

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***

**REPLY BRIEF OF APPELLANT
PUBLIC SERVICE COMPANY OF NEW MEXICO**

ORAL ARGUMENT REQUESTED

Patrick V. Apodaca, Senior Vice
President and General Counsel
Stacey J. Goodwin, Associate
General Counsel
PNM Resources, Inc.
Corporate Headquarters – Legal
Department
Albuquerque, NM 87158-0805
(505) 241-4836
Stacey.Goodwin@pnmresources.com

Richard L. Alvidrez
Miller Stratvert P.A.
500 Marquette NW, Suite 1100
P.O. Box 25687
Albuquerque, NM 87125
(505) 842-1950
ralvidrez@mstlaw.com

Raymond L. Gifford
Debrea M. Terwilliger
Wilkinson Barker Knauer LLP
2138 West 32nd Ave., Suite 300
Denver, CO 80211
(303) 626-2350
(303) 626-2329
RGifford@wbklaw.com
DTerwilliger@wbklaw.com

*Attorneys for Appellant
Public Service Company of New Mexico*

August 28, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION1

II. STANDARD OF REVIEW.....4

III. ARGUMENT AND AUTHORITIES5

 A. The Final Order is Not Supported by the Law or Facts 5

 1. The plain language of the ETA and the Financing Order contradict the
 Final Order’s requirement for SJGS rate credits..... 5

 2. The ETA and the Financing Order do not contain a deadline for
 issuance of the ETA Bonds or imposition of a rate credit. 7

 3. The Commission cannot rely on the PUA to justify the rate credit
 imposed by the Final Order. 10

 4. The Final Order improperly treats PNM’s estimations as guaranteed
 absolutes to justify revising the Financing Order’s rate credit terms. 11

 5. PNM’s challenge to the Final Order is not an untimely appeal of the
 Financing Order, nor is it barred by res judicata..... 12

 B. The Final Order’s Improper Single-Issue Ratemaking Is Not Justified
 under a Moral Hazard Theory. 14

 C. The Final Order’s Future Prudency Review Would Constitute an
 Impermissible Hindsight Review of the Bond Issuance. 16

 D. Appellees Fail to Refute the Irrevocability of the Financing Order and
 PNM’s Continuing Authority to issue the ETA bonds. 16

IV. CONCLUSION.....19

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Appellant Public Service Company of New Mexico (PNM”) states that the body of this Consolidated Reply Brief is 19 pages and contains 4,345 words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Word for Microsoft 365 MSO Version 2108, and is therefore within the limits permitted by the Court’s order issued on August 14, 2023.

TABLE OF AUTHORITIES

New Mexico Cases

<i>Baker v. Hedstrom</i> , 2013-NMSC-043.....	7
<i>Cibola Energy Corp. v. Roselli</i> , 1987-NMCA-055, 105 N.M. 774	5, 12
<i>Citizens for Fair Rates & the Env't v. N.M. Pub. Regul. Comm'n</i> , 2022-NMSC-010.....	1, 5, 11, 17
<i>Helena Chem. Co. v. Uribe</i> , 2013 NMCA-017	13
<i>Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n</i> , 1995-NMSC-062, 120 N.M. 579	5, 12
<i>N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n</i> , 2007-NMSC-053, 142 N.M. 533	4, 5
<i>Quynh Truong v. Allstate Ins. Co.</i> , 2010-NMSC-009, 147 N.M. 583	7
<i>State ex rel. Egolf v. N.M. Pub. Regul. Comm'n</i> , 2020-NMSC-018.....	10

New Mexico Statutes and Rules

NMSA 1978, §§ 62-1-1 to 62-13-16 (1941, as amended through 2021) (Public Utility Act).....	1, 2, 10, 11, 14
NMSA 1978, § 62-8-7 (2011).....	11
NMSA 1978, §§ 62-18-1 to -23 (2019, as amended through 2023) (Energy Transition Act)	passim
NMSA 1978, § 62-18-2(H)(2)(c).....	9

