IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39138

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee, and

SIERRA CLUB,
NEW ENERGY ECONOMY,
WESTERN RESOURCE ADVOCATES and
COALITION FOR CLEAN AFFORDABLE ENERGY,

Intervenors-Appellees.

In the Matter of the Application of Public Service Company of New Mexico for Approval of the Abandonment of the Four Corners Power Plant and Issuance of a Securitized Financing Order, NMPRC Case No. 21-00017-UT

ANSWER BRIEF OF INTERVENER-APPELLEE OF NEW ENERGY ECONOMY'S TO APPELLANTS' BRIEF-IN-CHIEF

John W. Boyd, Esq.
FREEDMAN BOYD HOLLANDER
& GOLDBERG, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

Mariel Nanasi, Esq.
300 East Marcy St.
Santa Fe, NM 87501
(505) 469-4060

Attorneys for Intervener/Appellee New Energy Economy

May 9, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO REGULATORY CASES

REGULATORY CASES FROM OTHER JURISDICTIONS

NEW MEXICO STATUTES AND RULES

I. INTRODUCTION

Public Service Company of New Mexico's (PNM's) appeal arises from a decision by the Public Regulation Commission ("Commission" or "PRC") to deny PNM's application for permission to abandon its interest in the Four Corners Power Plant ("FCPP"). The PRC did so principally because PNM failed to identify available resources to replace FCPP, as required by the Energy Transition Act ("ETA") and the Public Utility Act ("PUA"). It was unsurprising, then, that the Commission denied abandonment *at this time* and rejected PNM's request for a financing order to recover the costs it claimed upon abandonment.

PNM feigns outrage that the PRC found its so-called "proxy" replacement resource plan, based on outdated cost information, insufficient to satisfy the ETA and PUA— despite having repeatedly affirmed to this Court in prior proceedings that identifying available and reliable replacement resources is a necessary precondition to abandonment. *See below*, §IV, A1b. PNM asks this Court to substitute its own judgment for the PRC's and assume the role of assuring ratepayers that they can rely on PNM's non-plan for replacement power, even when PNM has raised alarms of possible "brownouts" this summer. The PRC and its staff have the expertise to assess whether PNM's plan will assure the reliability of electrical service. It is not the responsibility of the Court to assume that role, as PNM implicitly requests.

In addition to the absence of a replacement power plan, PNM's plan for abandonment includes the sale of its FCPP stake to Navajo Transitional Energy Company, LLC. ("NTEC"). Under PNM's arrangement with NTEC, PNM will pay NTEC $75 million to take PNM's coal shares and, upon closing, NTEC will "pay" PNM $1.[1] NTEC will continue operating FCPP, a coal plant. The intent of the ETA was to close coal plants, not keep them running. To that end, the ETA included a provision forbidding the PRC to allow a utility to sell a coal plant and thereby keep it running. §62-16.4.B(4). PNM incorrectly invokes the ETA to support reversing the PRC's decision while ignoring the ETA's prohibition against the sale of FCPP to NTEC. *See below*, §IV, A1a.

Furthermore, the record of this and the related PRC proceedings establishes that PNM renewed its FCPP obligations in 2013-14, without any contemporaneous financial analysis or resource comparison. PNM now seeks to shift to ratepayers hundreds of millions of dollars of contractual liability through this proceeding without regard to considerations of imprudence. As the record shows, shortly before passage of the ETA, PNM was found by the PRC to have acted imprudently in renewing FCPP obligations, but petitioned the PRC to withdraw that decision, asking that it defer the imprudence issue to the next rate case. *See below*, §IV, B.

[1] **1RP00474-5**.

PNM's position now is that the ETA relieved it of that agreement, and it is entitled to recover from ratepayers all costs arising from FCPP, regardless of its imprudence. As NEE explains below, however, the ETA cannot thwart the PRC's obligations to protect ratepayers.

Finally, there is the matter of PNM's effort to characterize the PRC as a rogue agency that needs to be disciplined by this Court. (*PNM Brief,* 1) It does so by telling the Court that, "for the second time," the PRC is refusing to apply the ETA to PNM's application for abandonment. *Id*. Not only has the PRC *never* refused to apply the ETA, it forthrightly and correctly applied it here. In 19-00018-UT, to which PNM refers as an example of the PRC "refusing" to apply the ETA, the PRC had not yet ruled on whether the San Juan Generating Station ("SJGS") abandonment case had been "pending" within the meaning of Art. IV §34 of the N.M. Constitution and whether, therefore, it was or was not covered by the ETA. It had asked for briefing on that topic and taken it under advisement. *State ex rel. Egolf v. N.M. Pub. Regulation Comm'n*, ("*Egolf*") 2020-NMSC-018, ¶12. But before the PRC could make a decision, the Governor and the legislature brought a writ proceeding, joined by PNM, to have this Court order the PRC to apply the ETA. *Id.,* at ¶¶1,12,13. For PNM to cite *Egolf* to support its claim that the PRC has now *twice* refused to apply the ETA is a disingenuous effort to prejudice this

Court against the PRC, which has *never* refused to apply the ETA and whose decision here was driven by the ETA's requirements, as NEE explains below.[2]

The issues before this Court are as follows:

When reviewing the record as a whole, did the PRC act arbitrarily, capriciously or contrary to law when it denied PNM's application to abandon FCPP:

a. Where PNM's application failed to provide a plan for sufficient replacement power so as to provide reasonable and proper service to its customers, as the ETA,[3] the PUA,[4] and applicable court-created legal standards[5] require?

b. When the ETA forbids the Commission to approve the sale of a carbon dioxide emitting electricity-generating resource as a means of complying with the renewable portfolio standard?[6]

c. Where PNM failed to carry out its contractual obligation in Case No. 16-00276-UT to perform a quantitative analysis of the economics of exiting FCPP compared to investments in other generation resources?[7]

---

[2] **37RP15414-27**.
[3] NMSA 1978, §62-18-4.
[4] NMSA 1978, §62-9-5.
[5] *Commuters' Committee v. Pennsylvania PUC*, 170 Pa. Super. 596 (1952) ("*Commuters' Committee*").
[6] NMSA 1978, §62-16.4.B(4).
[7] **30RP09795-6**.

d. Where PNM included costs in its securitization request which, if found to be imprudent, would be contrary to the public interest and result in a "grave injustice"?[8]

II. SUMMARY OF THE PROCEEDINGS

NMRA 12-318(A)(3) requires the appellant – here, PNM – to provide a Summary of Proceedings "briefly describing the nature of the case, the course of proceedings and the disposition" by the tribunal below, "including a summary of the facts relevant to the issues presented for review." NMRA 12-318(A)(3).

Although PNM's Brief includes a section entitled "Summary of the Proceedings," it is anything but. Rather, it is an argumentative, misleading rant, calculated to anger this Court with a recitation of imagined errors that the PRC supposedly committed in violation of law. PNM's "Summary of the Proceedings" is notable for its misleading, and sometimes false, recitation of what it claims are the "relevant facts."

A. Nature of the Case and Course of Proceedings

On January 8, 2021, PNM filed an Application for approval to abandon its interest in FCPP and sell its shares to NTEC for $1.[9] Additionally, PNM sought

[8] **36RP15089**; **1SRP034**.
[9] **1RP00474-5**.

approval for securitized financing of the abandonment and financing costs, along with funding for state-administered tribal and community programs.

On January 19, 2021, the Commission initiated this abandonment proceeding pursuant to §62-9-5 of the PUA and ETA. On February 26, the Hearing Examiner ("HE") required PNM to address the prudence of FCPP undepreciated investments for which PNM sought inclusion in a financing order as authorized by the *Revised Final Order* in 16-00276-UT and other matters.[10] Also in that Order, the HE found: "For purposes of pleading, at this nascent stage . . . PNM's Application and supporting testimony appear to sufficiently address the requirement under Section 62-18-4(D) that adequate potential new resources be identified. *For purposes of ultimate proof, however, whether this requirement has been satisfied awaits a ruling based on the evidence adduced at hearing*."[11] (emphasis supplied.)

