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 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

JOINT ANSWER BRIEF OF INTERVENORS-APPELLEES

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COME NOW Western Resource Advocates ("WRA"), the County of Bernalillo, the New Mexico Office of the Attorney General ("Attorney General"), New Energy Economy ("NEE"), the New Mexico Affordable Reliable Energy Alliance ("NM AREA), the Coalition for Clean Affordable Energy ("CCAE") and Prosperity Works, ("Intervenors-Appellees") and, pursuant to the Rules of Appellate Procedure and this Court's scheduling Orders, hereby file their Joint Answer Brief in the above-captioned appeal.

I. REQUEST FOR RELIEF

The Intervenors-Appellees respectfully request this Court to find that Public Service Company of New Mexico's ("PNM") appeal was not timely filed for the reasons stated in Section IV.A, below.

In the alternative, Intervenors-Appellees respectfully request this Court to find that PNM's arguments in its Brief-in-Chief ("BIC") are barred by the equitable doctrine of *res judicata* for the reasons stated in Section IV.B, below.

In the alternative, the Intervenors-Appellees respectfully request this Court to affirm the New Mexico Public Regulation Commission's ("NMPRC" or "Commission") June 29, 2022 Final Order Adopting Recommended Decision with Additions ("Show Cause Final Order") [RP 4575-4593]. In affirming the Show Cause Final Order, the Intervenors-Appellees respectfully request the Court to find and hold as follows:

1. The Commission has the authority under the New Mexico Public Utility Act ("NMPUA"), NMSA 1978, Section 62-3-1, *et seq.*, and the Energy Transition Act ("ETA"), NMSA 1978, Section 62-18-1, *et seq.*, to require PNM, in its April 1, 2020 Final Order on Request for Issuance of a Financing Order ("Financing Final Order") and in its Show Cause Final Order, to issue immediate rate credits at the time of the abandonment of the San Juan Generating Station ("SJGS" or "San Juan");
2. The NMPUA and the ETA are two statutes covering the same subject matter and should be harmonized and construed together, when possible, in a way that facilitates the operation and the accomplishment of the goals of both statutes. *See N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n* ("*NMIEC 2007*"), 2007-NMSC-053, ¶¶19-20, 142 N.M. 533;
3. PNM has not met its burden of demonstrating that the Show Cause Final Order is arbitrary and capricious;
4. The Commission's decision to order rate credits in its Show Cause Final Order does not disturb the finality of its Financing Final Order or otherwise violate the ETA;
5. The Commission's ordered rate credits, in its Financing Final Order and in its Show Cause Final Order, do not violate the Commission's policy against

piecemeal ratemaking or any precedent of this Court against piecemeal ratemaking;

6. The Commission's ordered prudence review of PNM's decision to delay the issuance of the energy transition bonds, is not ripe for review as the Commission has not issued its final decision on that prudence review and PNM has suffered no injury-in-fact; and
7. The Commission has the broad supervisory authority under the NMPUA, and the ETA, to investigate the prudence of PNM's decision to delay the issuance of the energy transition bonds.

II. BACKGROUND

A. PNM's Application

On July 1, 2019, PNM applied to the Commission for the issuance of a financing order in the case below, NMPRC Case No. 19-00018-UT, PNM's Consolidated Application for the Abandonment and Replacement of the SJGS and Related Securitized Financing Pursuant to the ETA ("Application"). [24 RPS[1] 006893-007027]. In that filing, PNM stated that its "Application is filed pursuant to, and in accordance with, the provisions of the Energy Transition Act" and was intended to follow "the Energy Transition Act's balanced approach to energy

[1] RPS stands for "Record Proper Supplemental" and refers to the supplemental Record Proper that was approved by this Court's July 20, 2023 Order.

transition, which minimizes rate impacts and brings long-term benefits to consumers and the State of New Mexico" and which provides a low-cost option for funding the undepreciated investment in the SJGS plant. Application pp.1, 10 [24 RPS 06898, 006907].

Importantly, PNM testified throughout the initial phase of Case No. 19-00018-UT that the securitized bonds would be issued "at or around" the time SJGS was abandoned. PNM Application, pp.8, 21 [24 RPS 006905; 006918]; 2019 Direct Testimony of Henry Monroy ("2019 Monroy Direct"), pp.4-7, 39-41, 63 [28 RPS 009207-009210; 009242-009244; 009266]; PNM Exhibit HEM-2 [28 RPS 009272]; 2019 Direct Testimony of Michael Settlage ("2019 Settlage Direct"), pp.3, 20, 26-28 [30 RPS 009780; 009797; 009803-009805]; PNM Exhibits MJS-6, MJS-7, and MJS-8 [30 RPS 009839; 009841-9844; 009846]; and 2019 Direct Testimony of Elisabeth Eden, p.15 [30 RPS 009922]. PNM provided testimony that the bonds would be issued on July 2, 2022, assuming SJGS would be abandoned on June 30, 2022 as scheduled. 2019 Settlage Direct, p.3 [30 RPS 009780]. Keeping with this schedule, PNM would begin charging its customers the Energy Transition Charge ("ETC") during its next billing cycle in August 2022. *Id.* [30 RPS 009780].

As part of PNM's Application, Section 62-18-4(B)(11) of the ETA required PNM to propose a 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."

PNM's proposed ratemaking method was described by its witness, Mr. Monroy, as follows:

> PNM intends to file a general rate case [in the Summer of 2021] 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….However, if there is a timing difference between commencement of the collection of the energy transition charge from customers <u>when bonds are issued upon the abandonment</u> and the time that base rates are adjusted to reflect the abandonment of the San Juan coal plant, then a regulatory liability will [be recorded to] protect customers from double recovery of the undepreciated investments.

2019 Monroy Direct, p.41 (emphasis added) [28 RPS 009244]. Mr. Monroy also explained PNM's "regulatory liability" would be created at the time of abandonment. *Id.* 38-41 [28 RPS 009241-009244].

PNM's initial Notice, which was mailed to customers along with their bills, described the savings they would receive due to the abandonment and securitization of SJGS. The Notice stated that customers could expect a net savings of approximately $7.11 for a residential customer using an average of 600 kWh per month in 2023. Affidavit of Notices in Customer Bills, Exhibit A (Sep. 4, 2019) [5 RPS 001248]. These estimated savings were based on the bonds being issued at the time of abandonment.

B. The Commission's Financing Final Order

The Hearing Examiners issued their Recommended Decision on PNM's Financing Application ("Financing RD") on February 21, 2020. [41 RPS 014674-014847]. In the Financing RD, the Hearing Examiners granted most of PNM's requested approvals, with the exception of PNM's proposed Section 62-18-4(B)(11) rate methodology. *Id.* [41 RPS 014674-014847]. Instead, the RD adopted the ratemaking proposal of NM AREA and WRA. *Id.* 80-86, 127-128 ¶44, 157 ¶33 [41 RPS 014760-014766, 014805-014806, 014835].

Under the NM AREA/WRA ratemaking proposal, PNM was required to issue immediate rate credits to customers upon the abandonment of SJGS in the event PNM had not filed its promised 2021 rate case. The rate credits were intended to remove SJGS costs from PNM's base rates at the time of abandonment. *Id.* 81-86 [41 RPS 014761-014766]. The Hearing Examiners stated, "Ratepayers should not bear the risk of the double recovery that would result if PNM's rate case filing is late." *Id.* 85 [41 RPS 014765]. The Hearing Examiners further explained that the rate credit had to be designed to remove "the full cost impact of the [SJGS] abandonment in PNM's base rates." *Id.* 84-85 [41 RPS 014764-014765]. The Financing RD was clear and unequivocal on the requirement for immediate rate credits upon the abandonment of SJGS. *Id.* [41 RPS 014764-014765].