NMSA 1978, § 62-18-2(H)(11) (2019)	9
NMSA 1978, § 62-18-2(S) (2019)	10
NMSA 1978, § 62-18-4 (2019).....	7
NMSA 1978, § 62-18-4(B)(7) (2019).....	11
NMSA 1978, § 62-18-4(B)(11) (2019).....	3, 6, 7, 11
NMSA 1978, § 62-18-5(F)(8) (2019).....	3, 6, 11
NMSA 1978, § 62-18-5(M)(2) (2019).....	17
NMSA 1978, § 62-18-7(A) (2019).....	3, 17
NMSA 1978, § 62-18-7(B) (2019).....	3, 17
NMSA 1978, § 62-18-11(B)(1) (2019).....	4, 7
NMSA 1978, § 62-18-16 (2023).....	8
NMSA 1978, § 62-18-23 (2019).....	10

I. INTRODUCTION

PNM respectfully submits this Consolidated Reply Brief and requests that the Court overturn the *Final Order Adopting Recommended Decision with Additions* (“Final Order”) [26 RP 4575-4593] issued by the New Mexico Public Regulation Commission (“Commission”). The Final Order erroneously concludes PNM violated the Energy Transition Act (“ETA”).¹ The Final Order unlawfully rewrites the Commission’s previous Financing Order.² The Financing Order authorized PNM to issue bonds pursuant to the ETA (“ETA bonds”); to recover the estimated energy transition costs of abandoning its San Juan Generating Station (“SJGS”) through the ETA bond proceeds rather than the Public Utility Act’s (“PUA”)³ general ratemaking process; and also authorized PNM to collect an Energy Transition Charge (“ETC”) to pay the debt service on the ETA bonds once they are issued.⁴

¹ NMSA 1978, §§ 62-18-1 to -23.

² PNM refers to the recommended decision and final order from the financing phase of this case as “Financing RD” and “Financing Final Order” respectively, and “Financing Order” collectively. [BIC 1] This Court upheld the Financing Order in Case No. S-1-SC-38247, *Citizens for Fair Rates & the Env’t v. New Mexico Pub. Regul. Comm’n*, 2022-NMSC-010 (“CFRE”). Consistent with the Court’s July 20, 2023 Order, the supplemental record from that related appeal is cited as [X RPS Y].

³ NMSA 1978, § 62-3-1, *et seq.*

⁴ Financing RD, ¶ 41 at 125-126 [41 RPS 014805-014806].

The Answer Briefs filed by the Commission (“CAB”) and Intervenor-Appellees⁵ (“IAB”) contend that the Final Order enforces the ETA because PNM was required as a matter of law to issue the ETA bonds around the time of abandonment; they further question, because PNM did not issue the ETA bonds at the time of abandonment, whether PNM is still allowed to issue the bonds. Appellees assert the Commission properly relied on the ETA, the Financing Order and the Commission’s general ratemaking authority under the PUA to order an immediate piecemeal rate reduction in the form of SJGS rate credits. [CAB 30; IAB 19] The Answer Briefs argue the rate credit is a necessary “remedy” because PNM’s timing estimations constituted a “promise” to immediately remove SJGS costs from its rates upon abandoning SJGS and PNM “renege[d]” on its “assurances.” [CAB 8; IAB 29, 32] Appellees claim that the Final Order addresses a legal “moral hazard” by preventing a “double recovery” of SJGS costs. [CAB 27-30; IAB 34-36] Finally, Appellees contend that PNM is untimely attempting to “revise” the Financing Order, and the doctrine of *res judicata* precludes this alleged attempt at “relitigating” the Financing Order. [CAB 18-19; IAB 13-17]

⁵ The “Intervenors-Appellees” are identified in their joint brief. [IAB 1] PNM refers to the Commission and Intervenors-Appellees, collectively, as “Appellees.”

It is not PNM, but Appellees, who seek to relitigate the Financing Order and unwind this Court's previous affirmance of the Financing Order.

The Financing Order directed PNM to provide a SJGS rate credit to customers after the ETA bonds are issued and PNM begins collecting the ETC, rather than the date of the SJGS abandonment. Financing RD [41 RPS 014764-14847] That directive follows the ETA requirement for a rate adjustment when the ETC goes into effect if plant costs are also still included in utility's general rates.⁶ The Financing Order does not identify a time or date certain by which PNM was required to issue the ETA bonds, a fact the Commission itself confirmed.⁷ The Commission cannot inject *post hoc* deadlines into the irrevocable Financing Order; the Financing Order must be applied as written.⁸

⁶ Section 62-18-4(B)(11) requires that an ETA financing application include "a proposed ratemaking method to account for the reduction in the qualifying utility's cost of service associated with the amount of undepreciated investments being recovered by the energy transition charge **at the time that charge becomes effective.**" (emphasis added). Section 62-18-5(F)(8) provides that a Financing Order shall approve a ratemaking method as set forth in the application.