An evidentiary hearing was conducted over seven days between August 31 and September 9, 2021. The HE issued two Recommended Decisions ("RD"), approving PNM requests to abandon its interests in FCPP, sell and transfer those interests to NTEC, and securitized financing. Although the HE recommended granting PNM's abandonment and approval of PNM's financing order, he held

[10] **3RP01357-62**.
[11] **3RP01358**.

that: "PNM's position carries an unacceptable and avoidable financial risk to ratepayers and is contrary to the public interest because, reading the ETA in harmony with the PUA . . ., it becomes readily apparent that acceptance of PNM's position would lead to a grave injustice ***if,*** i.e., assuming without deciding, well over $100 million in coal plant investments and costs otherwise found, after a full and fair hearing, to have been imprudently incurred were nevertheless improvidently foisted on ratepayers in final, actual abandonment costs."[12]

After weighing the evidence, the Commission rejected abandonment and the Financing Order because PNM had failed to meet the ETA and PUA standards for abandonment and such approvals would be contrary to the public interest.[13] It did not reach a decision on the prudence of PNM's FCPP investments, directing that a decision regarding prudence be made in the continuation of this case or another proceeding.

PNM appealed.

B. Facts Necessary to an Understanding of the Issues on Appeal

1. PNM's sale and transfer of its ownership share at FCPP to NTEC will not accelerate the elimination of coal-fired generation or New

[12] **36RP15089**.
[13] **37RP15414-27**.

Mexico's transition from coal as an electric generation resource to more sustainable resources.[14]

2. PNM provided the PRC with only "proxy replacement portfolios," based on an analysis of "generic placeholders," using five-year-old cost estimates and assumptions, "which reflect PNM's view of the most likely set of conditions in the future."[15] This was a unique departure from PNM's past submissions in all of its recent abandonment cases.[16]

3. ETA, §62-18-4, states: "The qualifying utility or the commission may defer applications for needed approvals for new resources to a separate proceeding; *provided that the application identifies adequate potential new resources sufficient to provide reasonable and proper service to retail customers*." (emphasis supplied.)

4. In addition to failing to identify resources sufficient to provide proper service to its customers, PNM admitted that it did not honor its obligation to present the FCPP replacement power cost-benefit

[14] **33RP13326-7**; **33RP13337-41**.
[15] **35RP14922**; **37RP15418**.
[16] 13-00390-UT, PNM SJGS Abandonment and Replacement Power, 12/16/2015; 19-00195-UT, PNM SJGS Abandonment and Replacement Power, 7/1/2019; 21-00083-UT, PNM PVNGS Abandonment and Replacement Power, 4/12/2021.

analysis required by the Stipulation in 16-00276-UT.[17] Under the Stipulation, PNM agreed to perform a cost-benefit analysis on the impact of an early exit from FCPP, including an analysis of the cost recovery of and return on PNM's undepreciated investments in FCPP together with full recovery of all existing contractual obligations, including default payments and penalties.[18]

5. In 16-00276-UT, the PRC concluded that PNM had imprudently renewed its FCPP obligations and that ratepayers should be protected from the inclusion of those costs in rates. PNM requested the PRC, however, to withdraw its determination that PNM had imprudently renewed its contracts and made investments in FCPP and agreed that the prudence review would occur in its next rate case.[19]

III. APPLICABLE LEGAL STANDARDS

Under NMSA 1978, §62-11-4, an appellant must overcome the presumption that the Commission's final decision is reasonable by showing that it was unreasonable or unlawful. *Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, ("*ABCWUA*") 2010-NMSC-013, ¶35, 148 N.M.

[17] **30RP09795-6**.
[18] **35RP14896-7**.
[19] **33RP13327-34**.

21. "[We] review the [Commission's] determinations to decide whether they are arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law, with the burden on the appellant to make this showing." *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶12 ("*CFRE*") citing, *New Energy Econ., Inc. v. N.M. Pub. Regul. Comm'n,* 2018-NMSC-024, ¶24, 416 P.3d 277 (internal quotation marks and citation omitted).

The Court considers the whole record to determine whether substantial evidence supports the Commission's decision. *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation. Comm'n* ("*NMIEC*"), 2007-NMSC-053, ¶24, 142 N.M. 533.

The substantial evidence standard is met where the record as a whole demonstrates the reasonableness of the agency's decision; the Court does not reweigh the evidence or replace the factfinder's conclusions with its own views. *DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶12, 146 N.M. 453. The Court gives substantial deference to factual findings predicated on matters requiring NMPRC expertise. *ABCWUA*, 2010-NMSC-013, ¶50.

IV. ARGUMENT

A. The Commission Correctly Rejected PNM's Application Because It Failed to Meet the Legal Standard for Abandonment

PNM bases its appeal on a claim that the PRC acted arbitrarily, capriciously, and unlawfully in denying its abandonment application. (*PNM Brief,* 25) PNM sought to abandon FCCP pursuant to the provisions of NMSA 1978, §62-9-5. (*PNM Brief*, 23), and PNM argues here that its "proxy" replacement power portfolio was adequate to demonstrate the availability of resources to replace FCPP. (*PNM Brief,* 11)

First, PNM acknowledged below that under the ETA it must meet the standard of abandonment. NMSA 1978 §62-9-5; **28RP01145-6**. PNM also acknowledged that the ETA does not change the legal standard for abandonment. **30RP09672-3**. Additionally, legal precedent for abandonment requires a showing of net public benefit. **36RP15032**. Because PNM failed to meet its burden of proof under abandonment, it was not entitled to a Financing Order. §62-18-5(E).

1. PNM's abandonment and sale to NTEC under the PUC, NMSA 1978 §62-9-5, and under the *Commuters' Committee* case fails the net public benefit test.

The Commission has interpreted "public convenience and necessity" as requiring a showing of a "net benefit to the public."[20] PNM argued that the Commission misapplies the ETA and ignores the abandonment statute. (PNM Brief, 3), citing NMSA 1978, §62-9-5. PNM argues that the Commission didn't weigh the benefits of abandonment. PNM's argument is not supported by the record. As explained below, PNM failed to meet its burden to prove that "abandonment" is in the public interest or that it will not result in a net public detriment. Furthermore, without a demonstration that replacement power is actually available at an acceptable cost, it is axiomatic that the continued use of FCPP is required.

a. The "sale" of coal plants is forbidden by the ETA; the continued burning of coal is a net public detriment.

Commissioner Maestas stated:

> I think most folks out there who are knowledgeable of the Energy Transition Act and understand its intent, maybe see the end result of this proposed abandonment and securitization as completely contrary to the intent of the ETA because it's going to continue to operate even if this abandonment eventually goes through. And we all know the purpose of the ETA is to not

[20] *Recommended Decision on Abandonment and Non-Securitized* Costs, Case No. 19-00018-UT, Feb. 21, 2020, p. 26; *New Energy Economy, Inc. v. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶14, 416 P.3d 277.

just allow PNM to divest itself of the coal-burning resources, but to allow New Mexico to transition away from any coal-burning resources in the State.[21]

PNM is paying NTEC $75 million to take its coal interests off its hands and will receive from NTEC at closing a total of one dollar ($1.00).[22] The ETA, §62-16.4.B(4), forbids the sale of coal plants: "[T]he commission shall prevent carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the renewable portfolio standard." In PNM's Direct Testimony, PNM confirmed that a purpose of its proposed abandonment and sale of its interest to NTEC is to help PNM comply with the Renewable Portfolio Standard ("RPS") in the ETA, NMSA §§62-16-4.A (5) and (6) (2019).[23]

PNM's sale not only defeats the ETA's unambiguous legislative directive to prevent such transfers, it indisputably would not (1) limit the operation of FCPP, (2) accelerate the reduction of CO_2 or other greenhouse gas emissions from electricity-generating resources, and (3) accelerate New Mexico's transition from coal to more sustainable resources.[24] Thus, PNM's abandonment scheme runs

[21] **1SRP031-2**.
[22] **1RP00474-5**.
[23] **28RP07138, 07150**; **30RP09884, 87, 92-93, 94-96, 906-7**.
[24] **31RP10595-10598**; **33RP12540-46, 52-55**; **33RP12656-58**.

counter to the public interest by perpetuating coal burning and contributing to climate change.[25]

By prolonging the burning of coal, PNM's sale to NTEC is also contrary to Governor Lujan Grisham's Executive Order 2019-003,[26] the 2020-2022 IPCC reports,[27] the ETA,[28] and the PRC's climate protection positions in various orders[29] that uphold decarbonization to mitigate the most extreme impacts of a destabilized climate.

