BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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 PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	**Case No. 21-00017-UT**
Applicant.	)	

JOINT MOVANTS' MOTION TO DISMISS APPLICATION AND SUPPORTING BRIEF

Joint Movants, New Energy Economy ("NEE") and Citizens for Fair Rates and the Environment ("CFRE"), (hereafter "Joint Movants"), pursuant to Commission Rules 1.2.2.12.A and B NMAC and based on the statutes, Commission rules and other legal authorities addressed below, moves the Commission to dismiss with prejudice the Public Service Company of New Mexico's *Amended Application for Approval of the Abandonment through the Sale of the Four Corners Power Plant and Issuance of a Securitized Financing Order* ("Amended Application") and supplemental testimonies in support thereof as a matter of law on the grounds that:

(A) "the application clearly is incomplete or incorrect"[1] due to fundamental deficiencies, and because "the Commission is charged with protecting the public interest,"[2] the Commission should dismiss the Amended Application because it does not comply with unambiguous legal mandates. PNM's Amended Application is deficient because:

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[1] *Matter of Rates & Charges of U S West Communications, Inc.*, 1993-NMSC-074, 865 P.2d 1192, 1195, 116 N.M. 548.

[2] *Id.,* citing, *see Mountain States 1977,* 90 N.M. at 331, 563 P.2d at 594 ("The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected....")

(i) PNM's Amended Application, which is 1059 pages, is incomplete and incorrect because, other than in a *Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995*, in PNM Exhibit TGF-3 (3-15-21 Supplemental) Page 2 of 6, it has failed to disclose[3] the obvious reason for the Four Corners Power Plant ("FCPP") divestiture: a condition of its potential merger with Avangrid.[4] The *Safe Harbor Statement reads*, in part:

> [T]here are risks and uncertainties in connection with the proposed acquisition of us by AVANGRID which may adversely affect our business, future opportunities, employees and common stock, including without limitation, (i) the expected timing and likelihood of completion of the pending Merger, including the timing, receipt and terms and conditions of any required governmental and regulatory approvals of the pending Merger that could reduce anticipated benefits or cause the parties to abandon the transaction, (ii) the failure by AVANGRID to obtain the necessary financing arrangement set forth in commitment letter received in connection with the Merger, (iii) the occurrence of any event, change or other circumstances that could give rise to the termination of the Merger Agreement, (iv) the possibility that PNMR's shareholders may not approve the Merger Agreement, (v) the risk that the parties may not be able to satisfy the conditions to the proposed Merger in a timely manner or at all, (vi) risks related to disruption of management time from ongoing business operations due to the proposed Merger, and (vii) the risk that the proposed transaction and its announcement could have an adverse effect on the ability of PNMR to retain and hire key personnel and maintain relationships with its customers and suppliers, and on its operating results and businesses generally. For a discussion of risk factors and other important factors affecting forward-looking statements, please see the Company's

[3] 20-00222-UT, *Order Regarding Avangrid Service Quality Issues and Management Audits and Suspension of the Filing Date for Statement in Opposition to the May 7, 2021 Stipulation*, May 11, 2021, p. 2. ("The Joint Applicants have failed to disclose any of the penalties and disallowances in the current proceeding, despite their relevance to this case[.]…The failure is also significant, given that [the company] has considered the issues to be sufficiently important to include them in its reports filed with the SEC. …Instead, the [company's] testimony has been less than forthcoming on these issues.")

[4] See Exhibit A, filed under seal, Excerpts from 20-00222-UT, CONFIDENTIAL PNM Exhibit NEE 4-11, p. 9 (portions of which are highlighted for expediency and convenience) *See also*, NM PRC Case No. 20-00022-UT, *Joint Applicants' Direct Testimony and Exhibits of Pedro Azagra Blazquez*, 11/23/2020, Exhibit PAB-3, Agreement and Plan of Merger, specifically p. 68, § 6.19, p. 71, § 7.2(g) and p.57, §6.5(d); Sierra Club's *Direct Testimony of Jeremy Fisher*, 4/2/2021, *passim*; ABCWUA's *Rebuttal testimony of Mark E. Garrett*, 4/20/2021, pp. 9-14; NEE's *Direct and Rebuttal Testimony of Christopher Sandberg*, respectively, 4/2/2021 and 4/20/2021, pp. 32-37 and pp. 14-21; and CCAE's *Direct Testimony of Noah Long*, 4/2/2021, p. 5-6.

> Form 10-K, Form 10-Q filings and the information included in the Company's Forms 8-K with the Securities and Exchange Commission, which factors are specifically incorporated by reference herein.