The Financing RD also held that the ETA required PNM to issue the energy transition bonds close in time to the abandonment of SJGS:

> The ETA then provides for the establishment of non-by passable charges, i.e., Energy Transition Charges (ETCs), to be paid by PNM customers to cover the bonds' debt service costs over the estimated 25-year life of the bonds. The ETA also provides for ratemaking mechanisms designed (1) to eliminate the costs of the abandoned facilities at the time the ETC rates are first collected (upon the abandonment of the units)….

Id. 13 (emphasis added) [41 RPS 014693].

On April 1, 2020, the Commission issued its Financing Final Order [44 RPS 014945-014959] in which it adopted, with a few changes, all of the proposed findings of fact, conclusions of law and ordering paragraphs contained in the Hearing Examiners' Financing RD including the requirement that PNM issue rate credits upon the SJGS abandonment. Financing Final Order, p.10, ¶A [44 RPS 014954].

On April 6, 2020, PNM issued its Compliance Filing in which it fully accepted the findings, conclusions and ordering paragraphs of the Commission's Financing Final Order. [44 RPS 014960-014976]. In Attachment A of that Compliance Filing, PNM amended Paragraph 61 of its Consolidated Application to read, in part, as follows:

> If PNM has not adjusted its base rates charged to customers in a general rate case to reflect the abandonment of the remaining SJGS plant before the start date of the Energy Transition Charges, PNM shall implement an immediate credit to customers in the amount of its cost of service

> related to SJGS Units 1 and 4 (including capital, operations and maintenance, and all other expenses) as an interim rate adjustment mechanism upon the start date of the Energy Transition Charges. This credit shall remain in effect until the conclusion of PNM's general rate case that includes the full cost impact of the abandonment of SJGS in PNM's base rates.

Id. 5 ¶F [44 RPS 014973].

Consistent with its April 6, 2020 Compliance Filing, PNM did not appeal the Commission's April 1, 2020 Financing Final Order. In fact, PNM defended the validity of the Commission's Financing Final Order in *Citizens for Fair Rates and the Environment v. New Mexico Public Regulation Commission* ("*CFRE*"), 2022-NMSC-010, ¶4, 503 P.3d 1138, 1146. Therefore, for the purposes of this appeal, the Commission's Financing Final Order is final and binding on PNM, including the requirement that PNM issue rate credits upon the abandonment of SJGS.

C. The Commission's Show Cause Proceeding

The Commission's Show Cause Proceeding began with the filing of the Joint Motion for Order to Show Cause by WRA, CCAE and Prosperity Works on February 28, 2022. [3 RP 0229-0249]. In that Motion, the Joint Movants alleged that PNM intended to delay the issuance of the securitized bonds until after the conclusion of its next rate case, which was to be filed in December 2022, well after the abandonment of the SJGS plant. *Id.* 1-2 [3 RP 0230-0231]. The Joint Movants alleged that under PNM's new rate plan it would "collect all of its [SJGS] costs in

rates, even though the plant is no longer serving PNM customers and PNM is no longer incurring costs to operate the plant." *Id.* 2 [3 RP 0231].

The Joint Movant's allegations regarding PNM's intentions were confirmed by PNM in its March 14, 2022 Verified Response to Joint Motion for Order to Show Cause ("Verified Response"). [3 RP 0255-0291]. In the Verified Response, PNM argued that neither the Commission's April 1, 2020 Financing Final Order nor the ETA required the issuance of the securitized bonds at the time SJGS was abandoned. PNM also argued that the Financing Final Order and the ETA only required SJGS costs to be removed from rates at the time the ETC was implemented. *Id.* 4-7, 9-10, 21 fn. 67 [3 RP 0261-0264; 0266-0267; 0278].

The Commission held an evidentiary hearing on May 23 to May 26, 2022. On June 17, 2022, the Hearing Examiners issued their Recommended Decision in Show Cause Proceeding ("Show Cause RD"). [25 RP 4328-4447]. The evidentiary hearing included testimony from four PNM witnesses and nine intervenor witnesses. Show Cause RD, p.7 [25 RP 4338]. The evidence showed that PNM never informed its customers, the Commission or the parties to the case, of its plan to delay issuance of the bonds and extinguish customers' expected savings. *Id.* 23-24 [25 RP 4354-4355]. However, PNM went to great lengths to develop messaging to persuade customers that PNM's withholding of the SJGS savings was altruistic. *Id.* 59-64 [25 RP 4390-4395]; CCAE Exhibit NL-4-1, p.3 [22 RP 3438]; CCAE

Exhibit NL-4-2 [22 RP 3449-3462]; CCAE Exhibit NL-4-3, p.4 [22 RP 3466]; and CCAE Exhibit NL-4-4 [22 RP 3474-3494]. PNM was aware that its plan would be viewed negatively by customers. PNM's public relations strategy outlined the risks involved with PNM's new plan:

> - This runs the risk of looking like a corporate shell game, eroding our credibility for future proposals and planning.
> - Impression of the company could have long-term implications for their reputation, brand and trustworthiness here – not only for customers but also regulation.
> - PNM is trying to avoid paying the bonds and savings to customers, this may be viewed as a corporation…breaking promises that we made.

Show Cause RD, p.63 [25 RP 4394], *citing* CCAE Exhibit NL-4-4 [22 RP 3489].

In the Show Cause RD, the Hearing Examiners summarized their findings as follows:

> The Commission's investigation has revealed PNM's new plan to issue the energy transition bonds approximately 15 months after PNM's full and final abandonment of the San Juan plant. This investigation has also revealed that PNM did not feel under any duty or compulsion to disclose – and indeed did not voluntarily disclose – its new plan to substantially delay the $360.1 million securitized bond issuance to the Commission, to the parties to this case, or the ratepayers who would be eventually bound to pay the non-bypassable charge on their bills. It is also evident that PNM's new plan contradicts the representations the Company made in its Application and its witnesses attested to in the initial phase of this proceeding. PNM's representations were material to the findings and conclusions made in the *Financing Order*, … and through the issuance of securitized bonds upon or shortly after the abandonment of San Juan Units 1 and 4.
>
> …[W]hat this investigation has revealed is that PNM's new plan 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; that fundamental relationship at the core and operation of the ETA is discussed in the next section of this decision. For present purposes, it suffices to find that the *Financing Order* does not contemplate or establish any remedy to address the de-linkage of the abandonment from the securitization that PNM is now planning. In short, the materially changed circumstances revealed in this proceeding require the Commission to issue a new order grounded in the Commission's rate-setting authority under the Public Utility Act, an order that addresses the extraordinary circumstances and establishes a remedial mechanism that ensures the rates charged to PNM customers are just and reasonable and protects customers from the double recovery and other potential harms resulting from the de-linkage PNM conceived and opted to execute without this Commission's prior authorization.

Show Cause RD, pp.50-51 [25 RP 4381-4382].

The remedial mechanism adopted by the Hearing Examiners to address PNM's new rate plan was to order PNM to issue immediate rate credits upon the abandonment of SJGS. Show Cause RD, p.112, ¶¶B & C [25 RP 4443]. The Show Cause RD clearly stated that the purpose of the rate credits was to enforce the rate credits previously ordered in the Commission's April 1, 2020 Financing Final Order. Show Cause RD, pp.109-113 [25 RP 4440-4444].