⁷ Days before this show cause proceeding was initiated, the Commission's Variance Order (*see* **BIC 5 [2 RP 0193-0211]**) confirmed that the Financing Order "does not require that PNM issue the Energy Transition Bonds . . . by any specific date." **[2 RP 0202]**.

⁸ *See, e.g.*, Section 62-18-7(B) (only the utility is allowed to seek an amendment to a financing order); Section 62-18-7(A) (the Financing Order is irrevocable and the Commission shall not "reduce, impair, postpone or terminate" the rights of the utility under the Financing Order). The Financing Order reiterates the statutory provision. Financing RD at 147, **[41 RPS 014827]**.

The only timing requirement imposed in the Financing Order is the concurrent implementation of a rate credit to customers when PNM commences charging the ETC, if PNM has not yet had its SJGS plant balances removed from rates in a general rate case.⁹ The Commission nevertheless believes PNM should have intuited the Financing Order contained a deadline, SJGS abandonment, to issue the ETA bonds.

While the ETA grants the Commission certain enforcement powers to ensure compliance with a financing order,¹⁰ here, there is no non-compliance to address. Appellees cannot and do not point to a decretal order that PNM failed to follow, and the Commission concedes that PNM has not violated the Financing Order.¹¹ The Commission cannot arbitrarily impose a selective rate reduction and retract the Financing Order authorizations, as a remedy for PNM's imputed noncompliance with the "spirit" of the ETA and Financing Order.

II. STANDARD OF REVIEW

PNM set forth the legal authorities governing the standard of review in its BIC. [BIC 13-14] This is primarily a case of statutory interpretation. Statutory interpretation is a question of law, which this Court generally reviews *de novo*. *N.M.*

⁹ Financing RD at 84-85 [41 RPS 014764-014765].

¹⁰ "Nothing in the [ETA] shall . . . prevent or preclude the commission from investigating the compliance of a qualifying utility with the terms and conditions of a financing order and requiring compliance therewith." Section 62-18-11(B)(1).

¹¹ See CAB 19 (this situation "involves not a violation of the Financing Order").

Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n, 2007-NMSC-053, ¶ 19, 142 N.M. 533. Secondly, the Answer Briefs make clear that the Commission selectively considered only those facts that supported its decision. While this Court affirms factual findings if they are supported by substantial evidence, it considers the whole record. *CFRE*, 2022-NMSC-010, ¶ 13. 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; see also *Cibola Energy Corp. v. Roselli*, 1987-NMCA-055, ¶¶ 8-9, 105 N.M. 774 (court must also consider evidence that undercuts the agency’s decision).

III. ARGUMENT AND AUTHORITIES

A. The Final Order is Not Supported by the Law or Facts

1. *The plain language of the ETA and the Financing Order contradict the Final Order’s requirement for SJGS rate credits.*

The Financing Order requires PNM to remove SJGS costs by implementing a rate credit when it begins collecting the ETC, to the extent the costs being repaid in the ETC are at the same time being recovered in rates:

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**.¹²

This directive tracks the ETA’s provision that the Commission devise a ratemaking method to ensure the cost of an abandoned plant is removed from rates “at the time the [ETC] become effective” Section 62-18-5(F)(8). The Commission now concludes that both the ETA and the Financing Order imposed different requirements on PNM: namely, that PNM’s rates had to be reduced as of the date of SJGS abandonment; and, that the ETA bonds had to be issued at or near the time of abandonment. **[25 RP 4377-4380]**

Appellees point to ETA Section 62-18-4(B)(11) **[CAB 26; IAB 26-27]** in support of this rereading. Far from making Appellees’ point, Sections 62-18-4(B)(11) disproves it: the utility must propose, and the Commission must establish, 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 through the energy transition charge **at the time that charge becomes effective** (emphasis added).” The statute does not tie the ETA rate adjustment to the time of abandonment; rather, it is tied expressly to the implementation of the ETC, so that plant investment costs are not recovered in base rates and in the ETC at the same

¹² Financing RD at 84-85 (emphasis added), **[41 RPS 014764-014765]**.

time. The plain language of Section 62-18-4(B)(11) cannot be rewritten to state “at the time of abandonment.” *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11; *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583.