---

[25] PNM admission that sale to NTEC will not accelerate the elimination of coal-burning, **30RP09698-702**; 20-00222-UT, *Order Granting Joint Motion to Take Administrative Notice of Climate Change, Causes and Likely Consequences*, June 21, 2021.

[26] https://www.governor.state.nm.us/2019/01/29/gov-lujan-grisham-signs-executive-order-committing-new-mexico-to-essential-climate-change-action/

[27] https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_Chapter06.pdf ("Warming cannot be limited to well below 2°C without rapid and deep reductions in energy system CO_2 and GHG emissions. … Prices have dropped rapidly over the last five years for several key energy system mitigation options, notably solar PV, wind power, and batteries."

[28] NMSA 1978, Section 62-16.4.B(4)

[29] 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, pp. 82-86, ("the problem of climate change and the role of CO_2 emissions from electric generating resources as major contributors to the climate change problem"); 19-00349-UT, *Recommended Decision*, 11/16/2020, p. 78-80 (*extending* current existing fossil generation should be considered *before* new fossil investments are made); 20-00222-UT, *Order Granting Joint Motion to Take Administrative Notice of Climate Change, Causes and Likely Consequences*, June 21, 2021.

b. Abandonment fails to meet the *Commuters' Committee* standards.

PNM's regulatory expert, Fenton, agreed that the "Commuters' Committee factors" test applies to abandonment cases in New Mexico.[30] This test was initially adopted by the Commission in NMPRC Case No. 2296. The four factors to be considered as prerequisites to abandonment are:

> 1. The extent of the carrier's loss and the relation of that loss to the carrier's operation as a whole;
>
> 2. The use of the service by the public and the prospects as to future use;
>
> 3. A balancing of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of such service; and
>
> 4. The availability and the adequacy of service to be substituted.

Commuters' Committee, 170 Pa. Super. at 604.

When PNM filed its *Emergency Writ to the Supreme Court*, No. S-1-SC-37552, relating to SJGS, it took an entirely different position regarding replacement power than it is taking now. There, it explained:

> PNM cannot adequately meet its burden of proof under the Commuters' Committee test [] because the impacts of discontinuance of service are still being developed, and service from SJGS remains warranted unless adequate replacement resources are *identified and available*. The NMPRC has previously denied abandonment of generation facilities where, as here, a utility could not *demonstrate the availability of adequate replacement resources*.[31]

---

[30] **28RP07147-51**.

[31] PNM's Emergency Writ to the Supreme Court, No. S-1-SC-37552, 2/27/2019, p.10.

And PNM had more to say:

> Based on past NMPRC standards, *PNM cannot file a complete or defensible application for abandonment because PNM does not presently have the necessary information to do so*. Although not yet finished, PNM has been diligently pursuing, and continues to diligently pursue, the actions and tasks necessary to present a complete application for SJGS abandonment by *updating cost analyses, and identifying and selecting necessary replacement resources to be proposed to the NMPRC*. … It is not within the NMPRC's purview to try to force PNM to do the impossible. … [It is] *impossible* for PNM to adequately comply with through the filing of a complete and defensible [abandonment] application.[32]
>
> PNM also must file a case that could be found *deficient on its face because it does not demonstrate what replacement resources may be available* and does not allow PNM to adequately account for changing energy policies that impact those choices. [] *PNM cannot meet its burden of proof and satisfy the requirements for an abandonment application*[.][33]

(emphasis supplied.)

In other words, PNM, in the writ case, presciently rebutted all the arguments it is making here by conceding that it would be "legally impossible" to proceed with abandonment without genuine replacement scenarios that have been vetted, "identified and available," and their costs known. PNM's argument in this case is wholly inconsistent with its argument in the "writ" case. Now, with a different objective, PNM states that requiring it to adhere to the *Commuters' Committee* factors and the ETA is "pretextual". (*PNM Brief,* 21)

---

[32] *Id.,* pp. 21-22.
[33] *Id.,* pp. 24-25.

Here, the Commissioners properly analyzed the *Commuters' Committee* factors, finding that PNM's proxy modeling failed to satisfy the requirement that the utility prove the "availability and the adequacy of service to be substituted." As Commissioner Hall stated: "I certainly did stand in support of the concern expressed in this Order and our solution to it in requiring that when we look at replacement resources, we have more than just a prediction from a model. We really do need to have, you know, a suite of portfolios presented to us that show what the real replacement resources will be."[34]

PNM's failure to identify sufficient replacement generation resources alone provides sufficient justification for the Commission to deny abandonment. The primary duty of a public utility is to reliably serve, at reasonable rates, all those who desire the service that it has been given a monopoly to render. For electric utilities, that is often characterized as "keeping the lights on." In New Mexico, that obligation is codified as "[e]very public utility shall furnish adequate, efficient and reasonable service." NMSA 1978, 62-8-2.

PNM's use of "proxy" replacement modeling was a unique departure from PNM's past submissions. In previous cases, PNM provided actual replacement resources that could be evaluated. In 13-00390-UT, when PNM applied for abandonment of SJGS units 2 and 3, PNM provided its preferred replacement

[34] **1SRP034**.

power scenarios. *New Energy Econ. v. N.M. Pub. Regulation Comm'n,* 2018-NMSC-024. In 19-00195-UT, when PNM applied for abandonment of SJGS units 1 and 4, pursuant to the ETA, PNM provided four different replacement power scenarios, with respective cost, environment, location, and reliability metrics. In 21-00083-UT, when PNM applied to abandon 114MW at PVNGS, it provided a solar plus storage replacement power package.

Here, PNM's rush to file this case was to satisfy Avangrid's requirement that PNM not own coal when the "merger" took place.[35] *See* discussion, *infra,* at §IV, A2a. The result was that it had to rely on stale data (from past cases) and generalized national data for its "proxy" modeling that it presented which was "not based on specific bids from a competitive solicitation,"[36] as is required by the ETA.[37] PNM's reliance on stale data has been rejected by the Commission in the past.[38] PNM's expert defensively stated that PNM ". . . will be filing a case based

---

[35] **33RP13325-13326**, **33RP13345-53**; **33RP12661-8**.
[36] **30RP09746**; **30RP09779-80**.
[37] §62-18-3; *See also*, §62-16-4 B and G(3)(a) requiring "competitive procurement"
[38] In PNM's 2015 general rate case, the HE found that reliance on a 2011 analysis for a 2014 decision was an improper use of "stale" data. 15-00261-UT, *Corrected Recommended Decision ("CRD")*, 8/15/2016, p. 94; *Final Order Partially Adopting CRD*, 9/28/2016, p. 32, ¶¶103-104. *See also*, 16-00276-UT, *Certification of Stipulation*, 10/31/2017, pp. 40-41. ("Putting aside any regulatory requirements, mere common sense would call for a utility to undertake, complete, and factor in a timely analysis before committing to a significant increase in capital investment." He said, "no business would rely on outdated cost numbers to justify current investment decisions, especially within the energy sector where circumstances can

on the RFP that's utilized to demonstrate that availability in the first quarter of next year."[39]

Importantly, PNM conflates the fact that the ETA allows deferral of applications for *approval* of replacement resources to a future proceeding, a process question, with the legal standards for abandonment that require proof that available, adequate, reliable electric service to protect consumers *exists*, a substantive question. §§62-18-4 (C)(D) *see also* §62-18-3.

Needless to say, PNM should have waited to apply for abandonment until it had actual replacement power data or file with sufficient evidence when this case is remanded to the PRC. Until PNM has a completed RFP, it cannot evaluate responsive bids, determine what is available at what cost, and then inform the PRC of the costs and benefits of each replacement scenario and PNM's preferred proposal.

Given the above, including PNM's previous insistence that it cannot legally meet its burden of proof for abandonment without actual and available replacement resources, the PRC made a reasonable and prudent decision to deny PNM's application and invite the company back once it had the requisite information.