On June 29, 2022, the Commission issued its Final Order Adopting Recommended Decision with Additions ("Show Cause Final Order") in which it adopted the Show Cause RD. [26 RP 4575-4593]. The Final Order rejected PNM's arguments and found that PNM's "new plan" to delay the issuance of the bonds and avoid the payment of the rate credits ordered in the Financing Final Order:

> enables a double recovery of costs by PNM. PNM ratepayers would pay and PNM shareholders would be able to continue to recover approximately $134 million of costs for the San Juan units – facilities that are no longer providing service to PNM customers – plus the costs of other resources that replace the San Juan units until the conclusion of the promised rate case in January or February 2024. Then, after the issuance of bonds in 2024, PNM ratepayers would pay and PNM shareholders would also recover the full amount of the abandoned plants measured at their value on the dates of their abandonment in June and September 2022 – without a credit resulting from ratepayers' payment of costs for Units 1 and 4 between the dates of the abandonments and the conclusion of the promised rate case in 2024. PNM ratepayers would be denied a large portion of the savings intended by the ETA. . . .We therefore recommend that PNM should be required to issue rate credits to PNM's ratepayers upon the abandonment of each unit to completely remove the costs of each unit from PNM's rates. The Commission's action would be taken under the Commission's general ratemaking authority to ensure fair, just, and reasonable rates.

Show Cause Final Order, p.11 [26 RP 4586].

PNM appealed and requested a Stay of the Commission's Final Order resulting in this Docket No. S-1-SC-39440.

III. STANDARD OF REVIEW

PNM has correctly stated the standard of review of Commission orders, and concedes that it carries the burden of proving that the Commission's Show Cause Final Order "is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regul. Comm'n*, 2010-NMSC-013, ¶17, 148 N.M. 21, 229 P.3d 494; *see also* NMSA 1978, § 62-11-4 (1965). [BIC 13-14].

As demonstrated in this Answer Brief, PNM has not met this standard. For this reason, the Commission's requirement for PNM to issue immediate rate credits in its Show Cause Final Order is: (1) within its statutory ratemaking authority under the NMPUA and the ETA; (2) based on substantial evidence in the record; and (3) neither arbitrary nor capricious. Additionally, the Commission has the broad supervisory authority under the NMPUA, and the ETA, to investigate the prudence of PNM's decision to delay the issuance of the energy transition bonds. The Show Cause Final Order should be affirmed by this Court.

IV. ARGUMENTS AND AUTHORITIES

A. The Court Should Find that PNM Does Not Have Standing to Appeal as it Did Not File a Timely Appeal to the April 1, 2020 Financing Final Order.

PNM's appeal in this case is barred because it did not make a timely appeal of the Commission's April 1, 2020 Financing Final Order. The Show Cause RD clearly states that the purpose of the ordered rate credits was to enforce the rate provisions of the Commission's Financing Final Order. Show Cause RD pp.109-113 [25 RP 4440-4444]. The Financing Final Order adopted the RD's recommendation that PNM be required to issue rate credits, upon abandonment, to disgorge the SJGS costs embedded in its rates if it had not filed a timely rate case. Financing Final Order, pp.10-11 [44 RPS 014954-014955]; Financing RD, pp.84-85 [41 RPS 014674-014765].

The right of appeal granted PNM in Section 62-11-1 of the NMPUA and Section 62-18-8(B) of the ETA provided PNM with a full and complete remedy for any perceived errors in the Commission's April 1, 2020 Final Order. *Leavell v. Town of Texico,* 1957-NMSC-81, ¶_, 63 N.M. 233, 235, 316 P.2d 247 ("Where a statute limits the time for bringing an action, that limitation is binding upon the court so that if the action is not brought within that period the court has no jurisdiction").

Section 62-18-8(B) states:

> An aggrieved party may file a notice of appeal with the supreme court in accordance with Section 62-11-1 NMSA 1978; provided that such notice shall be due no later than ten calendar days after denial of an application for rehearing or, if rehearing is not applied for, no later than ten calendar days after issuance of the financing order.

As noted above, rather than appealing the April 1, 2020 Financing Final Order, PNM filed a Compliance Filing on April 6, 2020 in which it fully agreed to the Final Order and amended its Application to be consistent with that Order. [44 RPS 014960-014976]. PNM cannot set the clock back to April 2020, as it is trying to do in this appeal, and raise arguments that it would have made to this Court had it filed an appeal in a timely manner. *Leavell,* 1957-NMSC-81, ¶_, 63 N.M. 235.

B. The Equitable Doctrine of Res Judicata Prevents PNM from Rearguing Claims that the Commission Rejected When It Issued its March 1, 2020 Final Order.

The equitable doctrine of *res judicata* prevents PNM from rearguing, in this appeal, arguments that it made, and lost, when the Hearing Examiners issued their February 21, 2020 Financing RD. This equitable doctrine, also known as claim preclusion, is applicable to the Commission's proceedings. *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1980-NMSC-5, ¶_, 94 N.M. 731, 736-37, 616 P.2d 1116. The doctrine is rooted in notions of judicial economy. *Res judicata* ensures the finality of decisions. Under *res judicata*, "a final judgment on the merits bars further claims by parties . . . based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979). *Res judicata* prevents litigation of all grounds for, or defenses to, remedies that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940). *Res judicata* thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

In order for the doctrine to apply, there must be full identity between the prior matter and the subsequent one with respect to the parties involved, the capacity or character of persons for, or against, whom the claim is made, the cause of action, and the subject matter of the cause of action. *Silva v. State*, 1987-NMSC-107, ¶_, 106 N.M. 472, 474, 745 P.2d 380. Since the current proceedings are

simply a continuation of Case No. 19-00018-UT, and are only directed at the enforcement of the Financing Final Order entered by the Commission on April 1, 2020, all of the elements of *res judicata* are met.

When the Commission accepted the Hearing Examiners' Financing RD in its April 1, 2020 Financing Final Order, it resolved all issues on the merits in the case below. PNM's subsequent, unilateral decisions to ignore the requirements of that Financing Final Order by delaying the issuance of the securitized bonds and its refusal to promptly issue the ordered rate credits at, or close to, the time of the SJGS abandonment, do not create a new opportunity for PNM to relitigate issues that were determined by the Commission in the Financing Final Order and not timely appealed. The doctrine of *res judicata* was developed by the courts to prevent just this result. *Chicot Cnty. Drainage Dist*., 308 U.S. 371, 378.

Every argument PNM has made in this appeal is simply a repetition of the arguments it made in the first phase of this case before the Commission issued its Financing Final Order. 2019 Rebuttal Testimony of Henry Monroy, pp.7-10 [28 RPS 009337-009340]; PNM's January 21, 2020 Response Brief, pp.29-31 [40 RPS 014168-014170]; and Financing RD pp.83-86 [41 RPS 014763-014766]. The Commission rejected PNM's arguments in its Financing Final Order. As noted, PNM fully accepted the Financing Final Order in its April 6, 2020 Compliance Filing. PNM also supported that Final Order when it intervened in *CFRE*, 2022-

NMSC-010, ¶4. This Court upheld the validity of the Financing Final Order in the *CFRE* decision. *Id.* Thus, the issues which PNM is rearguing in this appeal should be considered settled and barred from relitigation pursuant to the doctrine of *res judicata*.

C. PNM's Rate Arguments Are Not Consistent with the ETA and the NMPUA.

PNM argues that the Commission's broad authority to provide for just and reasonable rates under the NMPUA has been abrogated by the ETA. [BIC 22]. PNM argues that the ETA "provides a comprehensive statutory scheme" that occupies the field regarding ratemaking approaches for coal plant abandonments." [BIC 22]. PNM argues that this "comprehensive scheme" nullifies the ratemaking provisions of the NMPUA and prevents the Commission from ordering rate credits as they are not specifically allowed for in the ETA. [BIC 22].