There is no testimony about the PNM/Avangrid merger whatsoever in PNM's Amended Application. Yet, PNM Resources includes the information about the Avangrid merger and the "risks and uncertainties in connection with the proposed acquisition of us by AVANGRID" if "conditions of any *required* governmental and *regulatory approvals* of the pending Merger" are not met in its press announcement about the "seasonal operations" at FCPP, in its *Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995*, because failure to disclose to the Securities and Exchange Commission may include criminal and civil penalties. (emphasis supplied.) While PNM maintains that it's "regulatory proceeding for the abandonment and securitization of the Four Corners Power Plant is separate from the NMPRC docket for approval of PNM's merger with Avangrid,"[5] that belies the facts[6] and admission of witness, Pedro Azagra Blazquez, "the Chief Development Officer and a Member of the Executive Committee of Iberdrola, S.A. ("Iberdrola") ….. and also a member of the Board of Directors for Avangrid, Inc. ("Avangrid")."[7]

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[5] NM PRC Case No. 21-00017-UT, PNM Exhibit TGF-3 (3-15-21 Supplemental) Page 1 of 6.
[6] See Exhibit A, filed under seal, Excerpts from 20-00222-UT, CONFIDENTIAL PNM Exhibit NEE 4-11, p. 9 (portions of which are highlighted for expediency and convenience) *See also*, NM PRC Case No. 20-00022-UT, *Joint Applicants' Direct Testimony and Exhibits of Pedro Azagra Blazquez*, 11/23/2020, Exhibit PAB-3, Agreement and Plan of Merger, specifically p. 68, § 6.19, p. 71, § 7.2(g) and p.57, §6.5(d); Sierra Club's *Direct Testimony of Jeremy Fisher*, 4/2/2021, *passim*; ABCWUA's *Rebuttal testimony of Mark E. Garrett*, 4/20/2021, pp. 9-14; NEE's *Direct and Rebuttal Testimony of Christopher Sandberg*, respectively, 4/2/2021 and 4/20/2021, pp. 32-37 and pp. 14-21; and CCAE's *Direct Testimony of Noah Long*, 4/2/2021, p. 5-6.
[7] *See*, Exhibit B, NM PRC Case No. 20-00222-UT, Direct Testimony of Pedro Azagra Blazquez, 11/23/2020, p.1-2; and CCAE's *Direct Testimony of Noah Long*, 4/2/2021, p. 5-6.

PNM has misled the Commission as to the real reason that it is seeking to abandon, sell and securitize financing of $300 million of the FCPP, which is to satisfy its merger agreement with Avangrid, *not* because it is in the public interest. Failure to disclose information about the merger's requirement, and the specific condition precedent requiring FCPP divestiture and $300 million from ratepayers, is a material omission and gives the Commission an inaccurate and incomplete understanding of the case at bar; and

(ii) PNM has failed to produce the "seasonal operation" agreement with co-owners (Arizona Public Service ("APS"), Salt River Project ("SRP") and Tucson Electric Power "TEP") at FCPP yet relies on this "dialogue"[8] and cites to PNM Exhibit TGF-3, which is a self-serving PNM Resources' press release and an uncited document (perhaps a blog on APS' website), to claim that there is an Agreement in Principle,[9] that proves, at least in part, that there is a "net public benefit" or at least "no net detriment." Amended Application, p. 12. PNM's Falgren testifies that he anticipated that a final agreement for seasonal operation will be executed in April 2021.[10] Without the actual restructuring agreement and associated contractual conditions this Commission should dismiss the application because PNM has not met its burden of proof, which necessarily includes the "seasonal operation" agreement.

In 13-00390-UT, the Hearing Examiner found that the Stipulation as a whole was not fair, just and reasonable and in the public interest and that the Stipulation did not produce net benefits to the public.[11] Among the bases of his determination, which are relevant here, was that "PNM has not submitted an agreement, … access to information about the negotiations has been

[8] Supplemental Testimony of PNM witness Thomas Fallgren, p. 29.
[9] *Id.*, p. 30.
[10] *Id.*

strictly limited, … PNM is proposing the abandonment [of the plant] to comply with the requirements of [another contractual agreement[12]], the remaining owners are agreeing, in some measure, to absorb or find new owners for the shares being relinquished in order to keep [the plant] operating, … the restructuring agreement will assign cost responsibilities for the exiting and remaining owners."[13] "The negotiations for the restructuring of the ownership at the [plant] have proceeded without success for several years."[14] What is also unknown, similar to NM PRC Case No. 13-00390-UT, is the status of the coal fuel supply and associated cost terms and

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[11] NM PRC Case No. 13-00390-UT, *Certification of Stipulation*, 4-8-15, pp. 65-67.

[12] In NM PRC Case No. 13-00390-UT that contractual agreement was the Revised State Implementation Plan ("SIP") – a contractual agreement between PNM and the State of New Mexico, to close two units at the San Juan Generating Station ("SJGS") and implement pollution controls at the other two units. Herein, the contractual agreement is between PNM and a private company Avangrid, to merge the companies. *See*, Exhibit B, excerpts from NM PRC Case No. 20-00222-UT, Joint Applicants' Direct Testimony and Exhibits of Pedro Azagra Blazquez, Exhibit PAB-3, Agreement and Plan of Merger, specifically p. 68, § 6.19, (**Four Corners Divestiture**. …**PNM, shall (a) enter into definitive agreements providing for exit from all ownership interests in the Four Corners Power Plant ... and (b) make all applicable regulatory filings and take all commercially reasonable actions in order to obtain required approvals from applicable Governmental Entities, all with the objective of having the closing date for such exit to occur as promptly as practicable but in any event no later than December 31, 2024**.) (emphasis supplied); p. 71, § 7.2(g) (Four Corners Divestiture. Each of the Four Corners Divestiture Agreements shall have been duly executed and delivered by each of the parties thereto, and shall be in full force and effect as of the Closing, and PNM shall have made all applicable regulatory filings to obtain required approvals from applicable Governmental Entities, including for abandonment authority and securitization from the NMPRC.); p.57, §6.5(d) (for the purposes of determining whether a Burdensome Effect exists … (or could reasonably be expected to exist), in respect of a Specified Required Regulatory Approval only those terms, conditions, liabilities, obligations, commitments, or undertakings related to or arising out of rate concessions (including rate reductions and rate credits) to customers required to obtain such Specified Required Regulatory Approval will be taken into account.)

