed. *See, e.g.*, *Egolf*, 2020-NMSC-018, ¶ 16. ("Clear constitutional and statutory

delineations instruct that the New Mexico Public Regulation Commission has a nondiscretionary duty to administer applicable law duly enacted by the New Mexico Legislature") (Citing N.M. Const. art. XI, § 2; N.M. Stat. Ann. § 62-6-4)); *see also Quynh Truong*, 2010-NMSC-009, ¶ 37.

Beyond the fact that a "moral hazard" standard does not exist under the ETA or the PUA, "moral hazard" is not an administrative law standard recognized in New Mexico.[31] In this proceeding, it appears that the concept of a "moral hazard" was borrowed from the insurance contract context, where New Mexico courts have recognized that an insured may have an incentive to increase its risky behavior because the consequences of that behavior are, in part, contractually transferred to the insurer. *See, e.g., Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶ 32, 127 N.M. 603. This is not an insurance contract case, and this concept has never been imported to New Mexico administrative law. Nor are contractual principles implicated here, as this Court has made clear that utility customers do not have any contractual rights to specific utility rates or to utility assets.

[31] To the best of PNM's knowledge, prior to the proceeding below, the concept of a "moral hazard" had been invoked only once before the Commission, referenced briefly by a witness questioning whether a ratemaking proposal would create a potential regulatory advantage for the utility. *See, Final Order Partially Adopting Corrected Recommended Decision*, 2016 WL 5719430, at *46, Case No. 15-00261-UT (NMPRC Sept. 28, 2016) (discussing witness's discussion of moral hazard in the regulatory context).

*CFRE*, 2022-NMSC-010, ¶¶ 34, 53 ("Energy consumers generally do not possess a claim of entitlement to utility property or a right to any fixed utility rate.").

Regardless, the RD determined that "PNM's new plan constitutes a moral hazard that, without the remediation ordered herein, threatens substantial and potentially irremediable harm to ratepayers." **[25 RP 4442 ¶ 9]** The RD did not cite any New Mexico legal precedent, and the New Mexico "moral hazard" insurance cases are inapposite to the securitization of regulated utility assets under the ETA. The Commission instead supports its adoption of a new "moral hazard" standard with a single Florida Public Service Commission ("PSC") case[32] and the internet's Investopedia. **[25 RP 4390-91]**

The Florida PSC decision did not define a "moral hazard," or adopt a "moral hazard" regulatory standard; it merely summarized witness testimony describing the potential for a "moral hazard." Reliance on Investopedia as the only other source

[32] *In Re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies*, 2001 WL 1104733, at 134 (Fla.P.S.C.).

for creating a "moral hazard" standard speaks to a lack of legal support for the Commission's decision to break new ground.[33]

The Commission's ratemaking authority derives from the legislature. *See, State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 13, 127 N.M. 272 (the nature and extent of the Commission's authority is defined by the Legislature). Making new law is the province of the legislature, and "infringement [of that legislative province] occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own." *Id.*, ¶ 12. The Commission cannot vest itself with a new omnibus "moral hazard" authority to impose a remedy allowed neither by the ETA nor the Financing Order.

Further, the Commission's general supervisory rate authority does not justify its belief that without the rate credit, PNM's rates would no longer be just and reasonable under a "moral hazard" standard. First, the ETA, not the Commission's general supervisory ratemaking authority, controls cost recovery in securitization proceedings pursuant to the ETA. Second, even if the Commission could resort to

[33] Jurisprudence questions aside, Investopedia's website specifically states that its "content is for informational purposes and is not intended to substitute for the advice of a licensed or certified attorney, accountant, financial advisor, or other certified financial professionals." *See* https://www.investopedia.com/about-us-5093223. (last accessed May 21, 2023)

its general ratemaking authority to dictate its preferred result here, it cannot do so creating an entirely new "moral hazard" standard to try to justify piecemeal ratemaking.

### D. The Rate Credit in the Final Order Unlawfully Departs from the Commission's Well-Established Policy Against Piecemeal Ratemaking.

Piecemeal ratemaking is frequently referred to as single-issue ratemaking,[34] as it "involves changing rates for one item and ignoring all of the other cost of service elements."[35] The Commission has explained why it is critical to avoid piecemeal ratemaking:

> 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 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.[36]

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[34] *Final Order* at 149, Case No. 2262 (April 12, 1990). *See also, Final Order* at 43, Case No. 15-00166-UT (Nov. 18, 2015).