PNM's argument is meritless because it attempts to create a conflict between the ETA and the NMPUA that does not exist. As noted above, the ETA simply required PNM in its Application to propose a "ratemaking method" to account for the reduction in its cost of service with the abandonment of SJGS. NMSA 1978, § 62-18-4(B)(11). In determining the Legislature's intent in promulgating this section of the ETA, the Court will follow the classic canons of statutory construction, "looking first to the plain language of the statute, giving the words

their ordinary meaning, unless the Legislature indicates a different one was intended." *NMIEC*, 2007-NMSC-053, ¶¶19-20.

When construing regulatory statutes which cover the same subject matter, this Court's consistent precedent has been to harmonize those statutes "in a way that facilitates their operation and the achievement of their goals." *Attorney Gen. of State v. N.M. Pub. Regul. Comm'n*, 2011-NMSC-34, ¶¶10, 15, 150 N.M. 174, 258 P.3d 453 (Harmonizing the ratemaking provisions of the Efficient Use of Energy Act and the NMPUA); *see also NMIEC*, 2007-NMSC-053, ¶20 (Harmonizing the ratemaking provisions of the Renewable Energy Act and the NMPUA).

As this Court held in its recent *Egolf* decision, it "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." *State ex rel. Egolf v. N.M. Pub. Regul. Comm'n*, 2020-NMSC-18, ¶26, 476 P.3d 896, 903. This Court has repeatedly held that the Commission "is vested with broad discretion to pursue its statutory mandate to set just and reasonable rate or rates." *NMIEC*, 2007-NMSC-053, ¶30. The Commission is "statutorily and constitutionally free to use any ratemaking formula it chooses. The Commission's broad rate-making authority involves making pragmatic adjustments. Indeed, the result reached, not the method employed is what controls." *Id.* (citations and quotations omitted).

There is no language in Section 62-18-4(B)(11) that supports PNM's argument that the Legislature intended to limit the "ratemaking method" PNM could propose, or limit the method the Commission could ultimately approve. More importantly, there is no language in Section 62-18-4(B)(11), or in any other section of the ETA, that indicates, either expressly or by implication, that the Legislature intended to divest the Commission of its authority under the NMPUA to set just and reasonable rates or limit the rate methodology the Commission could employ to protect ratepayers from double recovery of SJGS costs. NMSA 1978, § 62-6-4(A) (2003) ("The Commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . ."). The opposite is true. The ETA expressly states that nothing in the ETA shall "prevent or preclude the commission from investigating the compliance of [PNM] with the terms and conditions of a financing order and requiring compliance therewith…." NMSA 1978, § 62-18-11(B)(1) (2019). The Commission relied on its broad ratemaking authority in the NMPUA when ordering rate credits, and correctly held that the ETA did not limit that authority. Financing RD, p.85 ("[T]he ETA does not deprive the Commission's other authority under the Public Utility Act to ensure that the rates charged to customers are just and reasonable."). [41 RPS 014765].

PNM's argument that the ETA limits the Commission's broad authority over ratemaking also relies on misstatements about the holdings in the case law it cites. [BIC 22]. For example, PNM relies on the *Egolf* decision for the proposition that the Commission cannot "disrupt the balance the Legislature struck by implementing relief [i.e., rate credits] not authorized under the ETA." [BIC 22] *citing Egolf,* 2020-NMSC-18, ¶33. Contrary to PNM's contention, the *Egolf* decision did not address the Commission's ratemaking authority under Section 62-18-4(B)(11). The limited issues before the *Egolf* Court were whether the Commission had exceeded its statutory and constitutional authority (i) when it initiated abandonment proceedings for SJGS Units 1 and 4 and (ii) when it determined that it did not have to apply the ETA to that abandonment. *Egolf,* 2020-NMSC-18, ¶3. Consistent with its narrow focus, the *Egolf* decision contains no language that limits the Commission's broad authority to ensure that rates approved pursuant to Section 62-18-4(B)(11) are just and reasonable. NMSA 1978, § 62-8-1 (1941) ("Every rate, made demanded or received by any public utility shall be just and reasonable."). Contrary to PNM's assertions, the Commission's Financing Final Order and its Show Cause Final Order are completely consistent with the *Egolf* decision because the Commission applied the provisions of ETA throughout both orders. *See generally,* Financing Final Order [44 RPS 014945-014959] and Show Cause Final Order [26 RP 4575-4593].

PNM has also misstated the holdings in the *CFRE* decision. [BIC 22]. That decision does not support PNM's argument that the ETA "occupied the field" and revoked the Commission's broad ratemaking authority under the NMPUA when a coal plant is being abandoned. In fact, the *CFRE* Court harmonized the ETA with the NMPUA. *CFRE,* 2022-NMSC-010, ¶42, *citing* NMSA 1978,§ 62-3-1(B). It held that both statutes were intended to carry out the over-riding policy of the NMPUA by balancing the interests of ratepayers and utility shareholders to ensure that all utility rates would be just and reasonable. *Id.* The *CFRE* Court also reaffirmed the principle that "[t]he Commission is not bound to the use of any single formula or combination of formulae in determining rates." *Id.* ¶47. Thus, contrary to PNM's arguments, the *CFRE* decision supports the Commission's use of its broad ratemaking authority when it ordered PNM to issue rate credits in both the Financing Final Order and the Show Cause Final Order.

PNM has also cited *Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, ¶9, 145 N.M. 372 for the principle that the ETA limited the Commission's broad ratemaking authority. [BIC 22]. However, the *Landess* decision had nothing to do with reconciling and harmonizing different state regulatory statutes that address the same subject matter. Rather, the decision dealt with a totally unrelated conflict between state and federal law and applied the doctrine of preemption to address a

frivolous taxpayer challenge to federal tax laws. 2008-NMCA-159, ¶7. Thus, the *Landess* decision has no relevance to the discreet issues in this appeal.

One case that PNM did not cite was *Qwest Corporation. v. N.M. Pub. Regul. Comm'n*, 2005-NMSC-042, 140 N.M. 440, 143 P.3d 478. This omission is noteworthy as the *Qwest* decision directly supports the Commission's broad authority to use rate credits to ensure just and reasonable rates. In the *Qwest* appeal, a telecommunications utility challenged the Commission's authority to require rate credits. The issue arose in the context of an alternative regulation plan ("AFOR plan") in which the utility agreed to invest $788 million in telecommunication infrastructure in the State over five years in return for the elimination of rate of return regulation. *Id.* ¶4. The Commission incorporated this commitment in its final order. The utility, however, failed to abide by the Commission's order. As a remedy for the utility's non-compliance, the Commission ordered Qwest to issue rate credits for any unspent dollars at the end of the five-year period. *Id.* ¶13.

In an argument that tracks PNM's arguments in this appeal, Qwest contended that the requirement for rate credits exceeded the Commission's statutory authority as there was no express provision in the New Mexico Telecommunications Act that allowed for rate credits. *Id.* ¶25. The Court disagreed and held that,

> [w]hile the Legislature did not expressly give the PRC the authority to issue consumer credits or refunds, the New Mexico Telecommunications Act and PRC's broad regulatory authority demonstrate the Legislature's intent to authorize the PRC to approve the terms of individual AFOR plans. The authority to choose a proper incentive to ensure compliance with those terms, expressly found in the AFOR plan, is implicit in the Legislature's grant of authority.

Id. (emphasis added).

The Commission's broad ratemaking authority under the NMPUA is as expansive as its authority to regulate telecommunications rates under the New Mexico Telecommunications Act. NMSA 1978, § 62-6-4(A) (2003). The Commission's authority to promulgate orders requiring PNM to issue rate credits to protect ratepayers is implicit in the NMPUA's broad grant of authority pursuant to Section 62-6-4(A), and is completely consistent with the Commission's authority under the ETA.