The Answer Briefs also invoke Section 62-18-11(B)(1) as authorizing immediate rate credits as a “remedy.” [CAB 20-21; IAB 19] While Section 62-18-11(B)(1) provides enforcement authority to ensure compliance with a Financing Order, its applicability presupposes an actual *non-compliance*. Neither the Final Order nor the Answer Briefs identify any violation of a Financing Order requirement. For all the Answer Briefs’ repeated rhetoric that PNM deviated from the estimated timing of its anticipated rate case and bond issuance, that is not the same as violating an actual deadline or mandate set by law or order. The Commission itself admits that this case does not involve a violation of the Financing Order. [CAB 19] Therefore, Section 62-18-11(B)(1) has been arbitrarily and unlawfully applied; it cannot provide the basis for the Final Order’s *post hoc* amendment of the Financing Order.

2. *The ETA and the Financing Order do not contain a deadline for issuance of the ETA Bonds or imposition of a rate credit.*

Notwithstanding the plain language of Section 62-18-4, Appellees contend other ETA provisions hint that PNM had a duty to issue the bonds and remove plant costs upon SJGS abandonment. In the Commission’s words: “the ETA contains

several provisions that suggest bonds should be issued upon abandonment, or as soon thereafter as possible.” [CAB 24] This theory requires that the Commission cast aside its previous order finding there was no deadline by which the ETA bonds were required to be issued and confirming PNM’s ongoing right to have the ETA bonds issued.¹³

For instance, Appellees contend the statutory goal of mitigating impacts from abandoning coal plants “would not be effective unless the bonds are issued close in time to the abandonment of the coal-fired facilities.” [CAB 26; *see also* IAB 25-26]. Appellees infer that ETA bonds must be issued at abandonment because Section 62-18-16 requires utilities to transfer a percentage of ETA bond proceeds to fund state-administered programs within thirty days of receipt.

Section 62-18-16 speaks only to how quickly PNM must transfer bonds proceeds to the state treasury upon their receipt; it does not create a deadline for issuing the bonds. To address that concern, the Financing Order authorized PNM to voluntarily prefund the state agencies’ monies [41 RPS 014782], and the Final Order below mandated PNM to do so. RD at 112, Decretal ¶ D (adopted by Final Order)

¹³ Variance Order (¶ 26) [2 RP 0202] (emphasis added). The Commission concluded the Financing Order dictates instead the terms and conditions that must be followed once the authorized actions “actually take place.” *Id.* ¶ 27 [2 RP 0202].

[25 RP 4443] PNM has complied with this requirement.¹⁴ The Final Order belies Appellees' interpretative arguments and highlights the arbitrariness of deciding that PNM must pre-fund ETA programs while simultaneously claiming it is implicitly unlawful for PNM to have the ETA bonds issued.

Appellees also argue that Section 62-18-2(H)(2)(c) suggests that the bonds must issue at or around the time of abandonment because it would be unjust for SJGS costs to remain in PNM's rates during the period between abandonment and bond issuance. [CAB 26-27; IAB 26] This ignores the specific language of Section 2(H)(11) cited above, as well as the fundamentals of ratemaking. A utility's rates are based on a Commission-approved annual revenue requirement that reflects what it generally costs to run the utility. Generally, for the years between general rate cases, none of the changes to a utility's costs and plant investments - both reductions *and* additions - are accounted for until the next case. While this means SJGS plant costs remain in existing rates, it also means that other plant additions and related depreciation expenses are not yet included in those rates. This basic principle of ratemaking underlies the ETA's Section 2(H)(11) provision that rates are to be adjusted only when the ETC is implemented to repay the ETA bonds.

¹⁴ See PNM Verified Compliance Report, Docket No. 19-00018-UT (August 24, 2022).

Contrary to the Appellees’ assertions, none of the ETA timing “suggestions” translate to a statutory mandate that ETA bonds be issued as soon as a plant is abandoned, nor would that be consistent with the ETA itself. Given that a financing application for authorization to issue ETA bonds can be filed at any point before 2032, it makes little sense that the ETA would prohibit the ETA bonds from being issued after plant abandonment while also requiring SJGS be abandoned by 2023.¹⁵

3. *The Commission cannot rely on the PUA to justify the rate credit imposed by the Final Order.*

The Commission cannot backfill its circumscribed authority under the ETA by invoking its general supervisory and ratemaking authority under the PUA. This Court previously rejected that attempt: “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.” *State ex rel. Egolf v. N.M. Pub. Regul. Comm’n*, 2020-NMSC-018 ¶ 17. It is not the PUA, but “the ETA [which] serves as the statutory scheme that the Legislature provided for abandonment proceedings.”