[13] NM PRC Case No. 13-00390-UT, *Certification of Stipulation*, 4-8-15, pp. 67-69.

[14] *Id.,* p. 76; At p. 80: (There is sparse information in the record; "it is not known what terms the parties are currently negotiating and what costs PNM will likely be incurring. … It is also not known what concessions and commitments PNM is willing to make to encourage the other owners to continue [to negotiate.]") (See, also, Supplemental Testimony of PNM's Fallgren, p. 4: "PNM first initiated these discussions in mid-2018 and continued to periodically raise this option

conditions.[15] "It is difficult to identify and measure the risks associated with the Stipulation, given the limited information PNM has presented in regard to these issues."[16] "As a result, the record does not contain enough evidence to determine whether [PNM's sale of its shares in the plant] is reasonable."[17] "The Commission [] is being asked to act with virtually *no current knowledge* about the interests, concerns and intentions of the [plant] owners regarding the restructuring of the ownership of the [FCPP] and only limited knowledge about the negotiations of [coal] fuel supply.[18] If the [FCPP] owners are not willing to accept the risks of a restructuring agreement for [FCPP] without knowledge of the terms of [coal] fuel supply, it is not reasonable to ask the Commission to act with even less knowledge[.] It is also unreasonable to assign those risks to ratepayers based on such a record."[19] (emphasis in the original.)

(B) PNM's Amended Application requests that the Commission act contrary to the New Mexico Renewable Energy Act ("REA"), NMSA § 62-16-4.B(4) and §62-16-4(D)(2019), as amended by the Energy Transition Act ("ETA"), Senate Bill 489, NMSA §§ 62-18-1 to 23 (2019)) and beyond its lawful authority under those statutory provisions by requesting

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with the other owners."
[15] *Id.,* pp. 80-86. At p. 97: ("Take-or-pay [coal] requirements can be substantial.")
[16] *Id.,* p. 88.
[17] *Id.,* p. 90.
[18] Supplemental Testimony of PNM witness Thomas Fallgren, pp. 14-15. (For a $75 million payment by PNM shareholders, NTEC will assume all of PNM's obligations under the FCPP CSA pursuant to the Coal Supply Agreement Assignment, according to the NTEC Purchase Agreement. Under Section 3.3 of the NTEC Purchase Agreement, PNM paid NTEC an initial refundable payment of $15 million at the time of the execution of the Agreement and will pay the balance of $60 million if the Commission approves the sale in this proceeding. However, PNM retains responsibility for the Four Corners plant decommissioning and coal mine reclamation obligations. What is entirely unknown is how the "seasonal operational" agreement, if it is executed in April 2021, or in the future, will impact the PNM/NTEC Purchase Agreement, including the coal supply, in part or full.)
[19] NM PRC Case No. 13-00390-UT, *Certification of Stipulation*, 4-8-15, p. 110.

Commission approval of PNM's proposed sale of its ownership interest in the FCPP to another entity, the Navajo Transitional Energy Company, LLC ("NTEC"), as a means of complying with the renewable portfolio standard ("RPS") requirements;

(C) NMSA § 62-16.4.B(4) (2019), provides that: "[i]n administering the standards required by Paragraphs (5) and (6) of Subsection A of this section, the commission shall prevent carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the standard." NMSA § 62-16-4(D) (2019), provides that:

> Upon a motion or application by a public utility the commission shall, or upon a motion or application by any other person the commission may, open a docket to develop and provide financial or other incentives to encourage public utilities to produce or acquire renewable energy that exceeds the applicable annual renewable portfolio standard set forth in this section; results in reductions in carbon dioxide emissions earlier than required by Subsection A of this section; *or causes a reduction in the generation of electricity by coal-fired generating facilities, including coal-fired generating facilities located outside of New Mexico.* (emphasis supplied.)

PNM's Amended Application and supporting supplemental testimony cannot satisfy the Commission's requirement for approval of abandonment of an existing generation resource by showing that PNM's proposed abandonment of the FCPP and sale of that CO_2- emitting electric generation plant to NTEC will result in a "net public benefit" or is in the public interest. As discussed herein preventing the reduction or cessation of coal burning **is** a net detriment to the public interest. (*See, also*, 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, pp. 82-86. Noting, "the problem of climate change and the role of CO_2 emissions from electric generating resources as major contributors to the climate change problem.")