The facts of the *Qwest* decision underscore its applicability to this appeal. The Commission required Qwest to issue rate credits only after Qwest failed to follow a Commission order requiring it to invest $788 million in telecommunication infrastructure in the State. *Qwest*, 2005-NMSA-042, ¶¶10-13. Similarly, PNM has failed to follow the Financing Final Order by refusing to issue the securitized bonds and provide rate credits close in time to the SJGS abandonment. PNM created the bond issuance and rate credit delay to unjustly enrich its shareholders at the expense of ratepayers. Consequently, the Commission

used its broad authority under the NMPUA, and the express authority under Sections 62-18-4(B)(11) and 62-18-11(B)(1) of the ETA, to enforce the terms of its Financing Final Order. *Qwest,* 2005-NMSA-042, ¶25 (stating that the Commission has the implicit authority to enforce its orders).

For all these reasons, the Court should affirm the Commission's authority to require PNM to issue rate credits to enforce the ratemaking provisions of Section 62-18-4(B)(11) of the ETA.

D. The ETA Requires the Securitized Bonds to be Issued Close in Time to Plant Abandonment.

PNM argues that the Commission has misconstrued the ETA by interpreting it to require the issuance of the securitized bonds at the time of the SJGS abandonment. [BIC 23-26]. First, as stated above, this issue was previously addressed by the Commission in its Financing Final Order. PNM did not appeal that Final Order. Second, the Hearing Examiners comprehensively responded to PNM's arguments on this issue in their RD. Show Cause RD, pp.45-50 [25 RP 4376-4381].

The fundamental legal error in PNM's argument is the failure to harmonize all of the provisions of the ETA. The Hearing Examiners, citing the 2007 *NMIEC* decision, *supra,* correctly held that "where several sections of a statute are involved, they must be read together [in pari materia] so that all parts are given effect." *Id.* 46 [25 RP 4377].

The Hearing Examiners conducted a comprehensive review of the ETA's provisions. *Id.* 45-50 [25 RP 4376-4381]. They concluded that "[t]he ETA appears to provide flexibility with respect to any mandated timing of the issuance of the energy transition bonds, specifically in Sections 4(B)(7) and 10, but Section 16 appears to establish a limit on that flexibility." *Id.* 46 [25 RP 4377]. They noted that Section 62-18-16 requires qualifying utilities to transfer specified percentages of the proceeds of the energy transition bonds "within thirty days of receipt" of the proceeds to funds established by the ETA to mitigate and redress the impact of the abandonment of the facilities at issue. *Id.* 48-49 [25 RP 4379-4380]; *see also* NMSA 1978,§ 62-18-16 (2019, amended 2023). These Section 62-18-16 funds include the Indian Affairs fund, the economic development assistance fund, and the displaced worker assistant fund. Show Cause RD, pp.47-48 [25 RP 4378-4379]. The Hearing Examiners found that:

> [b]ased upon the Legislature's establishment of the funds and the requirement to use the proceeds of the bond issuance for that purpose, the Legislature appears to have intended that the funds be provided at the approximate time of the abandonment, and, to make that occur, the Legislature also apparently intended that the energy transition bonds that would be used to fund those transfers would also be provided at the approximate time of the abandonment.

Id. 48 [25 RP 4379]. The Hearing Examiners concluded their analysis of the ETA's timing of the bond issuance by stating

> that the time for the issuance of the energy transition bonds should be interpreted as being reasonable to achieve Section 16's purpose. The

> Hearing Examiners thus find that PNM's new plan – to issue the bonds in January or February 2024, at least 18 months after the abandonment of Unit 1 and 15 months after the abandonment of Unit 4 – will not achieve the purpose of Section 16, that the revised plan is not reasonable, and that the revised plan violates the ETA.

Id. 49 [25 RP 4380].

The language in other provisions of the ETA supports the Hearing Examiners' findings and conclusions quoted above. Section 62-18-2(H)(2)(b) allows PNM to securitize $20 million for severance pay and job training for those employees who have lost their jobs at the time of abandonment. NMSA 1978, § 62-18-2(H)(2)(b) (2019). This provision clearly ties the timing of the issuance of the bonds to the timing of the abandonment of SGJS.

Section 62-18-2(H)(2)(c) states that the amount of "abandonment costs" that can be securitized will be determined "as of the date of abandonment." The Legislature would not have established that linkage if it intended the plant abandonment and the bond issuance to occur years apart. NMSA 1978, § 62-18-2(H)(2)(c) (2019).

Section 62-18-4(B)(11) required PNM to propose "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." NMSA 1978, § 62-18-4(B)(11) (2019). The implementation of the ETC up to eighteen months

after the abandonment does not accomplish the purposes of this Section as customers are paying for SJGS costs in current rates that will be collected again in the ETC charge. Show Cause RD, pp.67-71 [25 RP 4398-4402]. This double recovery by PNM clearly violates the intent of Section 62-18-4(B)(11).

In addition, Section 62-18-10(D) mandates that the generation resources of a utility that receives approval of a financing order and issues energy transition bonds "shall not emit, on average, more than four hundred pounds of carbon dioxide per megawatt-hour by January 1, 2023…." NMSA 1978, § 62-18-10(D) (2019). These specifically dated emissions standards, applicable only if the utility requests securitization, only make sense if the Legislature intended the abandonment and the financing of the bonds to occur before January 1, 2023.

PNM's interpretation of the ETA should not be accepted by the Court as it is contrary to the basic policy of the NMPUA, as confirmed by the *CFRE* decision, which is to balance the interests of ratepayers, the utility, and the public interest. *CFRE,* 2022-NMSC-010, ¶42. As such, PNM's interpretation of the ETA is inconsistent with legislative intent and leads to an absurd, unreasonable result. *United Water N.M. v. N.M. Pub. Util. Comm'n*, 1996-NMSC-7, ¶_, 121 N.M. 272, 276, 910 P.2d 906, 910.

PNM also argues that the Commission's Order on PNM's Notice and Request for Modification or Variance from Abandonment Date of San Juan

Generating Station Unit 4 ("Variance Order") [2 RP 0193-0211], shows that PNM can issue the bonds whenever it pleases. [BIC 5]. This argument, however, is based on an incorrect, out-of-context reading of that Order.

On February 17, 2022, PNM filed its Notice of Public Service Company of New Mexico and Request for any Necessary Modification to or Variance from Abandonment Date of San Juan Generating Station Unit 4 ("Variance Request") notifying the Commission of its intent to keep SJGS Unit 4 in operation for three months longer than originally planned. [1 RP 0006-0039]. Due to supply chain issues, PNM was concerned that it would not have sufficient resources to cover its load for Summer 2022. PNM's solution was to extend the operation of SJGS Unit 4 past the summer peak. The Commission agreed to allow PNM to extend the operation of SJGS Unit 4 for three additional months. *See generally* Variance Order [2 RP 0194-0208]. In its Variance Order, the Commission stated that "the Commission's Final Order on Abandonment did not specifically require that abandonment take place on that date," and the Financing Final Order "does not require that PNM issue the Energy Transition Bonds … by any specific date." *Id.* 8-9 ¶¶25-26 [2 RP 0201-0202].

At the time the Commission issued its Variance Order on February 23, 2023, PNM had not revealed its plan to delay the issuance of the bonds. PNM did not reveal that plan to the Commission until it filed its Verified Response on March 14,

2022. Show Cause RD, pp.23-24 [25 RP 4354-4355]. Although the Variance Order did not require PNM to abandon SJGS on a certain date or issue the bonds on a certain date, the Commission was clearly relying on PNM's repeated assurances, cited above, that it would issue the bonds promptly at the time of abandonment. The Commission was also relying on the April 6, 2020 Compliance Filing in which PNM agreed to abide by all of the provisions of the Financing Final Order. The Commission's Variance Order stated, "The Final Orders in this case dictate the conditions and terms by which abandonment of SJGS Units 1 and 4 and the issuance of Energy Transition Bonds must follow once the actions authorized by those orders actually take place." Variance Order, p.9 ¶27 [2 RP 0202]. A condition of both the ETA and the Financing Final Order was that bonds would be issued promptly at the time of SJGS abandonment. Financing RD, pp.13, 84-85 [41 RPS 014693; 014764-014765]; Show Cause Final Order, pp.24-51 [25 RP 4355-4382]. For these reasons, it is clear that the intent of the February 23, 2022 Variance Order was to address the date of PNM's planned abandonment of SJGS and not to comment on PNM's as yet unrevealed plan to delay the issuance of the bonds fifteen to eighteen months after abandonment.