¹⁵ Compare § 62-18-2(S) (providing closure deadlines for qualifying plants) and § 62-18-3 (addressing replacement location options for plant abandoned by 2023) with § 62-18-23 (providing ETA shall not apply to an initial application for financing order filed more than twelve years after effective date of ETA).

Id. at ¶ 33. Similarly, the ETA applies to the financing of those abandonments. *CFRE*, 2022-NMSC-010, ¶ 7.

This does not mean that the Commission’s general ratemaking authority under the PUA is undermined, nor that PNM is alleging a statutory conflict between the ETA and the PUA, as Intervenors-Appellees assert. **[IAB 17-24]** Rather, it means if the Commission is exercising its general ratemaking authority under the PUA’s Section 62-8-7, adjustments to rates to address SJGS costs must occur through a general rate case, not as a unilateral rate credit linked to repaying ETA bonds through the ETC. The Commission cannot invoke the PUA to justify modifying the parameters of a rate credit that is authorized only under specified circumstances in the ETA’s Sections 62-18-4(B)(11) and 5(F)(8).

4. *The Final Order improperly treats PNM’s estimations as guaranteed absolutes to justify revising the Financing Order’s rate credit terms.*

Appellees cherry-pick or inaccurately paraphrase selective PNM statements to claim that PNM guaranteed the future timing of the ETA bond issuance and ETC-based rate credits. **[CAB 2]** Pursuant to Section 62-18-4(B)(7), PNM provided a good faith estimate for the timing of the issuance of the bonds in the financing proceedings. **[20 RP 2751]** PNM also stated its expected timing for its next rate case, and directly tied the timing for the bond issuance to its next rate case. **[20 RP 2637]** That expected timing for PNM’s next rate case changed for good reasons: the

COVID-19 pandemic and the desired delay of new rates as part of commitments in a proposed merger. **[BIC 18-19]**. To be sure, in a few instances in the Financing Proceeding PNM stated that it would issue the bonds at or about the time of SJGS abandonment without limiting those statements as expectations or estimates only. But in many more instances, as the Financing Order observed, PNM was clear that it was stating only an expectation of future timing. **[BIC 17-18]**.

This Court is required to consider this evidence, which undercuts Appellee’s assertions of “broken promises.” *Morningstar*, 1995-NMSC-062, ¶ 12; *Cibola Energy Corp.*, 1987-NMCA-055, ¶¶ 8-9. That the anticipated timing did not transpire does not mean PNM “renege” on a promise or misled the Commission. And nowhere did the Commission order that PNM would be required to forego issuing the ETA Bonds or immediately reduce its rates outside of a rate case proceeding if the bond issuance did not coincide with SJGS abandonment.

5. *PNM’s challenge to the Final Order is not an untimely appeal of the Financing Order, nor is it barred by res judicata*

Intervenors-Appellees assert that *res judicata* bars PNM’s “subsequent, unilateral decisions to ignore the requirements of that Financing Final Order.” **[IAB**

14-17] Appellees for the first time¹⁶ also argue that PNM’s appeal of the Final Order is an untimely attempt to appeal the earlier Financing Order. [**CAB 18-19; IAB 12-14]** According to the Commission, “PNM simply deviated from this order.” [**CAB 18]**. These arguments miss the mark.

The Financing Order did not order PNM to issue the ETA bonds or alternatively issue rate credits “at, or close to, the time of the SJGS abandonment” as Appellees claim. PNM has not violated the actual requirement that SJGS costs remaining in rates are to be removed at the time the ETC is implemented through a rate adjustment, because that circumstance has not arisen.¹⁷ PNM has not “deviated” from the Financing Order, and the Commission has previously acknowledged as much.¹⁸

¹⁶ Appellees did not raise this “untimely appeal” argument in support of their positions in the Commission proceeding below, nor was this a basis for the Final Order, and the Court need not entertain these arguments. *See, e.g., Helena Chem. Co. v. Uribe*, 2013 NMCA-017 (arguments not raised in proceeding below are waived).

¹⁷ Intervenors-Appellees also repeatedly misstate the Financing Order: “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.” [**IAB 13 (emphasis added)**] That is not what the Financing RD recommended or what the Financing Order adopted, no matter how many times Appellees rewrite the actual language.