[35] *Id.*

[36] *Recommended Decision to Dismiss Proceeding* at 24-25, Case No. 2361 (Sept. 30, 1991), approved, *Final Order Approving Recommended Decision to Dismiss Proceeding,* Case No. 2361 (Feb. 6, 1992).

The Commission has adhered to its policy against piecemeal ratemaking for decades.[37] Further, the Commission has applied its policy against piecemeal ratemaking both in instances where seizing on a single ratemaking factor would increase rates to customers, and where it would decrease rates.[38]

While the Commission has long applied its policy against piecemeal ratemaking, it has recognized that this policy is subject to statutory exceptions. [39] *See Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regul. Comm'n*, 2010-NMSC-013, ¶ 11, 148 N.M. 21 (recognizing that the Legislature can create a statutory exception to the general prohibition against piecemeal ratemaking). The

[37] *See, e.g.*, *Final Order Partially Approving 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]." *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 Approving Recommended Decision to Dismiss Proceeding* at Exhibit A 24, Case No. 2361 (Feb. 6, 1992) (Commission "frown[s] upon using selective items to either increase or decrease rates.").

[38] *Final Order* at ¶ 61, Case No. 08-00092-UT.

[39] *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.").

ETA is such a statute, as it displaces the general rule against piecemeal ratemaking with regard to the specific rate adjustment that can occur when an ETC is implemented upon issuing ETA bonds. This does not, however, create a general exception to the prohibition against piecemeal ratemaking that allows the Commission to unilaterally adjust PNM's rates when these ETA bond issuance and ETC implementation criteria have not been met.

The Commission's Final Order directly contravenes its own long-standing policy against piecemeal ratemaking. As a result, the precise harm that the rule against piecemeal ratemaking is designed to guard against will result. If the Final Order stands, PNM's authorized annual revenues will be decreased through the ordered rate credit, with no consideration given to whether "other expense items may have decreased or revenues may have increased over their respective allowances in current rates,"[40] and no thought given to "reviewing the utility's complete cost of service."[41]

The rate credit mandated by the Final Order, outside of a complete cost of service review in a general rate proceeding, is classic single-issue ratemaking. Even assuming *arguendo* that the rate credit is permissible, it would need to be evaluated

[40] *Final Order* at ¶ 61, Case No. 08-00092-UT.

[41] *Id.*

in the context of PNM's *complete* cost of service, and balanced against other factors, like PNM's plant investment subsequent to PNM's last rate case,[42] which would increase PNM's annual revenue requirement and rates. PNM presented evidence that its substantial investment in new plant subsequent to its most recent 2016 rate review proceeding would cause PNM's rates to increase when PNM's overall investments, costs, expenses and revenues are considered as a whole.[43] The Final Order essentially ignored this evidence.

The PUA requires that public utility rates be just and reasonable. *See* NMSA 1978 § 62-3-1(B) (2008) and § 62-8-1 (1941). The Final Order ignored the unrefuted testimony that the rate credit's substantial reduction to PNM's authorized revenues, without consideration of PNM's ongoing costs of providing service, will preclude any reasonable opportunity for PNM earn its authorized return on investments.[44] Rates that do not provide this reasonable opportunity are inherently not fair, just or reasonable. In *CFRE*, this Court reiterated that rates that prevent the

[42] PNM's current rates have been in effect as of January 1, 2019, when the last phase of the rates authorized in Case No. 16-00276-UT became fully implemented.

[43] For instance, PNM presented evidence that, had it had filed a general rate case in June 2021 with rates effective July 2022, it estimates the rate increase would have been in the range of $23 million to $36 million. **[20 RP 2646-2647]**

[44] Monroy explained that PNM's revenue would decrease by $98 million on an annual basis and as a result, PNM would not reasonably be able to earn its return set by the Commission and would suffer from reduced cash inflows and diminished earnings. **[20 RP 2760-2761]**

utility from earning a reasonable rate of return on its investments violate due process, and that the ETA's financing framework associated with abandoning coal plants such as SJGS promotes the legitimate interests of Section 62-3-1(B) of the PUA. *CFRE*, 2022-NMSC-010, ¶ 42.