For all these reasons, Intervenors-Appellees respectfully request that this Court affirm the Commission's holding that the ETA requires the bonds to be

issued close in time to the abandonment of SJGS and disregard PNM's flawed interpretation of the ETA.

E. The Commission Did Not Act Arbitrarily and Capriciously When It Ordered PNM to Issue Rate Credits.

PNM contends that the Show Cause Final Order is arbitrary and capricious because the Commission adopted the Hearing Examiners' "contrived and statutory unsupported legislative intent analysis to rewrite the Financing Order and impose new requirements on PNM." [BIC 26]. This argument is meritless. A Commission order is only "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." *Albuquerque Cab Co. v. N.M. Pub. Regul. Comm'n,* 2017-NMSC-028, ¶8, 404 P.3d 1, 8.

The Hearing Examiners carefully examined both the language of the ETA and the evidence presented at the Show Cause hearing and concluded that PNM was the party that was attempting to rewrite the Financing Final Order by coming up with a new rate plan at odds with that Order. Show Cause RD, pp.24-51 [25 RP 4355-4382]. The Hearing Examiners correctly interpreted and harmonized the various sections of the ETA when they concluded that the statute required the bonds to be issued "close to the time of the abandonment." *Id.* 49 [25 RP 4380].

The Hearing Examiners also exhaustively reviewed the evidence produced at the Show Cause Hearing as well as PNM's and the parties' evidentiary and legal

arguments. *Id.* 24-49 [25 RP 4355-4380]. The Hearing Examiners concluded that the requirement for rate credits upon abandonment, in the event PNM had not filed its promised 2021 rate case, was a primary feature of the April 1, 2020 Financing Final Order and not a new requirement as PNM has argued in its BIC. *Id.* 21-22, 50-51, 58 [25 RP 4352-4553; 4381-4382; 4389]. Based on their comprehensive review, the Hearing Examiners concluded, that the Commission's investigation revealed that

> PNM's new plan 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; that fundamental relationship [is] at the core and operation of the ETA….

Id. 51 [25 RP 4382].

The Commission's ratemaking provisions in both the Financing Final Order and the Show Cause Final Order, requiring PNM to issue rate credits, are based on a careful, rational assessment of evidence in the record and the requirements of the ETA. As such those Orders are not arbitrary and capricious. *Albuquerque Cab Co.*, 2017-NMSC-028, ¶8.

Moreover, as argued above, these Orders are within the Commission's broad authority over ratemaking granted to it in the NMPUA. NMSA 1978, § 62-6-4(A) (2003); *see also Attorney Gen. of N.M. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶12, 101 N.M. 549, 685 P.2d 957; *Qwest*, 2005-NMSA-42, ¶25.

1. PNM Has Not Met its Burden of Demonstrating that the Show Cause Final Order is Arbitrary and Capricious.

PNM has not met its burden of showing that the Commission acted arbitrarily and capriciously when it adopted the Show Cause RD. The Commission's requirement in the Financing Final Order that PNM issue rate credits upon the implementation of the ETC was based on PNM's repeated assurances that it would issue the bonds promptly at the time of abandonment. Show Cause RD, pp.27-29, 31-34, 50 [25 RP 4358-4360; 4362-4365; 4381]. Additionally, the Commission was not acting arbitrarily when it investigated PNM's new rate plan as investigations are within its statutory authority. NMSA 1978, § 8-8-4(B)(7) (1998).

PNM unilaterally changed it representations about the bond issuance without notifying the Commission or the parties. Show Cause RD, pp. 23-24, 50 [25 RP 4354-4355; 4381]. PNM's new rate plan disregards the requirements of the Financial Final Order and is contrary to PNM's obligations as a regulated utility. As the Court has held, "In return for monopoly power in its industry, the utility must submit to Commission regulation." *Pub. Serv. Co. of N.M. v. N.M. Public Serv. Comm'n*, 1991-NMSC-83, ¶_, 112 N.M. 379, 387, 815 P.2d 1169; *see also Morningstar Water Users Ass'n v. N. M. Pub. Util. Comm'n*, 1995-NMSC-62, ¶_,

120 N.M. 579, 590, 904 P.2d 28, 39 (PNM does not have the authority to set its own rates); NMSA 1978, § 62-6-4(A) (2003).

Moreover, at the time of the Show Cause hearing, PNM could have decided to issue the bonds but refused to do so. Show Cause RD, pp.78, 82 [25 RP 4409; 4413]. The evidence demonstrated that it was necessary and proper for the Commission to order rate credits to enforce its prior Financing Final Order. Otherwise, PNM would be double recovering the costs of its undepreciated investment in SJGS from customers. Show Cause RD, pp.24-51, 67-71 [25 RP 4355-4382; 4398-4402].

In defending its new plan, PNM makes inconsistent arguments. On one hand PNM states that it always planned to issue the bonds at the end of a rate case. [BIC 6, 17]. On the other hand, PNM acknowledged that its decision to delay both the bond issuance and the inclusion of the ETC in rates was a change from its original rate plan filed on July 1, 2019. [BIC 6, 17]; 2022 Direct Testimony of Henry Monroy, p.4, lines 10-12 [20 RP 2637]; [1 TR 24-25 (5/23/2022)] [19 RP 2202-2203].

PNM's argument that it always intended to issue the bonds after a rate case, ignores the fact that its original plan was to file a rate case in 2021, not two years later. Show Cause RD, p.18 [25 RP 4349]; [3 TR 768-769 (12/12/2019)] [29 RPS

009447-009448]. Moreover, PNM's original plan is irrelevant as the Commission rejected that plan and approved WRA's and NM AREA's recommendation that PNM be required to issue rate credits upon abandonment in the event the 2021 rate case did not occur. Show Cause RD, pp.18-21 [25 RP 4349-4352]; Financing RD, pp.84-85 [41 RPS 014764-014765].

For these reasons, the Court should find that the Commission's decision, in its Show Cause Final Order, to require PNM to issue rate credits for the SJGS costs upon abandonment is supported by the record evidence, the Financing Final Order and the language of the ETA and is not arbitrary and capricious.

2. The Commission's Moral Hazard Finding is Consistent with its Ratemaking Authority.

PNM argues that the Commission side-stepped the ETA and arbitrarily created a new moral hazard standard in its Show Cause Final Order. [BIC 28-30]. This argument is also based on an incorrect interpretation of the ETA. As shown above, there is no language in the ETA that indicates that the Legislature intended to create a comprehensive new ratemaking scheme that revoked the Commission's broad ratemaking authority under the NMPUA when a coal plan is being retired. [BIC 28-30]. PNM's argument is contrary to this Court's precedent of harmonizing related regulatory statutes "in a way that facilitates their operation and the achievement of their goals." *Attorney Gen.*, 2011-NMSC-34, ¶¶10, 15. PNM's argument is also contrary to the specific holding in the *CFRE* decision in which the

Court harmonized the ratemaking provisions of the ETA and the NMPUA. *CFRE*, 2022-NMSC-010, ¶¶42, 47.