¹⁸ *See supra*, n. 11.

B. The Final Order’s Improper Single-Issue Ratemaking Is Not Justified under a Moral Hazard Theory.

PNM’s BIC demonstrated that the Final Order’s rate credit impermissibly departs from the Commission’s well-established policy against single-issue ratemaking. **[BIC 33-39]** The Answer Briefs defend this single-issue ratemaking as necessary to avoid a “moral hazard.” **[CAB 27-30; IAB 34-36]**. As an initial matter, there is no “moral hazard” legal standard under New Mexico law. **[BIC 28-33]** Appellees brush this aside, claiming that “moral hazard” is just a rubric, a “term of art” **[CAB 29; see also IAB 35]** that informs the Commission’s enforcement authority under the ETA and its general authority to ensure just and reasonable rates under the PUA. **[CAB 29]** They further contend that invoking this newfound “moral hazard” authority is appropriate to avoid a double-recovery of SJGS costs. **[CAB 27-32; IAB 34-39]** The ETA, however, shields customers from double recovery by requiring a rate adjustment at the time the ETC goes into effect.

The fallacy of Appellees’ “double-recovery” claim, pervasive throughout the Answer Briefs, is exemplified by the Commission’s Answer Brief:

If PNM customers are still paying the same rates without having had bonds issued and without having had a rate case determination, PNM customers are paying for operations and maintenance on a plant that has no workers, is no longer in operation, and is not serving customers. This is both adverse to the ratepayers and a windfall for PNM. **[CAB 28]**

While it is true that SJGS costs currently remain in PNM's rates it is equally true PNM's significant investments in new plant since its last rate case are not yet included in rates. This is the nature of utility ratemaking and why rates based on a representative annual revenue requirement are to be changed through general rate proceedings. Appellees ignore that PNM customers are currently *not* paying for operations and maintenance on nearly \$2 billion in investments added subsequent to PNM's last rate case that *does* have workers, *is* in operation, and *is* serving customers. For that reason, the delay in filing a rate case delayed an overall rate increase as new plant additions since PNM's rates were last set far exceed the remaining SJGS plant balance. **[BIC 6]** This is another reason why the Commission's departure from its long-standing policy against single-issue ratemaking was inappropriate.

Appellees contend that the Commission's piecemeal ratemaking was nonetheless warranted to address "exceptional circumstances" and to remedy "a utility's refusal to follow the requirements of a Commission order." **[IAB 37]** The Commission similarly characterized its departure from its own long-standing policies as necessary to deal with a "utility disregarding an order," and an appropriate "response to PNM's own unlawful action." **[CAB 31]** But PNM has taken no unlawful action, and has not violated the Financing Order, a fact admitted by the Commission.

C. The Final Order’s Future Prudency Review Would Constitute an Impermissible Hindsight Review of the Bond Issuance.

PNM’s BIC demonstrated the Final Order’s requirement of a prudency review regarding the timing for the issuance of the bonds would result in an impermissible retroactive review. [BIC 39-41] The Commission contends there will be no hindsight review [CAB 32-34], but the Final Order requires PNM to compare bond interest rates at the time of abandonment of SJGS Units 1 and 4, respectively, against bond rates at the time PNM issues the bonds—and face a consequence if interest rates have increased. [BIC 39-41] That is classic hindsight prudency review. It will purport to determine whether PNM’s “delay” in issuing the bonds was prudent based on future interest rates unknowable at the time of abandonment, compared against interest rates that existed *in the past*.

D. Appellees Fail to Refute the Irrevocability of the Financing Order and PNM’s Continuing Authority to issue the ETA bonds.

The Final Order questions whether PNM’s proposed issuance of the ETA bonds is now outside the authority of the Financing Order. Final Order, ¶ 11 [25 RP 4442] PNM’s BIC demonstrated that by questioning the legitimacy of PNM’s ongoing right to issue the ETA bonds, the Commission has unlawfully impaired the marketability of those bonds. [BIC 41-45] Numerous provisions in both the Financing Order and the ETA establish the Financing Order as irrevocable, and expressly grant PNM continuing authority issue the ETA bonds. [PNM BIC 42-45]

For example, the Financing Order grants PNM “*the continuing, irrevocable right* to cause the issuance of the Energy Transition Bonds....in accordance with the terms of this Financing Order (italics added).” Financing RD at 156, ¶ 28 [41 RPS 014836] This Court confirmed the irrevocable nature of the Financing Order. *CFRE*, 2022-NMSC-010, ¶ 8.