(D) a failure by the Commission to dismiss PNM's Amended Application for the foregoing reasons would result in a waste of resources by Joint Movants, PRC Staff other parties and the Commission because it would require that parties and the Commission address the merits of PNM's Amended Application that the Commission is expressly prohibited by law from approving.

Due to the clear and unambiguous legislative directive to the Commission in NMSA §§ 62-16.4.B(4) and 62-16-4(D) (2019) and PNM's prior participation in the drafting of and support for passage of the ETA, PNM knew that its Amended Application asks the Commission to approve a sale of its existing FCPP generation resource that the Commission is expressly prohibited by that statute from approving. PNM cannot rely on the parts of the ETA it likes, for instance, deferral of the filing of replacement resource portfolio, (§ 62-18-4(D)), Amended Application, p. 4, and timeframe and Commission decision on the consolidated requests within the nine-month period beginning March 15, 2021, (§§ 62-18-5(A) and (C)), Amended Application, p. 5, but then dismiss the ETA's prohibitions and its clear intent for the reductions of emissions overall, including the resale of coal to other entities, NMSA §§ 62-16-4.B(4) and 62-16-4(D)(2019). For that reason, Joint Movants also request that the Commission find in its order dismissing PNM's Amended Application that none of the costs incurred by PNM in connection with its original Application, Amended Application or proposed sale of the FCPP to NTEC were prudent or reasonable for purposes of any PNM request for recovery of those costs from its customers in any future rate case.

In support of this Motion, Joint Movants state:

1. Commission Rule 1.2.2.12.A NMAC provides that motions may be made at any time during the course of a proceeding and that "[t]he commission discourages any delay in the filing of a motion once grounds for the motion are known to the movant."

2. As addressed in this Motion and Joint Movants' accompanying supporting brief, the grounds for this Motion are apparent from PNM's Amended Application, supporting Direct and Supplemental testimonies, applicable law, and do not rely on any disputed facts material to this Motion.

3. Commission Rule 1.2.2.12.B NMAC provides: "**Motions to dismiss:** Staff or a party to a proceeding may at any time move to dismiss a portion or all of a proceeding for lack of jurisdiction, failure to meet the burden of proof, failure to comply with the rules of the commission, or for other good cause shown. The presiding officer may recommend dismissal or the commission may dismiss a proceeding on their own motion."

4. The New Mexico Supreme Court upheld that the Commission may reject and dismiss any filing that "'patently is either deficient in form or a substantive nullity'" because, for example, it fails "'to set forth all data relevant to the necessity and reasonableness of the relief requested.'" *In the Matter of the Rates and Charges of U.S. West Communications, Inc. v. New Mexico State Corp. Comm'n*, 1993-NMSC-074, ¶10, 865 P.2d 1192, 1194, 116 N.M. 548 ("*U.S. West*") (the Commission has the authority to dismiss), *quoting Municipal Light Bds. v. Federal Power Comm'n*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied* 405 U.S. 989 (1972) and *Intermountain Gas Co. v. Idaho Pub. Util. Comm'n*, 98 Idaho 718, 722, 571 P.2d 1119, 1123 (1977); *see also* Case No. 14-00332-UT, *Initial Recommended Decision*, April 17, 2015, adopted

unanimously by *Final Order Adopting Initial Recommended Decision Completeness of PNM's Filed Application*, May 13, 2015.

5. PNM's Amended Application makes clear that it requests, *inter alia*, Commission approval of a proposed sale and transfer of its ownership interest in the FCPP by PNM to NTEC in accordance with the "Purchase and Sale Agreement" executed on November 1, 2020 submitted as PNM Exhibit TGF-2 to the Direct Testimony of PNM witness Thomas Fallgren. Amended Application, pp. 2-3; Fenton Supplemental, p. 6 (referring to that proposed sale, as described by Mr. Fallgren, relying on the Commission's authority under NMSA § 62-6-12(A)(4) to approve sales of public utility plant or property other than in the ordinary course of business, and NMSA § 62-6-13 addressing the Commission's authority to approve transactions proposed by a public utility unless the commission finds that that the proposed transaction is unlawful or is inconsistent with the public interest."); Fallgren Direct, pp. 11-16, 23-24 (addressing the terms of and consideration provided in the Purchase and Sale Agreement) and PNM Fallgren Direct, Exhibit, TGF-2.

6. As set forth below, PNM's Application and supporting Direct Testimony incorrectly assert that PNM's Amended Application "satisfies" the provisions in the ETA. Application, pp. 4; Fenton Dir., p. 7. In the *Consolidated Response of Public Service Company of New Mexico Pursuant to Order Requesting Briefing on Sufficiency of PNM's Application and Scope of Issues in Proceeding and Motions to Dismiss of Sierra Club and New Energy Economy and Citizens for Fair Rates and the Environment*, February 18, 2021 at p. 6, PNM argued that the ETA's RPS standard under the Renewable Energy Act should be ignored because "PNM does not need to exit FCPP prior to its anticipated closure in 2031 to comply with any applicable RPS. Section 62-16-4(B)(4) of the Renewable Energy Act, which limits the transfer of carbon emitting resources to

comply with the RPS applicable in 2040 and 2045, has no bearing on PNM's Application or the proposed transfer of FCPP in 2024." Also see, Supplemental Testimony of Mark Fenton, p. 10, making essentially the same argument. The problem with PNM's argument is that it ignores the "purpose" of the ETA, which is to cause "the reductions in carbon dioxide emissions" and prevent "carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold."