---

change . . ., due to fuel volatility or utility industry setbacks."); 19-00102-UT, *Order on Petition for Investigation*, 1/8/2020, ¶¶15, 17 ("PNM [is] on notice of its obligation to perform continuing and timely updates of any analyses it may have performed that provide the basis for any decision it may reach.")

[39] **30RP09775**.

If the present is any indication, identifying future available replacement resources is especially critical. PNM has identified and briefed the Commission on construction delays of facilities intended to replace the approved abandonment of SJGS.[40] In real time, PNM is warning the PRC of capacity shortfalls and disruptions due to replacement resource inadequacy at SJGS. PNM alerted the PRC and the press that potential reliability deficiencies of electric service could result in blackouts and brownouts for customers.[41] Given the difficulties in constructing already-approved resources, the Commission could not responsibly authorize PNM to abandon its interest in FCPP without confidence that generation from the abandoned facility would be adequately replaced.

The PRC correctly determined that under both the ETA and the *Commuters' Committee* factors, PNM's abandonment request was incomplete because it failed

---

[40] **27RP06819-20**.

[41] **27RP06846-9**; 19-00195-UT, Notice of PNM Presentation to Commission at July 28 Regular Open Meeting, July 23, 2022. ("PNM references an anticipated delay and potential default of the Rockmont Project, which also will not be online for the 2022 Summer Peak season and notes that the potential shortfall of the San Juan replacement resources for July 2022 could total as much as 400 MW of solar and 130 MW of storage. PNM raises concerns regarding PNM's ability to meet its 2022 Summer Peak season loads."); 21-00260-UT (Inquiry initiated on October 27, 2021), focused on global supply chain disruptions, impacts to future operations, ability to provide utility service and supply shortages.); 20-00182-UT, PNM's November 23, 2021, Compliance Notice on Status of Purchase Power Agreements ("Worldwide supply chain disruption and other project delays over the last several months are the result of the COVID-19 and Delta variant pandemic, which caused well-published manufacturing, shipping and distribution impacts.")

to identify reliable replacement power portfolios to provide adequate and reliable electric service.

2. The Commission reasonably demanded proof of the availability of cost competitive and reliable replacement power resources before it approved FCPP abandonment; Had PNM fulfilled its prior obligation to provide a quantitative resource analysis, it would have had the requisite evidence to meet its burden.

PNM complains that it should not be required to prove competitive and sufficiently reliable replacement power resources. (*PNM Brief,* 3, 16-26, 32-37) This is not the law, but even if it were, PNM has only itself to blame for finding itself in this position. PNM doesn't deny that it breached its agreement in Case No. 16-00276-UT to perform a quantitative analysis of the economics of exiting Four Corners compared to investments in other generation resources. It argues only that its violation does "not constitute a legal basis on which to deny an abandonment application." (*PNM Brief,* 18) As an initial matter, "there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure." *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n ("PNM v. PRC"),* 2019-NMSC-012, ¶32 (citations omitted.) As this Court

observed in that case, "the failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process." *Id.*

PNM's argument (*PNM Brief*, 34) ignores the fact that it explicitly agreed in 16-00276-UT to perform a cost-benefit analysis of the impact of a possible early exit from FCPP in 2024 and 2028.[42] *Id.* at ¶88. It is now proposing to exit even earlier. Ironically, if PNM had complied with that obligation, it would have been able to provide *actual* replacement power packages (rather than proxy replacements) that could have been evaluated for cost, reliability, environmental risk, ETA compliance, and its impact on utility operations.

PNM's argument conflates a public utility's duty to comply with IRP rules with PNM's duty to perform a comparative cost and resource analysis of remaining in FCPP with exiting and procuring new resources, as the law requires and as it promised. (*PNM brief*, 34-37)

In *CFRE*, the Court reiterated that the Commission has a constitutional duty to regulate public utilities and that ratepayers (statutorily[43]) are entitled to "reasonable and proper service at fair, just and reasonable rates." *CFRE at* ¶¶45, 35, *citing ABCWUA,* 2010-NMSC-013, ¶30. How can the Commission know if PNM's proxy modeling would result in fair, just and reasonable rates if there is no

[42] **36RP15024-5; 30RP09795-6**.
[43] NMSA 1978, Section 62-3-1(B) (2008).

actual consideration of alternatives and the company only employed outdated cost assumptions? Of course, the Commission couldn't know, hence the request for actually available replacement resource portfolios and hence the reason for rejection.

a. Evidence below showed that the reason for PNM's rush to abandonment without a replacement resources plan was to comply with a condition precedent in the PNM/Avangrid merger.

Evidence below showed that PNM rushed to file the FCPP abandonment case to meet a merger commitment it had made to Avangrid: transferring its interests to NTEC was a condition precedent to the merger and played a central role in the merger negotiations. **34RP14117-32**. No matter, apparently, that the ETA forbids such a sale.

On 11/23/2020, PNM and Avangrid, *et. al*., filed the Direct Testimony of Pedro Azagra Blazquez, the Chief Development Officer and Member of the Executive Committee of Iberdrola, S.A. and a Member of Avangrid, Inc.'s Board of Directors, in Case 20-00222-UT. He testified:

> **Q. ARE THERE ANY OTHER CONTINGENCIES THAT MUST BE SATISFIED UNDER THE MERGER AGREEMENT?**
>
> **A.** Yes. Avangrid is committed to moving as quickly as possible to the clean generation of power. To that end, the Merger Agreement requires that prior

> to consummation of the Merger, PNM must execute agreements to divest itself of its ownership interest in the Four Corners Power Plant, and file for the necessary regulatory approvals to abandon that interest. PNM has executed an agreement with the Navajo Transitional Energy Company that will allow PNM to divest its 13% interest in the Four Corners Power Plant in 2024. I understand that PNM is preparing the necessary applications for regulatory approval in a separate proceeding. Joint Applicants are not seeking any approvals in this proceeding with respect to the Four Corners Power Plant.

In other words, the removal of FCPP from PNM's books was a requirement of the Agreement and Plan of Merger.[44]

Six weeks after it filed the merger case, before it had even issued an RFP for replacement power,[45] PNM filed its FCPP abandonment application as required by the Avangrid deal.

B. The PRC Ordered That Unresolved Prudence Investment Issues Be Addressed in the Continuation of This Proceeding or Subsequent Proceeding

1. The Prudence Issue is Not Final Therefore Not Ripe for Review; This Court Should Remand for the PRC to Decide Prudence Based on the Evidentiary Record in 16-00276-UT and 21-00017-UT

PNM argues that "The Commission's final error is its abrupt refusal to resolve the prudence of PNM's 2012-2013 decisions to remain as a FCPP

[44] **34RP14117-32**; **33RP13325**; **33RP13345-54**; **33RP13442-74**.
[45] PNM's Application was filed on 1/8/2021, **36RP15010**; FCPP RFP issued on 3/8/2021, **30RP09744**.

participant-owner. . .. This is the third case in which the Commission declined to find FCPP imprudence due to a lack of evidence, the first and second being PNM's 2015 and 2016 Rate Cases." (*PNM brief*, 5) NEE agrees in part and disagrees in part with PNM—but for very different reasons. In *CFRE, supra*, at ¶27, the Court reaffirmed that "[d]ecisions of administrative entities are fit for review only when the agency's decision is final," *citing AFSCME*, 2016-NMSC-017. As a threshold issue, therefore, the prudence issue is not final and therefore is not ripe for review. *Id*. at ¶28.

PNM complains, however, that the PRC has had multiple occasions on which it should have reviewed the prudence of PNM's unilateral and unstudied re-investment in a fifty-year old, non-performing coal plant. The first challenge to PNM's investments at Four Corners related only to the reasonableness of the FCPP coal supply agreement ("CSA"). 2015 Rate Case. The Commission found that the CSA cost and terms were reasonable. This Court upheld the decision and that it was based on substantial evidence." *PNM v. PRC*, 2019-NMSC-012, ¶¶90-95.