Moreover, the Commission has not created a new moral hazard standard in its Show Cause Final Order. By adopting the moral hazard terminology, the Commission was simply stating that PNM's new rate plan is an attempt to "game" the Financing Final Order and gain an unearned financial advantage by delaying the issuance of the securitized bonds. Show Cause RD, p.59-64 [25 RP 4390-4395].

After reviewing the evidence regarding PNM's secret development of its new rate plan, the Hearing Examiners concluded, "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." *Id.* 10 [25 RP 4341]. As the Hearing Examiners stated, "given the blatant manipulation of provisions of the ETA on the part of PNM and the attendant moral hazard revealed in this proceeding, the Hearing Examiners believe it would be utter folly for PNM's position not to be called out for what it is." *Id.* 108 [25 RP 4439]. The Hearing Examiners also held that there was no language in the ETA that indicated that the Legislature intended to eliminate the Commission's broad supervisory authority to deal with PNM's gamesmanship. *Id.* 64 [25 RP 4395]. By adopting these holdings in its Show Cause Final Order, the

Commission was simply relying on the evidence produced during its investigation of PNM's new rate plan. Additionally, PNM was given a full opportunity to be heard on this issue in the Show Cause proceeding. [1 TR 276-276 (5/23/2022)] [19 RP 2454-2457]; Briefing Order (5/26/2022), p.2 [19 RP 2173]; PNM Post-Hearing Brief-in-Chief (6/3/2022), pp.35-37 [24 RP 4289-4291]; PNM Post-Hearing Response Brief (6/9/2022), pp.34-35 [23 RP 4080-4081].

For these reasons, it is clear that the Commission created no new standard when it used the moral hazard language in its Show Cause Final Order. In adopting this term, the Commission was merely describing the situation that PNM created when it refused to follow the express requirements of the Financing Final Order by coming up with a new rate plan. The Commission acted within its broad authority over rates and its supervisory authority over PNM when it ordered PNM to issue immediate rate credits to protect customers. *NMIEC*, 2007-NMSC-053, ¶30; *see also* NMSA 1978, § 62-6-4(A) (2003).

3. The Commission's Ordered Rate Credits do not Violate its Policy Against Piecemeal Ratemaking.

PNM argues that the Commission's ordered rate credits violate its policy against piecemeal ratemaking. [BIC 35]. This argument is contrary to law and should be disregarded. It is true that the Commission has a long-standing policy against piecemeal ratemaking. Show Cause RD, pp.82-86 [25 RP 4413-4417]. However, the Hearing Examiners noted that the Commission's piecemeal

ratemaking policy is just that, a policy, not a prohibition. *Id.* 85 [25 RP 4416]. That policy can be set aside when the Commission is faced with extraordinary circumstances. *Id.* 85-86 [25 RP 4416-4417]. In support of this finding, the Hearing Examiners cited the testimony of WRA witness, Dr. Blank. Dr. Blank testified that the policy against piecemeal ratemaking does not apply in this case because

> [t]here are situations where rate adjustments outside of a general rate case are allowed, and in fact necessary. The removal of SJGS from service, and associated costs of nearly $100 million per year, is the type of extraordinary event that warrants immediate rate reconciliation, particularly in light of PNM's ability to recover its investment via securitization bonds.

Id. 84-85 [25 RP 4415-4416]; *see also* Responsive Testimony of James R. Dauphinais, pp.22-24 [10 RP 1036-1037]; Response Testimony of Larry Blank, pp.24-26 [15 RP 1674-1676]; [2 TR 313-314 (5/24/2022)] [21 RP 2792-2793].

In addition, this Court has recognized an exception to the policy against piecemeal ratemaking where the Commission needs to create a remedy to deal with a utility's refusal to follow the requirements of a Commission order. *Qwest,* 2005-NMSA-42, ¶25. PNM's refusal to issue the rate credits mandated by the Commission's Financing Final Order required such a remedy.

Moreover, the Commission has recognized that the Legislature also can create statutory exceptions to that policy. *See* NMPRC Case No. 08-00092-UT Final Order (5/22/2008), pp.24-25 ¶61. The Legislature created just such an

exception when it allowed utilities to use fuel and purchased power clauses to collect those costs outside of a general rate filing. *Id.*; *see also* NMSA 1978, § 62-8-7(E) (2011).

The Legislature has created similar statutory exceptions to piecemeal ratemaking in the Renewable Energy Act and the Efficient Use of Energy Act. NMSA 1978, §§ 62-16-6(A) (2019); 62-17-6(A) (2018). The Legislature also created exceptions to the Commission's piecemeal ratemaking policy in Section 62-18-4(B)(11) of the ETA where it required a utility seeking a financing order to propose "a ratemaking method" to remove the utility's undepreciated investment from its rates upon the abandonment of a qualifying generation facility. Section 62-18-4(B)(11) does not require these costs to be removed in a base rate case. Similarly, the ETA created another statutory exception to the policy against piecemeal ratemaking as it allows a utility to add an ETC charge to customers' rates without filing a base rate case. NMSA 1978, §§ 62-18-2(G); 62-18-2(L); 62-18-2(P); 62-18-4(B)(3); and 62-18-5(F)(2) & (3).

The policy against piecemeal ratemaking can be set aside when the Commission is faced with extraordinary circumstances. As can be seen from the facts of this case, the Commission had good reason to set aside its policy against piecemeal ratemaking and order PNM to issue immediate rate credits. This determination is within the Commission's broad ratemaking authority and

expertise and was not arbitrary or capricious. For all these reasons, PNM's piecemeal ratemaking arguments have no merit and should be disregarded by the Court.

4. The Ordered Rate Credits Do Not Deprive PNM of a Reasonable Opportunity to Earn its Authorized Return on its Investments.

PNM argues that the Commission's ordered rate credits are unreasonable because they will deprive it of its opportunity to earn its authorized return on its equity ("ROE"). [BIC 7, 36-37]. This argument is not supported by the relevant precedents. It is settled law that rate regulation does not guarantee that a utility will be profitable. *State v. Mountain States Tel. & Tel*., 54 N.M. 315, 338, 224 P.2d 155 (1950). Rate regulation only provides a utility with the opportunity, not a guarantee, that it will earn its allowed ROE. Show Cause RD, pp.74-78 [25 RP 4405-4409].

Moreover, the evidence demonstrates that any financial harm PNM may suffer as a result of the ordered rate credits was self-inflicted. *Id.* 78, 82 [25 RP 4409; 4413]. PNM has been aware, since the issuance of the Financing Final Order in April 2020, that it would have to issue rate credits to remove the SJGS costs from its base rates when SJGS was abandoned. Financing RD, pp.84-85 [41 RPS 014764-014765]. With that knowledge, PNM had the opportunity issue the energy transition bonds and recover its $283 million undepreciated investment in SJGS. Show Cause RD, pp.78, 82 [25 RP 4409; 4413]. PNM also had the opportunity to

file a base rate case, in which it could have sought recovery of any investments it had made since the filing of its last rate case in 2016 [1 TR 251-256 May 23, 2022] [19 RP 2429-2434]. PNM did not take advantage of either opportunity.

Furthermore, PNM's revenue deficiency claim is based on unsupported, hypothetical numbers. In the evidentiary hearing, the PNM witnesses, Monroy and Chan, admitted that PNM had not submitted enough data in its Show Cause testimony to determine if its revenue deficiency projections were correct. Show Cause RD, pp.76-78 [25 RP 4407-4409]; [1 TR 60-61; 202-204 (5/23/2022] [19 RP 2238-2239; 2380-2382]; [4 TR 657 (5/26/2022] [23 RP 3933]; and [2 TR 313-314 (5/24/2022)]; [21 RP 2792-2793].