PNM's sale to NTEC must be understood in the context of applicable rules of statutory construction. Courts must construe the statute "in light of its purpose and interpret it to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." *Faber v. King*, 2015-NMSC-015, ¶8, 348 P.3d 173 (internal quotation marks and citation omitted). When construing individual statutory sections contained within an act, courts examine the overall structure of the act and consider each section's function within the comprehensive legislative scheme. *Britton v. Office of Atty. General,* 2019-NMCA-002, ¶ 27, 433 P.3d 320, 330, *citing, Faber at* ¶9. "To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Hovet v. Allstate Ins. Co.,* 2004-NMSC-010, ¶10, 135 N.M. 397, 89 P.3d 69. "A construction must be given which will not render the statute's application absurd or unreasonable and which will not defeat the object of the Legislature." *State ex rel. Newsome v. Alarid,* 1977-NMSC-076, ¶ 9, 90 N.M. 790, 568 P.2d 1236, *superseded on other grounds by statute as stated in Republican Party of N.M. v. N.M. Taxation and Revenue Dep't, 2012-NMSC-026, 283 P.3d 853*.

7. Contrary to its Amended Application, PNM's original Application asserted that a purpose of PNM's proposed abandonment and sale of its ownership interest in the FCPP to NTEC

is to allow or help PNM comply with the 80% RPS by January 1, 2040 and the "zero carbon resources" by January 1, 2045 requirement in the REA, NMSA §§ 62-16-4.A (5) and (6) (2019). Fenton Direct, pp. 2, 7, 9,14; Phillips Direct pp. 3, 6, 11-12, 13-14, 15, 25. Now, PNM is contradicting its own prior testimony: "compliance with the renewable portfolio standard that applies in 2040 and 2045 is *not* the reason for PNM's proposed sale to NTEC."[20] (emphasis supplied.)

8. Until this Hearing Examiner ruled on the insufficiency of PNM's original Application,[21] a "seasonal operation" agreement was "very unlikely," but all of a sudden between February 26, 2021 and March 15, 2021, when PNM needed to demonstrate to the Commission that the sale of its ownership interest in the FCPP to NTEC would result in some public benefit, a "seasonal operation" agreement (that is not included in the Amended Application **or finalized**) was apparently sketched out. Mr. Fallgren decries the "completely speculative notion that FCPP could be closed before the end of 2024" yet, this is merely his opinion not fact. Supplemental Testimony Fallgren, pp. 23-25. What we know to be true is that Section 6.1 of PNM's sale agreement to NTEC prevents an early shutdown of FCPP, which is definitively abhorrent to the public interest because we are in a climate crisis, and the coal transition part of the ETA was **the** public interest justification for its adoption.

9. "The United States is getting redder. No, not *that* kind of red. (We'll leave that to the political pundits.) We're talking about the thermometer kind. The National Oceanic and Atmospheric Administration last week issued its latest "climate normals": baseline data of

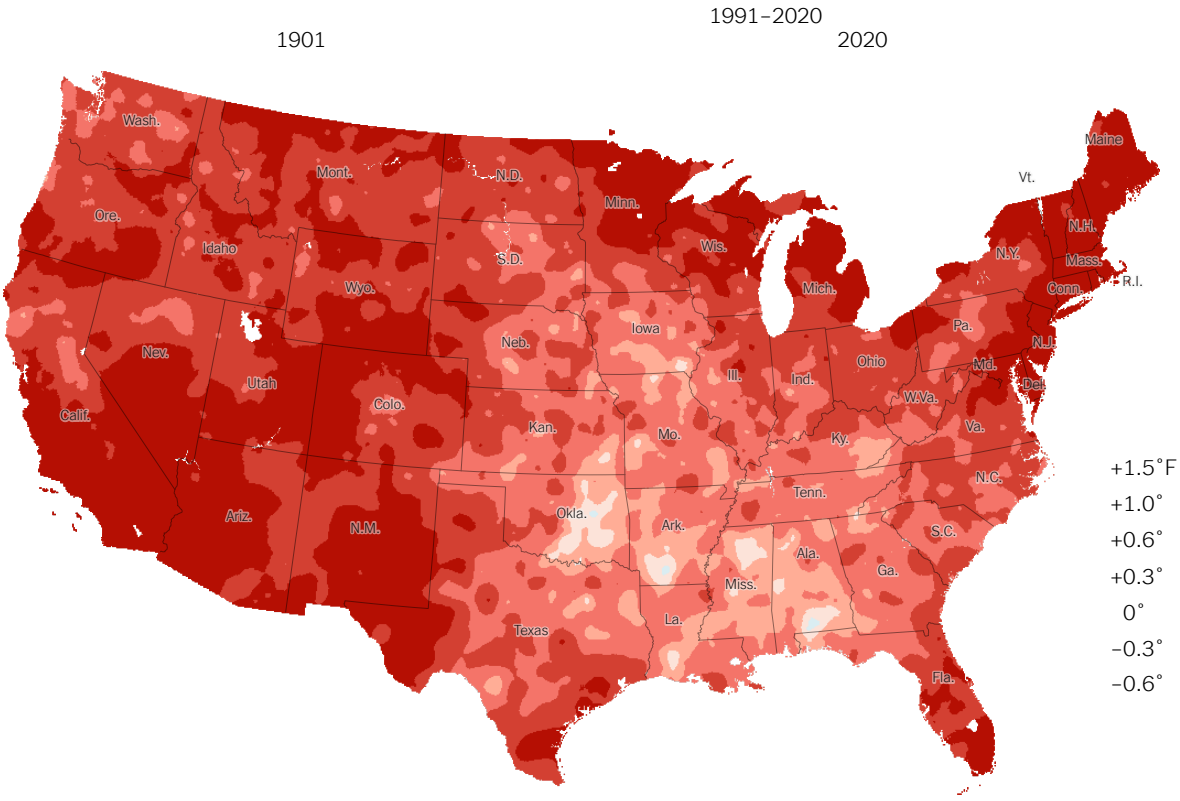
[20] Supplemental Testimony of Mark Fenton, p. 10.