When prudence became a subject of a hearing in 2016, the HEs found that PNM had acted imprudently in renewing the contracts without considering alternatives.[46] Initially, the PRC agreed and ordered that ratepayers be protected

[46] **33RP13327-30**.

from those costs and added sanctions associated with them.[47] PNM, however, pleaded with the PRC to withdraw the imprudence finding and put off a final prudence review until PNM's next general rate case, *which PNM has yet to request.*[48] Now, in the context of its sudden need to abandon the very plant that it should have closed six years ago, PNM has the nerve to complain that it is the victim of a rehashing of the prudence issue for the *second* time.

Notwithstanding PNM's hypocritical complaint, the Commission here simply relied on the HE's statement that there was inadequate evidence to evaluate prudence. NEE agrees that this was error by the HE: The Commission had previously ordered, and PNM agreed in 16-00276-UT, that PNM's investments at FCPP would be subject to a prudence review and that administrative notice of all the evidence in 16-00276-UT would be admitted in that future hearing.[49] When the Commission ordered the HE in the case below, 21-00017-UT, to conduct the prudence review, however, he incorrectly refused to take administrative notice of all evidence.[50] Because the HE failed to admit all the evidence from 16-00276-UT, which was his duty, he found that there was an inadequate record on which to make a prudence determination.[51]

---

[47] **33RP13331**.
[48] **33RP13331-4**.
[49] **33RP13331-3**.
[50] **36RP15016-7**, **74**.
[51] **27RP06656-61**.

NEE agrees that there should not be another evidentiary hearing on the issue of prudence. NEE respectfully submits that the appropriate resolution is to remand to the Commission for a decision on prudence, based on the evidence presented in both the 16-00276-UT and 21-00017-UT cases.

In summary, PNM has misstated the record: only two cases, 16-00276-UT and 21-00017-UT, have addressed PNM's prudence and, in both cases, PNM objected to review, probably because it was undisputed, even according to its own expert, that PNM's analysis of reinvesting in FCPP was "inadequate." **31RP10653**. Yet PNM now seeks to securitize the full undepreciated investments in FCPP and shift the entire burden of the utility's imprudence to its ratepayers.

2. PNM's Argument that the ETA Precludes A Prudence Review is Faulty and Would Result in Grave Injustice

The PRC directed that "prudence issues" concerning the investments in FCPP would be addressed in a re-filed abandonment or other proceeding. **37RP15425-6**. PNM argues that because the ETA defines the abandonment costs to be securitized, it precludes any prudence review or disallowance of PNM's undepreciated investments in FCPP being recovered in rates as of January 1, 2019. PNM requests that this part of the order be vacated and the PRC "apply the ETA" on remand. *(PNM Brief*, 41)

PNM also objects to the Commission's deferral of a prudence inquiry of its FCPP costs on the basis of *res judicata*, which it refers to as "re-litigating the prudence of certain expenditures for FCPP." *(PNM Brief*, 44)

This is incorrect. The Commission did not exceed its authority.[52] Such a decision is squarely within the authority of the Commission under §62-6-4(A) to regulate the rates of public utilities and the obligation of the Commission under §62-8-1 to ensure those rates are just and reasonable.[53] In *CFRE*, the Court declined to review "a Commission order because 'the Commission has not yet determined if and to what extent investment in any plant is imprudent, or how imprudence would affect its rate treatment' and because the Commission 'has not, by its actions in this case, determined that ratepayers must pay for imprudent investment'". *CFRE, supra*, ¶27. Because foisting potentially imprudent costs on ratepayers may result from abandonment authorization and securitization, the PRC correctly concluded that it was consistent with the public interest to determine the prudence of PNM's investments before permitting abandonment.

Additionally, PNM's agreement to defer a prudence review was *voluntary and under its control*. It agreed that it would bear the burden of affirmatively

[52] *PNM v. NMPRC*, *supra* at ¶¶84, 86, *citing* §62-6-4(A); *see also* N.M. Const., Art. XI, §2.
[53] *Id,* at ¶¶9, 86.

demonstrating the prudence of the asset costs in a future proceeding, per its prior stipulation.[54]

a. A short history of the commission's requirement for a prudence review.

The history of PNM's decision to renew its contracts for FCPP (rather than let them expire) is important context for PNM's claim that the PRC is somehow to blame for the prudence review not being performed.

1) Eight years ago, PNM renewed the FCPP contracts, creating nearly a billion dollars of liability it would ask to shift to ratepayers. It did so without any economic analysis, comparison with other available resources or legal justification.[55] PNM falsely told the PRC that FCPP would remain cost-effective for many years.[56] Not surprisingly, the HEs and the PRC found that PNM had acted imprudently in renewing those contracts and that ratepayers should be protected from PNM's unsubstantiated and costly decision.[57] The PRC initially adopted the *Certification of Stipulation*, including its finding of imprudence, except that it *increased* the sanctions the HE had recommended be imposed on

[54] *Id.* at ¶ 88.
[55] **33RP13326-60**.
[56] *Id.*
[57] *Id.*

PNM for imprudently extending the life and investment in FCPP.[58] PNM moved for reconsideration of the imprudence findings and sanctions, petitioning the PRC to *defer* the issue of prudence until PNM filed its next rate case.[59]

2) On January 10, 2018, in 16-00276-UT, the Commission, without any new evidence, in its *Revised Order Partially Adopting Certification of Stipulation* stated at 22-23:

> Those Signatories propose that the Commission's concerns about the long-term impact of FCPP and the issue of apparent imprudence with respect to PNM's continued use of FCPP should be reserved and litigated in a separate future hearing." ¶65.
>
> [T]he Commission is justified in deferring, for the limited duration of the period that the revised Stipulation will be in effect, a finding on the issue of PNM's prudence in its continued participation and investment in FCPP until PNM's next rate filing. Deferring such ruling will permit consideration of the issue with the full participation of all parties without any constraints …, while also permitting *a more full opportunity for the Commission to consider the necessity and scope of any remedy in light of PNM's alleged imprudence …. In the subsequent proceeding, administrative notice will be taken of the evidence on the issue of prudence admitted in the current proceeding*." ¶66.

(emphasis supplied.)

3) NEE appealed, but withdrew its appeal after all other parties took the position that the Commission's Order deferring the imprudence/sanctions issue

---

[58] 16-00276-UT, *Order Partially Adopting Certification,* 12/20/17, at 33, ¶112. (Ordering "a further inquiry into the full scope of potential further disallowances.")
[59] **33RP13331-34**.

would "suffice to protect ratepayers for the limited time that the Revised Stipulation would remain in effect before the need for any additional disallowances can be addressed." No. S-1-SC-36870*, Joint Response Brief of ABCWUA, City of Albuquerque, Bernalillo County, and NMIEC*, 10/12/2018, at 13. *Answer Brief of Intervener – Appellee PNM*, 10/12/2018, at 12.

Thus, the issues of imprudence and sanctions were left pending, *at the request of PNM,* with PNM on notice that the Commission would consider full disallowance of FCPP costs, as it had initially ruled. *PNM v. NMPRC*, 2019-NMSC-012, ¶¶9, 10, 21, 32, 35, 38-42, 47, 52 (full disallowance of imprudently incurred costs a possibility where necessary to protect ratepayers); *also* at ¶¶81-83. The stipulating parties agreed that these questionable investments would be subject to a further prudence review and PNM would have the burden to make an affirmative demonstration that incurring the FCPP costs was prudent and reasonable.

4) In its Order on *Sierra Club's Motion to Re-Open Docket to Implement the Revised Final Order*, the Commission stated,

> [I]ssues related to PNM's abandonment application and request for a financing order should be litigated in Case 21-00017-UT. . .. Such issues as whether the terms of the ETA may provide an opportunity for consideration of the prudence of undepreciated investments … consistent with the due process requirements that all parties to that case have full notice and opportunity to be heard on those issues.

16-00276-UT, *Order* ¶¶24-25, 2/10/21

5) The docket below was the "subsequent proceeding" and the HE was directed to take administrative notice of evidence on the issue of prudence that was admitted into the record in 16-00276-UT via ¶66 of the *Revised Order Partially Adopting Certificate of Stipulation* recited above.