Appellees’ attempts to avoid these clear limitations are unavailing. The Commission now claims that its Final Order “does not call into question the irrevocability of the financing order because the statute contemplates amendment and enforcement.” [CAB 23] In an exercise of semantics, the Commission argues the Financing Order is irrevocable but not “indelible” and subsequently can be unilaterally amended by the Commission to “effectuate” provisions of the ETA. [*Id.*] The Commission is statutorily precluded from unilaterally amending the Financing Order absent a request by PNM, § 62-18-7(A) and (B), and the Commission’s attempt to rely on Section 62-18-5(M)(2) for authority falls equally flat. Questioning PNM’s “continuing, irrevocable right” to issue the ETA bonds straightforwardly ignores the ETA and impedes the issuance of the bonds, and the Commission should have ensured the Final Order affirmed rather than interfered with the authorization granted to PNM in the Financing Order.

Intervenor-Appellees evidentiary challenge on this point **[IAB 45]** ignores the uncontested record. PNM’s expert securities witness provided unrebutted testimony that any regulatory challenge by a utility commission to securitization is a negative credit factor, and bonds will not be issued if legal opinions cannot be rendered that a bond issuance complies with a financing order and faces no challenge. **[21 RP 2918:2-2920:11, 3236]** The Financing RD also recognized the critical importance of the Commission’s affirmation that it will not take any action to impair the value of the Energy Transition Property in order to enhance “investor understanding that the risk of an adverse change in law or regulation is remote and will permit counsel to deliver important legal opinions that such adverse changes would not be legally valid.” Financing RD at 62 **[41 RPS 014742]**

Intervenor-Appellees’ argument that PNM failed to preserve this argument is meritless. **[IAB 45]** PNM directly challenged the Commission’s determinations that the ETA bonds should have been issued at the time of abandonment, as well as the requirement for a prudency review of interest rates associated with any bond issuance; the unlawful impairment of the ETA bonds’ marketability is the result of those determinations and is appropriately encompassed within PNM’s Statement of Issues. **[26 RP 4580, ¶ 11; Statement of Issues # 2, 3, and 5]**

IV. CONCLUSION

The Commission ordered unlawful “remedies” for not issuing the ETA bonds at the time SJGS was abandoned, despite the Final Order imposing no requirement or deadline to do so, by making a *post hoc* determinations that PNM’s estimated timing of future events in the Financing Proceeding constituted “promises.” Additionally, the Final Order unlawfully impairs the marketability of the bonds by calling into question PNM’s ongoing authorization to issue the bonds despite the irrevocable, clear language of the Financing Order. PNM respectfully requests that the Court overturn the Final Order on the grounds it violates the ETA’s provisions regarding the implementation of a rate adjustment, conflicts with the Commission’s general ratemaking authority by ordering a piecemeal rate reduction, exceeds the Commission’s ETA financing amendment and enforcement authority, and further fails to comport with the Financing Order previously upheld by this Court by impairing the marketability of the ETA bonds.

Respectfully submitted this 28th day of August 2023.

PUBLIC SERVICE COMPANY OF NEW MEXICO

/s/ Stacey J. Goodwin

Patrick V. Apodaca, Senior Vice President
and General Counsel

Stacey J. Goodwin, Associate General Counsel

PNMR Services Company

Corporate Headquarters – Legal Department

Albuquerque, NM 87158-0805

(505) 241-4927

Stacey.Goodwin@pnmresources.com

Richard L. Alvidrez

Miller Stratvert P.A.

500 Marquette NW, Suite 1100

P.O. Box 25687

Albuquerque, New Mexico 87125

(505) 842-1950

RAlvidrez@mstlaw.com

Raymond L. Gifford

Debrea M. Terwilliger

Wilkinson Barker Knauer LLP

2138 West 32nd Ave., Suite 300

Denver, CO 80211

(303) 626-2350

(303) 626-2329

RGifford@wbklaw.com

DTerwilliger@wbklaw.com

Attorneys for Public Service Company of New Mexico

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of PNM's Reply Brief was served on all counsel of record through the Court's Odyssey filing system on August 28, 2023.

/s/ Stacey J. Goodwin

Stacey J. Goodwin