temperature, rain, snow and other weather variables collected over three decades at thousands of locations across the country."[22]

The below map compares the most recent 30 year temperature average with the 20th century average, and makes clear that allowing the prevention of heat-trapping carbon emissions to be baked into an electric utility contract is *not* in the public interest. "There's a New Definition of 'Normal' for Weather", *New York Times*, May 12, 2021.[23]

[21] NM PRC Case No. 21-00017-UT, Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding, February 26, 2021.
[22] https://www.nytimes.com/interactive/2021/05/12/climate/climate-change-weather noaa.html?campaign_id=54&emc=edit_clim_20210512&instance_id=30666&nl=climate-fwd%3A&regi_id=74343111&segment_id=57869&te=1&user_id=4c7a6be12444c2c9aeb38231 be4f302c.
[23] *Id.*

30-year temperatures compared with 20th century average



Note: Data not available for Alaska and Hawaii. • Source: NOAA's National Centers for Environmental Information

10. PNM's Amended Application (p. 6) requests Commission approval of PNM's recovery from customers of an estimated $300 million as ETA-defined abandonment and other energy transition costs which include an estimated $271.3 million in undepreciated investments in the FCPP,[24] $4.6 million in "Plant decommissioning costs," $16.5 million in "Transition funds to be

[24] Despite: "The Hearing Examiners find that the appropriate remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the $90.1 million of the SCR investment and the $58 million of the additional life-extending capital improvements is the disallowance of all costs associated with the investment and improvements. This follows the precedent established in PNM's last rate case as a remedy for PNM's imprudence on the balanced draft investment, and, as such, it would likely be the appropriate remedy if this case were being tried on its merits." 16-00276-UT, 10/31/2017, *Certification of Stipulation*, p. 68. Notwithstanding, our Supreme Court's decision in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation*

distributed to state agencies for tribal and community assistance," and $7.3 million in "Transactional costs associated with issuing energy transition bonds and obtaining approval of abandonment."

11. PNM states that, as part of its claimed $271.3 million in undepreciated investments in the FCPP, its proposed Purchase and Sale Agreement for the FCPP requires that PNM make an estimated $73 million in capital investments between July 2020 and December 2024 for the FCPP for which PNM's Amended Application requests treatment as FCPP abandonment and energy transition costs recoverable from customers pursuant to the ETA. Amended Application, p.15, ¶10; p. 22, ¶28; Supplemental Testimony Thomas S. Baker, p. 2-3, PNM Table TSB-1 and TSB-4 (3-15-21 Supplemental), Page 1 of 1.

12. PNM participated in the drafting of the ETA and fully supported its passage during the 2019 Session of the New Mexico Legislature.[25]

13. PNM previously has argued and insisted to the Commission and to the New Mexico Supreme Court that the ETA is entirely lawful, does not violate any provisions in the New Mexico Constitution, and that the Commission must fully comply with all applicable provisions in the ETA. *See, e.g.*, Case No. 19-00018-UT, *Legal Brief of Public Service Company of New Mexico Concerning Applicability of Energy Transition Act*, 8/23/2019; No. S-1-SC-37552, *Emergency Verified Petition of Public Service Company of New Mexico for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument,* 2/27/2019; No. S-1-SC-38041, *Response of Public Service Company of New Mexico in Support of Emergency Verified Petition for Writ of*

Comm'n, 2019-NMSC-012*,* 444 P.3d 460, ¶40, in which the Court required that ratepayers be protected from the impacts of imprudent decisions.

[25] 19-00018-UT, TR., 12/10/2019 Ronald N. Darnell, PNM Senior Vice President, pp.117-118.

Mandamus and Response to Motion to Dismiss or Stay, 1/3/2020; No. S-1-SC-38247, *Answer Brief of Intervener-Appellee Public Service Company of New Mexico to Appellants' Brief-in-Chief,* 10/5/2020.