6) PNM and parties were offered the opportunity to not only include evidence from the 16-00276-UT case, but the HE specifically allowed PNM to submit any other relevant evidence on prudence,[60] and PNM did so.[61]

7) In the *FCPP Financing Order RD*, 21-00017-UT, the HE correctly found that the ETA must be read in harmony with the PUA and that the "Commission's [16-00276-UT] order was sufficiently specific and certain to put PNM squarely on notice that it bore, and still bears, the burden of proving the prudence and reasonableness of the Four Corners SCR controls and additional life-extending capital expenditures"[62] in its future application for abandonment because PNM had explicitly agreed it would do so. Even though that contemplated future proceeding is this one, the HE failed to make such a prudence determination despite substantial record evidence, because he erroneously declined to take

[60] **3RP01357-62**.
[61] **31RP10894-11052; 31RP11067-11092**.
[62] **36RP15087-8**, *citing,* 16-00276-UT, *Revised Final Order*, at 23 ¶66; *PNM v. NMPRC*, ¶88.

administrative notice of the record in 16-00276-UT, despite the PRC's instruction that he do so.

b. The ETA does not preclude a prudence review; PNM's interpretation would raise constitutional concerns.

PNM claims that "the undepreciated FCPP investments contested by the parties fall squarely within §62-18-2(H)(2)(c), which provides that 'abandonment costs' to be securitized include investments on the utility's books and records *being recovered in rates as of January 1, 2019*." (*PNM Brief*, 41) (emphasis added). PNM uses 2(H)(2)(c) to justify its argument that its pre-ETA promise to submit its FCPP decision to a prudence review was preempted by the ETA. However, in so doing, PNM conveniently ignores what qualifies as an energy transition cost under the ETA. By *definition*, it is what's on PNM's books *at the time of abandonment*— not on January 1, 2019.

What the ETA says:

> SECTION 2. DEFINITIONS. -- As used in the Energy Transition Act:
> . . . .
> H. "energy transition cost" means the sum of:
> . . . .
> (c) *undepreciated investments as of the date of abandonment on the qualifying utility's books and records in a qualifying generating facility* that were either being recovered in rates as of January 1, 2019 or are otherwise found to be recoverable through a court decision; and . . ..

(emphasis supplied.)

The ETA unambiguously defines the undepreciated capital investments that are "energy transition costs" recoverable under 2(H)(2)(c) with reference to the amount on PNM's books and records at the time of abandonment – *which here will be determined after PNM submits its reapplication for abandonment and the PRC has considered evidence of imprudence.* We will not know the actual amount of an "energy transition cost" until such time. If the Commission disallows cost recovery for all or part of its undepreciated investment then, as a result, that amount will not be on PNM's books and records at the time of abandonment.

As the HE noted in the *Financing Order RD*, PNM agreed to the deferred review when it agreed to the *Commission's Revised Final Order*. PNM did not appeal. Thus, PNM has been on notice that it bore (and still bears) the burden of proving prudence and reasonableness of the Four Corners SCR controls and additional life-extending capital expenditures by expressly acquiescing to that process. **36RP15088**.

Further, NEE agrees with the HE that PNM stretches the phrase "being recovered in rates as of January 1, 2019." As the HE observes, if one accepts such an interpretation, one would also have to accept that the Legislature deliberately "vitiated, limited, removed, even arrogated the Commission's supervisory authority over substantial and disputed costs placed provisionally in rates subject to a future determination of prudence and reasonableness to which PNM voluntarily

submitted in the process of having other parties sign on to the Modified Revised Stipulation." **36RP15089**. PNM's argument overlooks the fact that when the Legislature has seen fit to modify or limit the Commission's authority or discretion in ratemaking, it has inserted language that makes its intention unambiguously apparent. **36RP15092**. To believe that the Legislature would do so by implication is not credible, particularly if the result would be that ratepayers get stuck with imprudent costs.

PNM also argues that the ETA supersedes the Commission's 2016 postponement of a further review of those pre-2019 investments for rate-making purposes. *(PNM Brief*, 42) However, nowhere in the ETA does it state the Commission loses its ability to review the prudence of investments on a utility's books and records as of January 1, 2019. It is a big leap of logic to take *a description* of what qualifies as an "energy transition cost"—the amount on the utility's books and records at the time of abandonment—and apply that description to circumscribe the Commission's authority to determine just and reasonable rates. *PNM v. NMPRC*, ¶86, *supra*. (The Commission did not exceed its authority when it made a "finding specifically concerning the reasonableness of costs PNM was seeking to include in its rate base. Such a decision is squarely within the authority of the Commission under Section 62-6-4(A) to regulate the rates of public utilities

and the obligation of the Commission under Section 62-8-1 to ensure that those rates are just and reasonable.")

Accepting PNM's self-serving, aggressive interpretation of 2(H)(2)(c) would burden New Mexico ratepayers with $150 million in coal plant investments and other costs that, after a full hearing, were previously found imprudently incurred, an outcome that was withdrawn and deferred, *at PNM's request.* Such an interpretation of the ETA is implausible because it results in (1) an unintended usurpation of the supervisory authority of the Commission, (2) a risk of injustice to ratepayers because it would result in unfair, unjust and unreasonable rates, (3) an injury to the rights of Signatories to the Modified Revised Stipulation, and (4) a disservice to the public interest. Had the Legislature intended such results, it presumably would have expressed its intention plainly.

PNM argues that all investments included in its 2019 rates, by definition, meet the fair, just, and reasonable standard. *(PNM Brief*, 43), *citing* §62-8-7(D). However, as the HE found, this is a unique situation where costs were "provisionally" recovered in rates in 2019 *only because PNM asked the PRC and the parties to agree to defer the prudence review*. **36RP15068**. The FCPP investments included in rates for which a determination of prudence was expressly deferred were never subject to a final decision on the merits of prudence. Without such a determination, there is no basis to assume that costs are, *in fact*, fair, just,

and reasonable, unless the ETA is interpreted as requiring the imposition of a legal fiction on ratepayers. Thus, the Commission retains the authority to review whether those contested investments were prudently incurred under §62-3-1(B). This aligns with the *Financing Order RD,* **36RP15071**, and *CFRE, supra*, at ¶¶26-27, in which the Commission retains the authority to review and potentially disallow imprudent expenditures in PNM's base rates.

PNM also neglects to mention the overarching policy in the PUA that "[t]he Act shall be liberally construed to carry out its purposes." §62-3-2B. Allowing PNM to recover unreviewed and imprudent FCPP costs based on a sweeping assertion that they have been transformed from imprudent to prudent "by definition" and have magically become "fair, just, and reasonable" runs counter to the express policies of §62-3-1B. A liberal interpretation of the PUA forbids such a result, particularly in light of PNM's efforts to defer a prudence determination and the agreement among PNM and the parties to 16-00276-UT that prudence would be addressed later.

Similarly, PNM creates confusion with its references to the *Egolf* and *CFRE* cases. *(PNM Brief*, 44) The *Egolf* case found that because "the ETA was in effect at the time of PNM's application, the Commission has a nondiscretionary duty to apply the ETA to San Juan abandonment proceedings." *Egolf,* ¶22. But, as the HE here noted, "whether the Commission is constitutionally obligated – or statutorily

obligated for that matter – to authorize the final, actual, and reconciled recovery of an 'Energy Transition Cost' on which a prudence review that was expressly deferred, as requested by the public utility itself, but then not conducted before the utility filed for abandonment pursuant to the ETA is an altogether different issue that directly calls into question the Commission's rate-setting authority" under the PUA. **36RP15046**.

In *CFRE,* this Court explicitly declined to consider the issue of whether the ETA should be interpreted to allow the recovery of imprudent costs or whether the ETA could abrogate PNM's voluntary contractual obligation to the Stipulating Parties in a prior case. *CFRE* ¶¶26-27, 44-48. More on point, this Court noted, without deciding, that the provisions of the ETA must be interpreted to exist in "harmony with or as an alternative to other provisions governing the Commission's authority to regulate a 'public utility in respect to its rates and service regulations . . .." *CFRE*, ¶66, *citing* §62-6-4(A).