PNM argues that it needs the revenues it recovers in base rates from SJGS to cover the estimated $2 billion in plant investments it has made since its last rate case. [BIC 6]. This argument is completely inconsistent with the NMPUA's ratemaking process. As the Court explained in the *PNM Gas Services* decision, "[t]he ratemaking process is prospective in nature in that past deficits may not be made up by excessive charges in the future." *In re Petition of PNM Gas Serv.*, 2000-NMSC-12, ¶6, 129 N.M. 1, 1 P.3d 389, 390. PNM has no right to earn a return on system investments that the Commission has not reviewed and vetted in a base rate case. *Id.*; Show Cause RD, pp.74-78 [25 RP 4405-4409].

In addition, the Hearing Examiners' review of the case record demonstrated that unless the SJGS costs are removed from PNM's rates through the mechanism of rate credits, PNM will likely be over-earning its allowed ROE. *Id.* 80-81 [25 RP 4411-4412].

For these reasons, it is clear that PNM's claim that the rate credits the Commission ordered in both the Financing Final Order and the Show Cause Final Order will cause it financial harm is not supported in either law or in the record evidence. PNM's claim should be disregard by this Court. *See In re Adoption of Doe*, 1984-NMSC-024, ¶2, 100 N.M. 764, 676 P.2d 1329 (holding that an appellate court will not consider an issue if no authority is cited in support of the issue).

5. The Commission's Ordered Prudence Review Is Not Ripe for Review as PNM has not Suffered an Injury-In-Fact.

Any issue brought to the Supreme Court must be ripe for judicial review. To meet this standard, there must be a final resolution of the relevant issue by the agency and a developed factual record. *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967) ("[A]n appellate court will not review the proceedings of an administrative agency until the agency has taken final action."). PNM's arguments against the Commission's ordered prudence review in its next rate case do not meet this standard. [BIC 39-42].

In this context, the Supreme Court must closely examine which issues the Commission decided and which it reserved for later consideration. *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-018, ¶25, 111 N.M. 622, 808 P.2d 592. ("The basic purpose of ripeness law is and always has been to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems."). Ripeness analysis involves a two-pronged inquiry: "the fitness for the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* "The hallmark of cognizable hardship is usually direct and immediate harm." *Morgan v. McCotter*, 365 F.3d 882, 891 (10th Cir. 2004). The "mere possibility or even probability that a person may be adversely affected in the future by official acts" is insufficient to establish ripeness. *New Energy Econ. v. Shoobridge*, 2010-NMSC-049, ¶18, 149 N.M. 42, 243 P.3d 746.

The standing question "bears close affinity to questions of ripeness - whether the harm asserted has matured sufficiently to warrant judicial intervention. In some cases, the issues of standing and ripeness will completely overlap." *Am. Fed'n of State v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.*, 2016-NMSC-17, ¶31, 373 P.3d 989. To obtain standing in New Mexico, litigants must allege an injury-in-fact, i.e., that "they are directly injured as a result of the action they seek to challenge." *Id.*

¶32. Hypothetical possibilities of injury "will not suffice to establish the threat of direct injury required for standing." *Id.*

PNM's arguments against a prudence review are not ripe as it has not suffered an injury-in-fact. It is clear from the Show Cause Final Order, that the Commission has reserved its prudence determination for later consideration in PNM's next rate case filing. Show Cause RD, p.112 ¶E [25 RP 4443]; Show Cause Final Order, pp.13-14 [26 RP 4587-4588]. At the time of this appeal, the Commission has yet to develop a factual record or issued a final order regarding this issue. Thus, PNM has not experienced any hardship or been adversely affected. Because the Commission has made no prudency decision, PNM has not suffered any injury-in-fact. At this time, PNM is merely speculating about the outcome of any prudence review and the possibility of a future injury. For all these reasons, this issue is not ripe for this Court's review and PNM lacks standing to bring this issue before this Court.

PNM has also argued that the Commission's ordered prudence review of its decision to delay the bond issuance is unlawful. [BIC 39]. This argument is meritless as the Commission has the authority under both the ETA and the NMPUA to ensure that the cost of the bonds, which will be passed on to ratepayers through the ETC, is prudent. *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-012, ¶21, 444 P.3d 460, 470 ("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."); NMSA 1978, §§ 62-18-11(B)(1); 62-6-4(A) (2003); 62-8-1 (1941). Furthermore, the Commission preserved its ability "to review the reasonableness and prudence of PNM's actual, finally-incurred expenditures" in the Financing Final Order which PNM did not appeal. Financing RD, p.94 [41 RPS 014774].

Because the total cost of the bonds, including financing costs, will be recovered from ratepayers though the ETC, the ETA requires that when the utility issues the bonds it will use reasonable efforts to obtain the "lowest cost objective." NMSA 1978, § 62-18-4(B)(12) (2019). The lowest cost objective means that the structuring, marketing and pricing of energy transition bonds results in the lowest energy transition charges. NMSA 1978, §§ 62-18-2(N); 62-18-4(B)(12) (2019).

If interest rates are substantially higher than they would have been had PNM issued the bonds in 2022, and the Commission finds that PNM was not prudent in its decision to delay the issuance of the bonds, ratepayers should not be required to pay those imprudent costs through the ETC.

Contrary to PNM's assertions, the Commission is not seeking to have the utility "time the market" with regard to the issuance of the bonds. [BIC 40-41]. Rather, the Commission is seeking to hold ratepayers harmless from any

imprudence on PNM's part. Show Cause RD, pp.102-108 [25 RP 4433-4439]. The Commission clearly has the authority under Section 62-18-11(B)(1) of the ETA, and pursuant to its broad supervisory authority over PNM's rates, to ensure that the rates customers will pay through the ETC are just and reasonable. NMSA 1978, §§ 62-6-4(A) (2003); 62-8-1 (1941).

6. *PNM's Claim that the Commission Has Impaired the Marketability of the Energy Transition Bonds is Not Supported by Any Record Evidence. **

PNM's claim that the Commission has impaired the marketability of its bonds is unfounded, and further, has not been preserved by PNM. [BIC 42-45]. "In order to preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked." Rule 12-321 NMRA (2022). The case law on this issue is settled. The matter must have been raised and ruled on by the lower court in order to be preserved for appeal. *See State v. Bell*, 2015-NMCA-028, *cert. denied* 2014-NMCERT-012; Rule 12-208 NMRA (2022) (The Statement of Issues must "contain each issue to be presented by the appeal.").

PNM argues the Commission has somehow influenced the marketability of the bonds without any evidence in the record to support this claim. PNM did not preserve this claim in the record below and this issue appears nowhere in PNM's Statement of Issues filed on August 1, 2022. In addition, the Financing Final Order obligated PNM to issue the bonds at the time of abandonment. PNM could have

challenged the Financing Final Order but chose not to. For these reasons, this issue has not been properly preserved and should be disregarded.

For all the reasons stated herein, the Commission's Order is not arbitrary and capricious and is grounded in substantial evidence on the record.

VII. CONCLUSION

WHEREFORE for all the reasons stated herein Intervenors-Appellees respectfully request this Court to affirm the New Mexico Public Regulation Commission's Show Cause Final Order, grant Intervenors-Appellees Requests for Relief, as stated above, and for any other relief that this Court deems is just and reasonable.

VIII. REQUEST FOR ORAL ARGUMENT

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

IX. STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G), NMRA, the Intervenors-Appellees state that the body of the foregoing Answer Brief is 46 pages and contains 10,887 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 27th day of July 2023.

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CERTIFICATE OF SERVICE

I CERTIFY that on this day I caused the foregoing **Joint Answer Brief of Intervenors-Appellees** to be submitted to Odyssey File and Serve, which in turn caused all counsel of record to be served by email.
DATED: 27th day of July 2023**.**

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