Ignoring the record evidence that a consideration of all factors would require an increase, rather than a decrease, in PNM's rates, the Final Order imposed an immediate rate decrease (i.e., the rate credit) without making the requisite finding that PNM's rates, viewed in totality, are unjust and unreasonable if a rate credit is not established.[45] The RD adopted by the Final Order skipped that step altogether, finding that the circumstances presented in its investigation require the Commission to use its supervisory authority over rates to establish a "remedial mechanism that ensures rates charged to PNM customers are fair, just and reasonable and protects customers from the double recovery and other potential harms …." **[25 RP 4441-42, ¶ 8]**

As a matter of law, the Commission cannot conclude it requires a remedial mechanism to ensure just and reasonable rates when there has been no finding of unjust and unreasonable rates and there has been no consideration of the aggregate

[45] The RD simply assumes that PNM's rates will become unjust and unreasonable unless the rate credit is implemented. **[25 RP 4441-4442, ¶ 8]** There is no factual basis to support a finding that, absent the rate credit, PNM's rates will no longer be just and reasonable.

cost of service underlying those rates. The Commission itself has underscored this: "[u]nless a complete picture is presented, the Commission cannot possibly fulfill its duty to determine just and reasonable rates."[46]

Section 62-8-7(D) permits the Commission to determine a just and reasonable rate "[i]f after a hearing the commission finds the proposed rates to be unjust, unreasonable or in any way in violation of law." This does not, however, confer upon the Commission the unfettered authority to engage in piecemeal ratemaking not authorized by statute outside of a full rate review proceeding. While the Commission held a hearing, it did not assess PNM's current annual cost of service and related revenue requirement, and made no finding that PNM's current rates, in the aggregate, are unlawful, unjust or unreasonable. The Final Order's rate credit is *ultra vires* and cannot stand. *See City of Albuquerque v. N.M. Pub. Regul. Comm'n*, 2003-NMSC-028, ¶ 22, 134 N.M. 472 ("Absent a finding of unreasonableness, the PRC lacked authority to modify the common law rule that permits municipalities to require that utilities bear the expense of relocation for such improvement project. Therefore, we conclude the tariff, as adopted [by the PRC], is ultra vires …"). It

[46] *Recommended Decision to Dismiss Proceeding* 25, Case No. 2361 (Sept. 30, 1991), approved, *Final Order Approving Recommended Decision to Dismiss Proceeding*, Case No. 2361(Feb. 6, 1992).

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was error for the Final Order to engage in piecemeal ratemaking to order a rate credit not authorized by the ETA or permitted under the PUA.

### E. The Final Order Unlawfully Requires a Future Prudence Review of the Timing of the Issuance of the ETA Bonds.

Based on its finding that PNM improperly delayed issuing the ETA bonds, the RD recommended that the Commission evaluate the prudence of PNM issuing the bonds beyond the abandonment dates of SJGS Units 1 and 4. **[25 RP 4442, ¶ 11]** The RD recommended that the Commission examine "any increased interest rate that PNM's bonds incur as a result of the delay," whether PNM has taken steps to protect customers from interest rate increases, and "whether PNM's delay beyond the dates of abandonment is outside the authority provided the Company in the Financing Order." **[*Id.*]**

The Commission adopted this recommendation and required that two benchmark dates be established to compare proxy interest rates from the dates of abandonment with actual interest rates from the bond issuance. **[26 RP 4587]** The Commission additionally required PNM to track all of its costs incurred in the show cause proceeding for a future prudence review. [***Id.***]

As with other provisions in the Final Order, the Commission has no legal justification to impose this future prudence review requirement. The Commission expressly acknowledges that the terms of the Financing Order do not require that

PNM issue the ETA bond by any specific date.[47] There is no legitimate legal basis for a prudence review related to the timing of the bond issuance. If the Commission cannot and did not dictate the timing of the bond issuance, then it cannot order cost disallowances or impose other financial consequences based on the timing of the bond issuance compared against an artificially created benchmark date. Again, the Commission cannot do indirectly, through a future prudence review, that which it cannot do directly. *White,* 2010-NMCA-043, ¶ 16.