Additionally, contrary to PNM's statements (*PNM Brief* at 44), *CFRE* supports NEE's view that the Commission has the authority to decide what formula or manner of deciding rates it chooses—and here it ordered a prudence review. While this court held in *CFRE* that the Commission was not *constitutionally required* to utilize the prudent investment theory for rate-setting, as NEE had argued in that case, the court emphasized that the Commission could

choose from among many accepted methodologies, and the prudent investment theory was one. *CFRE* at ¶ 47 (This Court has repeatedly recognized that "[t]he Commission is not bound to the use of any single formula or combination of formulae in determining rates." *PNM v. PRC*, 2019-NMSC-012, ¶10 (brackets, internal quotation marks, and citation omitted).) This language underscores the rate-making authority and discretion of the Commission, even after the ETA.

PNM incorrectly proposes that the *CFRE* case undercuts the PRC's statutory authority to mandate that the HE resolve outstanding prudency issues of FCPP expenditures in a subsequent proceeding. **37RP15426**. A reading of *CFRE* does not support that view.

Moreover, PNM cites *CFRE* for the principle that "application of ETA does not interfere with vested or contractual rights . . . because neither the stipulation nor Commission decisions confer such rights to consumers . . .." *(PNM Brief*, 44) This case raises the rights of consumers under the PUA and the ETA. More on point, this Court declined to "reach the unripe question regarding the extent of the Commission's authority in the ratemaking proceedings contemplated by the ETA. *See* §62-18-4(B)(10); §62-18-5(F)(8)." *CFRE,* ¶44. "[W]e do not reach the unripe question whether such a [prudence] review is statutorily authorized, but it is apparent that this review is not constitutionally required." *CFRE* ¶48. Based on

this language, it is hard to argue that this Court has previously determined that the ETA forecloses a prudence review.

Such a determination of prudence, and if any amount of disallowance is appropriate, is squarely within the authority of the Commission under §62-6-4(A) to regulate the rates of public utilities, the obligation of the Commission under §62-8-1 to ensure that those rates are just and reasonable, and serves to enforce PNM's binding and voluntary obligation under the Stipulation. Most important, and consistent with its decision in *PNM v. PRC*, this Court should not interpret the ETA as granting PNM and other utilities the right to recover imprudent costs. There is nothing explicit in the ETA to suggest that the legislature repealed the PUA[63] or nullified N.M. Supreme Court consumer protection law,[64] and PNM's interpretation that the ETA supersedes both would lead to an unconstitutional result. This is not an interpretation that this court should adopt. *State v. Pangaea Cinema LLC*, 2013-NMSC-044, ¶ 18, 310 P.3d 604*, citing, Chatterjee v. King*, 2012-NMSC-019, ¶ 18, 280 P.3d 283. ("[W]e seek to avoid an interpretation of a

[63] For instance: NMSA 1978 § 62-3-3(B) (public interest requires the regulation and supervision of utilities); NMSA 1978, § 62-3-4(A) (PRC shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates)
[64] *PNM v. PRC*, 2019-NMSC-012, at ¶¶32,47.

statute that would raise constitutional concerns.") N.M. Const. Art. II, §19 (legislature prohibited from impairing the obligation of contracts).

Critically, if this Court agreed with PNM that under its interpretation of the ETA it was relieved of its agreement to submit its re-investment in FCPP to a prudence review, then it would make the ETA unconstitutional to that extent. Why? Because PNM negotiated a settlement agreement among parties and the agency itself in a quasi-judicial regulatory proceeding under which it would submit FCPP costs to a prudence review. If such an interpretation of the ETA were correct, it would cause a violation of N.M. Const. Art. II, §19 because it would have impaired the obligation of PNM's settlement agreement, which is a contract like any other. *Jones v. United Minerals Corp*., 1979-NMSC-103, 93 N.M. 706, 604 P.2d 1240 (settlement agreement is an enforceable contract). *See*, **33RP13500**. Procuring legislation to avoid contractual obligations is what this section of the constitution exists to prevent.

To hold otherwise would be to hold that PNM, by getting the ETA through the legislature, managed to escape the fundamental requirement that its rates be "just and reasonable" as provided by §62-3-1 (*CFRE* ¶ 57, *citing*, *ABCWUA,* 2010-NMSC-013, ¶30), and was permitted by the legislature to nullify its settlement with the parties and the PRC in 16-00276-UT.

c. The plain language of 62-18-2(H)(2)(c) does not prohibit a prudence review for purposes of imposing a disallowance of imprudent costs.

PNM claims because nothing in 62-18-2(H)(2)(c) and 62-18-4(B)(10) of the ETA provides for a prudence review by the regulatory authority, a prudence review is prohibited. PNM looks to legislative intent to support this untenable position.

Under the "plain language" approach to statutory interpretation, the Commission should not "depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions*." Regents of Univ. of N.M. v. N.M. Federation of Teachers*, 1998-NMSC-020, ¶28, 125 N.M. 401, 962 P.2d 1236 (N.M. 1998).

Under the "rejection-of-literal-language" approach, "where the language of the legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others." *Helman v. Gallegos*, 1994-NMSC-023, ¶3 (internal quotation marks and citation omitted).

Under either approach, interpreting the ETA as PNM does— to prohibit a prudence review with the consequence that imprudent costs are included and recovered as "abandonment costs" is an imposition on ratepayers that is at war

with the system established by the PUA. Without a clearly expressed intent to do so, a court should not attribute such an intent to the legislature. Adhering to such an interpretation would lead to ratepayers, not PNM and its shareholders, footing the bill for costs that PNM incurred unilaterally and imprudently. The implications of such an interpretation, going forward, would be dire for ratepayers.

d. *Res Judicata* does not bar a prudence inquiry into PNM's continued participation in FCPP.

PNM argues that FCPP prudence was addressed in the 2015 Rate Case, (*PNM Brief* at 44) though this Court has already found that the only issue addressed in that case was the reasonableness of the coal supply contract.[65] PNM objected to "re-litigation of FCPP prudence" under *res judicata* in the 2016 Rate Case on the ground that the prudence issue was determined in the 2015 Rate Case. It acknowledges that the Commission declined to apply *res judicata* standards in the 2016 Rate Case **34 RP 14314-14315** but urges the Court to do so here. To the contrary, this issue was decided correctly and based on the law. *Res judicata* does not apply here.

PNM's *res judicata* argument, which has been disallowed by the Commission and its Hearing Examiners several times at this point, should be seen for what it is: a

[65] *PNM v. PRC,* 2019-NMSC-012, ¶¶90-95.

ploy to extricate itself from a promise. PNM expressly agreed in 16-00276-UT that it would bear the burden of affirmatively demonstrating the prudence of the FCPP life extension and capital expenditure costs in its next general rate case. How can PNM complain of "re-litigation" of FCPP prudence when (so far) it has done everything imaginable to forestall *litigation* on the issue?

By pleading with the PRC to withdraw its finding of imprudence in 16-00276-UT, and to defer a final decision until the next rate case, PNM has no one but itself to blame for the lack of a final decision. But even if this were not the case, can PNM seriously suggest that because the issue has not reached finality, it should be resolved *in PNM's favor? Is PNM saying that this Court should determine the prudence issue, and not the administrative body charged with determining it?*

Further, if a *res judicata* argument was ever viable, PNM waived the issue of when it agreed to have a prudence review. When PNM filed its *Emergency Verified Petition for Writ of Mandamus and Request for Oral Argument,* No. S- 1-SC-37552, Feb. 27, 2019, it acknowledged that "the NMPRC can assess the prudence of a utility's actions in determining whether to abandon or continue operating a given resource[.]" PNM footnoted this sentence as follows: *See* NMPRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification*

of Stipulation, ¶66 at 23 (reviewing PNM's alleged imprudence in continued participation and investment in FCPP).

Since PNM did not take exception to 16-00276-UT, the *Revised Order Partially Adopting Certification of Stipulation*, or appeal the Commission's Order, it has waived its *res judicata* argument in its Verified Response. *State v. Zamarripa*, 2009-NMSC-001, ¶38, 145 N.M. 402, 199 P.3d 846 ("Waiver is the intentional relinquishment or abandonment of a known right or privilege.")