14. The New Mexico Supreme Court determined that the Commission must apply the ETA. No. S-1-SC-38041, Order of 1/29/2020.

15. As a matter of law, accepting them as true for the purpose of addressing this Motion, neither the alleged cost savings to PNM customers nor any other alleged economic or other benefits of PNM's proposed abandonment and sale of its ownership interest in the FCPP to NTEC described by PNM in its Application and Direct or Supplemental Testimony provide a lawful basis or justification for the Commission to violate the directive in NMSA § 62-16-4.B(4) (2019) or the clear and unambiguous legislative directive to encourage emissions reductions in NMSA § 62-16-4(D) (2019) by approving PNM's proposed sale of its interest in the FCPP to NTEC.

16. As previously asserted by to the Commission in Case Nos. 16-00276-UT and 20-00210-UT, the appropriate way for PNM to have saved its customers money, in accordance with applicable law and regulatory principles, due to the economic obsolescence and climate-altering consequences of the FCPP, PNM should have acted prudently to abandon its interest in that plant in 2016, instead of investing further capital expenditure dollars to prop up a polluting and non-performing plant, prior to passage of the ETA. *See, e.g.*, Case No. 16-00276-UT, *Certification of Stipulation*, pp. 29-68; *NEE's Brief-in-Chief*, 9/8/2017, *passim*; *NEE Response to Sierra Club's Motion to Re-open Docket No. 16-00276-UT to Implement the Revised Final Order,* 1/11/21, *passim*; Case No. 20-00210-UT, *NEE Complaint,* 10/31/2020, *passim*; *See, also*, Exhibit C, NM PRC Case No. 20-00222-UT, *Direct Testimony of Jeremy Fisher*, April 2, 2021, pp. 20-25.

17. PNM's Application and Amended Application and testimonies included therein acknowledge that, in order for the Commission to approve PNM's request, PNM bears the burden of showing that Commission approval of PNM's proposed abandonment and sale of its ownership interest in the FCPP to NTEC is in the public interest because it will result in a net public benefit. Fenton Dir., p. 10, *citing* Case No. 19-00018-UT *Recommended Decision* at 26 (February 21, 2020).

18. PNM's witnesses assert that PNM's proposed abandonment and sale of PNM's ownership interest in the FCPP to NTEC is consistent with the ETA's objective and goal of accelerating "New Mexico's *transition* from coal as an electric generation resource to more sustainable resources" and will benefit the public interest because they "will result in the Four Corners region having more control over the region's energy transition," and that they will "further the public interest and the public policy under" the ETA due to that Act's "focus on the economic impacts of abandoning a qualifying facility." Fenton Dir., pp. 16-17; Sanchez Dir., pp. 9-11. (emphasis supplied.)

19. As matter of law, PNM cannot satisfy its burden of showing that its proposed abandonment and sale of the FCPP will result in a net public benefit or are in the public interest because, even if the Commission accepts as true all of the facts and claims asserted in PNM's Application and supporting Direct Testimony, PNM's Application requests that the Commission violate the legislative directive in NMSA § 62-16-4.B (4) and § 62-16-4(D)(2019), as provided in Section 29 of the ETA (that PNM witness Fenton acknowledges "establishes the comprehensive framework for PNM's requested approvals in this case"[26]) by approving PNM's

[26] Direct Testimony of Mark Fenton, p. 7.

proposed sale of its ownership interest in the FCPP to NTEC, which sale indisputably would not reduce or limit the operation of the FCPP, will not accelerate the reduction of CO_2 or other greenhouse gas ("GHG") emissions from electricity-generating resources in New Mexico and will not accelerate New Mexico's transition from coal as an electric generation resource to more sustainable resources.

20. Pursuant to the PUA, NMSA § 62-6-13, the Commission is neither required nor authorized to approve a transaction proposed by a public utility, such as PNM's proposed sale of its ownership interest in the FCPP to NTEC, which it is expressly prohibited by statute (the ETA and the REA) from approving or which is inconsistent with the public interest as provided in those statutes.

21. The Commission previously repeatedly noted the above-quoted legislative directive to the Commission in the ETA, codified in the REA as NMSA § 62-16-4.B(4) (2019), in Case No. 19-00349-UT where it assessed and denied a post-ETA request by El Paso Electric Co. ("EPE") for approval of a new natural gas-fired resource with a useful life that would extend beyond the January 1, 2045 "zero carbon resources" requirement standard in NMSA § 62-16-4.A(6) (2019). Case No. 19-00349-UT, *Recommended Decision*, pp. 46 (n.100), 62 (ns.145 & 146) & 77, adopted by *Final Order*.

22. Because PNM was aware, or reasonably should have been aware, of the above-quoted directive to the Commission in NMSA § 62-16-4.B (4) and § 62-16-4(D)(2019) prior to November 1, 2020 when it executed the proposed Purchase and Sale Agreement with NTEC and prior to its filing of its Application in this case, Joint Movants request that the Commission find in its order dismissing PNM's Applications that none of the costs incurred by PNM in

connection with its Application or proposed sale of its ownership interest in the FCPP to NTEC were prudent or reasonable for purposes of any PNM request for recovery of those costs from customers in any future rate case.