The contemplated future prudence review would also necessarily involve assessing whether the final bond rates may have been lower at the time of the abandonment of SJGS (without PNM having known that would be held to this standard), as opposed to when the bonds are actually issued. Such an exercise would constitute impermissible hindsight prudence review. *PNM*, 2019-NMSC-012, ¶ 29 ("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.").

Moreover, neither PNM nor the Commission are qualified or in the business of "timing the market" to know if interest rates today will be lower than interest rates

[47] Variance Order, ¶ 26 at 9. *See also* Financing RD, ¶ 6 at 150-151 ("PNM and SPE shall be afforded flexibility in establishing the terms and conditions of the Energy Transition Bonds[.]").

at a given point in the future. The only evidence on this point specifically warns against such efforts and disavows this as a consideration for when bonds should be issued. **[21 RP 3228-3229]**

It is also problematic that the contemplated prudence review appears to be a one-way street. The Final Order clearly contemplates a remedy if PNM were found imprudent, should interest rates be higher at the time of bond issuance than at the time of SJGS abandonment. There is no provision in the Final Order that PNM will benefit should interest rates actually be lower. The one-sided remedy of this hindsight prudence review provides another basis to invalidate this provision.[48] This problem is exacerbated because the *ultra vires* Final Order itself, and the statements therein suggesting that PNM may no longer have the authority to issue the bonds within the scope of the Financing Order, may themselves impair the marketability and ratings of those bonds, as discussed in the following section. The Commission's impermissible hindsight prudence review did not consider this and provides no basis to distinguish and isolate any impact on marketability due to the timing of the bond issuance, as opposed to impairment caused by the Final Order itself.

[48]*See, e.g.*, *Mountain States Tel. & Tel. Co. v. N.M. Corp. Comm'n*, 1982-NMSC-127, ¶ 26, 99 N.M. 1 ("The rate-making process involves a balancing of investor and consumer interests. Neither is paramount."); *Final Order* at ¶ 61, Case No. 08-00092-UT (ratemaking must consider all rate setting factors to be fair to both customers and the utility).

### F. The Final Order Unlawfully Questions the Irrevocability of the Financing Order and PNM's Authority to Issue the ETA Bonds.

As part of the prudence inquiry, the RD specifically includes the question of whether PNM's proposed issuance of the ETA bonds is outside the authority of the Financing Order and whether the marketability of the bonds may be impaired. **[25 RP 4442, ¶ 11]** The adoption of this recommendation in the Final Order unlawfully implies that there is some doubt about PNM's continued authority to issue the ETA Bonds. Both the ETA and the Financing Order establish and confirm PNM's continuing and irrevocable right to issue the ETA bonds.

The fact that the Commission raised as a purportedly valid issue whether PNM is still authorized to issue the ETA bonds itself impairs their marketability and may prevent their issuance. As Atkins confirmed, regulatory stability surrounding the approval of a securitization bond issuance is critical and the legal and regulatory risks in utility securitization bond issuances are the most important among the key drivers in rating the bonds. Any challenge by a utility commission to securitization is a negative credit factor. **[21 RP 3236]** If legal opinions cannot be rendered that a bond issuance complies with a financing order, the bonds will not be issued. **[21 RP 2918:2-2920:11]**

PNM has and is fully complying with the Financing Order and the ETA. Further, even if the Final Order is upheld, it would not mean that PNM is precluded

from issuing the ETA Bonds. The ETA establishes financing orders as unique and inviolable legal instruments. Section 62-18-5(D) provides that the "issuance of a financing order is the only approval required for the authority granted in the financing order." The Financing Order grants PNM, through the authorized special purpose entity, the right to issue the ETA bonds in one or more series without the need to secure a separate order for each issuance.[49] This is in conformity with 62-18-5(H) of the ETA.

Moreover, Section 62-18-7(A) provides that a "financing order is irrevocable and the commission shall not reduce, impair, postpone or terminate the energy transition charges approved in the financing order, the energy transition property or the collection or recovery of energy transition revenues." The irrevocable nature of financing orders is reconfirmed in other sections of the Energy Transition Act as well. *See* §§ 62-18-5(H), 62-18-7(C), 62-18-9(B). Financing orders remain in effect until the authorized ETA bonds and any related financing costs have been paid in full. § 62-18-9(A). Dispositive of this issue is this Court's holding in *CFRE* that "[o]nce issued '[a] financing order is irrevocable . . . .'" *CFRE*, 2022-NMSC-010, ¶ 8. Thus, there is no question that the Financing Order remains effective and PNM has legal authority to issue the ETA bonds.