Additionally, PNM has a continuing obligation to monitor the validity of its decision to continue at FCPP in light of changing circumstances. *Investigation into Vermont Elec. Utilities' Use of Smart Metering & Time-Based Rates*, 2009 WL 4024900, at *1 (Vt. P.S.B. Nov. 16, 2009) ("Our determination that a Plan is acceptable will not shield a utility from a subsequent investigation and potential disallowance based upon the economic used-and-useful principle if events following approval should have led to an alteration of the [] deployment.") Because of changed circumstances and the obligation of a utility to continually model the most cost-effective portfolio of resources, the issue of a utility's continued prudence cannot be bound by *res judicata* from a previous case, especially where PNM agreed to be bound by a future FCPP prudence review in exchange for a rate increase.

e. PNM's Expert's Hindsight Review in 21-00017-UT of the Evidence Proffered in 16-00276-UT was that PNM's Analysis was "Inadequate."

PNM's expert witness, Graves, submitted evidence in 21-00017-UT about FCPP prudence and a potential remedy.[66] Graves admitted that his "rebuttal testimony is a hindsight review[.]"[67] Yet, our Supreme Court has held that "hindsight review is impermissible."[68] PNM's $400,000 expert[69] Graves testified as follows:

- "[A]gree that the early analysis was inadequate, and had flaws in it."[70]
- Admitted that as a general rule ratepayers should not tolerate information from a financial analysis that was done a year and a half prior to the time of actual decision-making; "The updated information is of course very helpful."[71]
- Admitted that in his *post hoc* analysis he did not use Strategist.[72]
- Did not remember using load forecasts from the 2016 rate case.[73]
- Admitted that PNM failed to produce contemporaneous modeling or include capital expenditures in its modeling.[74]

---

[66] **31RP10894-11052; 31RP11067-11092**.
[67] **31RP10765**.
[68] *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383, 405 (N.M. 2000); *See also, Corrected Recommended Decision*, 15-00261-UT, Aug. 15, 2016, pp. 88-89; upheld in *PNM v. PRC*, 2019-NMSC-012, ¶¶27-38.
[69] **31RP10693**.
[70] **31RP10653**.
[71] **31RP10657**.
[72] **31RP10658**.
[73] **31RP10661**.
[74] **31RP10666-9**.

- Didn't read the testimony in 16-00276-UT.[75]
- Admitted that other than the Strategist runs, there was no other analyses that PNM conducted to evaluate the prudence of Four Corners.[76]
- **Admitted that if PNM's reason for investing in FCPP was to avoid a possible distraction with the BART filing regarding the San Juan Generating Station that would not be a good enough reason for saying PNM didn't look at other things.**[77]
- **Admitted that if the basis for their life extension and investment in FCPP was the Strategist financial runs and that if the chief negotiator "was truly oblivious to the findings and the extent to which they supported the decision he was going to make, that would seem inappropriate."**[78]

Although Mr. Graves' *post hoc* analysis was far more thorough than what PNM did originally, the Graves analysis cannot be relied on to show "no harm" because Mr. Graves did not use load forecasts from the relevant time period, did not include environmental risks (at all, including SCR), did not use Strategist, did not read the testimony or exhibits from that time period, etc. What we do know is that PNM was focused on its flagship operation at SJGS and concerned that, if PNM exited FCPP, it would raise eyebrows at the Commission about the economics and risk of further investment in coal.[79]

---

[75] **31RP10692**.
[76] **31RP10694-5**.
[77] **31RP10673-7**.
[78] **31RP10691**.
[79] **31RP10673-7**; 16-00276-UT, *Certification of Stipulation,* 10/31/2017, p. 43, p. 51; *Revised Order Partially Adopting Certification of Stipulation,* 1/10/2018, p. 20-21.

NEE agrees with PNM that no additional evidence should be taken on the question of PNM's prudence regarding FCPP. *(PNM Brief*, 48) The Court should require the Commission to make a prudence determination based on the evidence already submitted in 16-00276-UT and 21-00017-UT and no new evidentiary hearings should be allowed.

f. PNM's Abandonment Application was Denied In Part Because the Commission Didn't Want to Include in Securitization Potentially Imprudent Costs.

The Commissioners' deliberations and the Final Order itself shows that the Commissioners weighed abandonment and its ramifications and, in addition to the reasons stated above for rejection, the Commission didn't want to include potentially imprudent costs in the securitization of costs that would remain as a non-bypassable charge to customers for the next 25 years. This is sufficient reason to deny abandonment – and another reason why they determined that abandonment was not in the public interest.

Commissioner Maestas stated when deliberating:

> I think this Order makes prominent the issue of the -- the prudency of those questionable capital investments associated with the SCR controls and other life-extending capital improvements. That prudency [review] needs to take place. It needs to be resolved, if not in this proceeding, in a subsequent proceeding, so I -- I think this Order is -- is very well balanced and I think -- I think also considers the primary issues at play in this case.[80]

[80] **1SRP032**.

In the Commission's *Order on Recommended Decisions,* it found:

> 41. Sierra Club concludes: "The potential $146 million disallowance short-circuited by abandonment exceeds the $143 median savings Mr. Phillips calculated."
>
> 42. While in this order the Commission does not rule on Sierra Club's argument, the issues in that argument do underscore the need to serve the public interest by rendering a final decision on the merits of the prudence issues concerning the expenditures on SCR and other improvements reserved to this case by the Commission's orders in the 16-00276-UT case which the HE was unable to resolve and issue a recommendation on due to the deficiencies outlined in his RD.
>
> 43. Accordingly, the prudence issues concerning the expenditures on SCR and other improvements reserved to this case by the Commission's orders in the 16-00276-UT and which have not been resolved by this proceeding should be addressed in any subsequent proceeding on an application by PNM for abandonment of FCPP and request for approval of replacement resources filed in accordance with this order and NMSA 1978, Section 62-18-4 D.[81]

The Commission made a factual determination that it could not assess the reasonableness of PNM's replacement portfolio because there was an evidentiary vacuum – it could not determine if a replacement portfolio among a number of feasible options would result in fair, just and reasonable rates because PNM provided no substantial evidence for the Commission to review. In *CFRE*, the Court found that "NMSA 1978, Section 62-3-1(B) accords to energy

[81] **37RP15425**.

consumers an entitlement to 'reasonable and proper service at fair, just and reasonable rates.'" *CFRE, supra*, ¶15.

The Commission did not "divorce" the abandonment decision from the terms of the ETA, the *Commuters' Committee* standards, the PUA, and public interest requirements. Because PNM did not meet its burden of proving abandonment, it, consequently, was not entitled to a financing order. The Commission's decision comports with the law and, as this Court has affirmed, was well within the Commission's power under the ETA to do.[82]

V. CONCLUSION

NEE requests that the Court affirm the Final Order; remand the issue of abandonment when PNM files a case with replacement power alternatives for FCPP; forbid the transfer, reassignment and sale of FCPP pursuant to the ETA; and, if the Court rules on the issue of prudence, require that the Commission make

[82] In *CFRE*, the Court denied Petitioners' substantive due process claims, challenging the constitutionality of the ETA, because the Commission had the right to review PNM's financing order to determine "'*if* the [C]ommission finds that the qualifying utility's application for the financing order complies with the requirements' of Section 62-18-4." (emphasis supplied.) *CFRE, supra*, ¶17. Here, the Commission exercised its authority and found that PNM did not meet its burden of proving abandonment, §62-9-5, required under ETA §62-18-4.

its final decision based on the evidence already adduced in Cases 16-00276-UT and 21-00017-UT.

Respectfully submitted this May 9, 2022.

Attorneys for Intervener/Appellee New Energy Economy

/s/ John W. Boyd, Esq.
FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

/s/ Mariel Nanasi, Esq.
300 East Marcy St.
Santa Fe, NM 87501
(505) 469-4060

STATEMENT OF COMPLIANCE

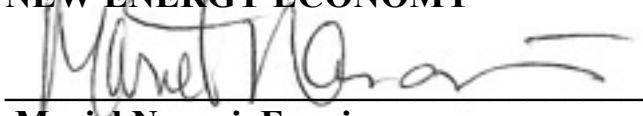
Pursuant to Rule 12-318(G) NMRA, PNM states that the body of the foregoing Answer Brief is 51 pages and contains 10,998 (less than 11,000) words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Microsoft Word for Office 365, and is therefore within the limits permitted under Rule 12-319(F).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on May 9, 2022.

DATED: 9th day of May, 2022.

NEW ENERGY ECONOMY



Mariel Nanasi, Esquire