[49] Financing RD, ¶¶ 23 and 24 at 138.

The Financing Order confirms that PNM has the continuing, irrevocable right to cause the issuance of the ETA bonds in one or more series in accordance with the terms of the order[50] Indeed, the Financing Order repeatedly confirms that it and PNM's rights thereunder are irrevocable and not subject to impairment by the Commission or otherwise.[51] As discussed above, the Commission is precluded from unilaterally amending the Financing Order absent a request by PNM. § 62-18-7(A) and (B).

Even if PNM's failure to issue the ETA bonds at the time of abandonment was found to be inconsistent with intent of the ETA or Financing Order, such a finding would not negate PNM's continued right to issue the bonds. Section 62-18-10(C) provides that the "failure of a qualifying utility to comply with any provision of the Energy Transition Act shall not invalidate, impair or affect a financing order,

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[50] *Id.*, ¶ 28 at 156.

[51] *Id.*, *See e.g.*, "The financing order is irrevocable, and the ETCs are not subject to reduction, alteration, or impairment by any further action of the Commission[.]" Financing RD at 61. "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, the Energy Transition Property or the collection or recovery of energy transition revenues, including recovery of the Ongoing Financing Costs through the Energy Transition Charges.") *Id.* at ¶ 56 at 147; *see also*, ¶ 28 at 156. "Pursuant to Section 9(B) of the ETA, this Financing Order shall remain in effect and unabated notwithstanding the bankruptcy, reorganization or insolvency of the qualifying utility (PNM or its successors) or any non-utility affiliate or the commencement of any proceeding for bankruptcy or appointment of a receiver. *Id.* at ¶ 57 at 147; s*ee also, id.*, ¶ 45 at 160.

energy transition property, energy transition charge or energy transition bonds and financing costs."[52] The Commission's recourse in the event of a violation of a financing order or the ETA is to require compliance and to impose statutory penalties. §§ 62-18-11(B)(1) and (2).

Finally, it is disingenuous for the Commission to suggest that PNM is not entitled to issue the ETA bonds given the Final Order's requirement that PNM fully fund severance pay for impacted workers together with the state-administered funds. **[25 RP 4431-4433]** The Commission's authority to require PNM to make these payments is founded solely upon Sections 62-18-2(H)(2)(b), 62-18-2(H)(4), and 62-18-16 of the ETA and through a valid and enforceable Financing Order.

## VI. CONCLUSION

The Commission's Final Order should be overturned because it is contrary to the ETA, exceeds the Commission's general ratemaking authority, and conflicts with the Financing Order upheld by this Court. The doubt cast on PNM's continued rights to issue the ETA bonds by the Commission is contrary to both the ETA and the Financing Order and impairs the marketability of the bonds. The Final Order's call to further investigate PNM's continued rights to issue the ETA bonds must be

[52] *See also,* § 62-18-23 providing that a qualifying utility may file an initial application for a financing order for a period of twelve years after the enactment of the ETA.

vacated as unlawful and its ability to take further actions that would affect the validity of the bonds, or reduce, impair, postpone or terminate the energy transition property or the ETCs authorized in the irrevocable Financing Order must be rejected. PNM's continuing right to issue the bonds must be confirmed.

## VII. REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-319(B)(1) NMRA, PNM respectfully requests that the Court allow oral argument on the important matters at issue in this appeal.

## VIII. STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G), NMRA, PNM states that the body of the foregoing Brief-in-Chief is 46 pages and contains 10,971 words in Times New Roman 14-point font, a proportionately-spaced typeface, as calculated by Word for Microsoft 365 MSO Version 2108, and is therefore within the limits permitted under Rule 12-318(F)(3) NMRA.

Respectfully submitted this 22nd day of May 2023.

**PUBLIC SERVICE COMPANY OF NEW MEXICO**

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of PNM's Brief-in-Chief was served on all counsel of record through the Court's Odyssey filing system on May 22, 2023.

*/s/ Stacey J. Goodwin*
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