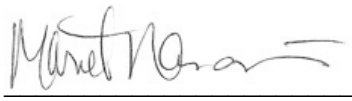
23. In support of this Motion, Joint Movants submit the accompanying legal brief below.

24. Joint Movants contacted counsel for PNM, the Commission's Utility Division Staff and others that have moved to intervene as parties in this case to date and is authorized to state: PNM opposes. San Juan County takes no position. CCAE supports. Sierra Club supports the relief requested in the motion, on movants' grounds that the application is deficient. No other party responded before the filing of this Motion.

WHEREFORE, Joint Movants respectfully request that the Commission promptly dismiss PNM's Application with prejudice.

Respectfully submitted May 17, 2021,

New Energy Economy,



Mariel Nanasi, Esq.
600 Los Altos Norte St.
Santa Fe, NM 87501-1260
(505) 469-4060
mariel@seedsbeneaththesnow.com

Citizens for Fair Rates and the Environment

_____/s/_____

Thomas Manning, Director
406 S. Arizona St. Silver City N.M. 88061
cfrecleanenergy@yahoo.com
575-538-2123

ARGUMENT

Joint Movants' Motion requests that the Commission dismiss PNM's original and Amended Application with prejudice in accordance with the Commission's procedural Rules (1.2.2.12.A and B NMAC) and applicable Commission precedent for five reasons. First, "the application clearly is incomplete or incorrect"[27] due to fundamental deficiencies, and because "the Commission is charged with protecting the public interest,"[28] because:

(A) PNM failed to disclose that FCPP divestiture was prompted by and was *because of* its Merger with Avangrid. PNM's claim that it is seeking the abandonment, sale and securitized financing of FCPP is based on a false pretense – that it is in the public interest (allegedly because it will save customers money, is good for the Navajo Nation economy, and that it will produce a reduction in abandonment costs by using securitization).[29] However, the "public interest" isn't the motivating factor, merger with Avangrid is. FCPP divestiture is a necessary condition of Avangrid, and that is why this case is being brought; Approvals are *necessary* by December 2021 to consummate the Avangrid *deal* prior to the "End Date" of January 20, 2022.[30] In order for the Commission to determine whether PNM's Amended Application is fair, just and reasonable and in the public interest it must determine if evidence in the record *as a whole* supports that conclusion. Although FCPP divestiture is a condition precedent of the merger, PNM was not

[27] *Matter of Rates & Charges of U S West Communications, Inc.*, 1993-NMSC-074, 865 P.2d 1192, 1195, 116 N.M. 548.
[28] *Id.,* citing, *see Mountain States 1977,* 90 N.M. at 331, 563 P.2d at 594 ("The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected....")
[29] Supplemental testimony of Thomas Fallgren, p. 17.

forthcoming about this material fact and there is no testimony about the merger in the record.

(B) PNM failed to include the seasonal operational agreement in its filing. This case is premature because it doesn't include a "pending" agreement (PNM's Fallgren two months ago on March 15, 2021, anticipated that the agreement would have been finalized last month). Parties, Staff and the Commission cannot access the reasonableness of the PNM "sale" to NTEC to absorb its coal shares at FCPP and its impact on the corresponding Operating Agreement, Co-Tenancy Agreement, and Coal Supply Agreement modifications, etc. and how it will impact early shutdown or prevent it. There are other related issues that will most probably be included in the seasonal operational agreement that most certainly must be evaluated as well.

Second, accepting all of the factual claims in PNM's Application and direct testimony as true for the purpose of Joint Movants' Motion to Dismiss, PNM's Application requests that the Commission act contrary to the REA, NMSA § 62-16-4.B (4) (2019), and the legislative directive to encourage emissions reductions in NMSA § 62-16-4(D) (2019), as amended by the ETA (Senate Bill 489, NMSA §§ 62-18-1 to 23 (2019)), and that it act beyond its lawful authority under those statutory provisions by requesting Commission approval of PNM's proposed sale of its ownership interest in the FCPP to NTEC.

Third, as a matter of law, due to the legislative directive in NMSA § 62-16.4.B(4) (2019), as amended by the ETA, providing that "the commission shall… prevent carbon dioxide emitting

[30] See, Exhibit B, Merger Agreement, p. 72, §8.1 (a)(b)(c).

electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the standard", as a matter of law, PNM's Application and supporting direct testimony also cannot satisfy the Commission's requirement for approval of abandonment of an existing generation resource by showing that PNM's proposed abandonment of the FCPP and sale of that CO_2-emitting resource to NTEC will result in a "net public benefit" or is in the public interest. For those reasons, PNM's Application is patently deficient in substance, inconsistent with applicable law and, pursuant to Commission and New Mexico Supreme Court precedent, "a substantive nullity."

Fourth, as a matter of law, because parties herein relied on to their detriment the contractual agreement, the Modified Stipulation in Case No. 16-00276-UT, requiring a prudence review regarding the acts and conduct of PNM's utility management to invest in and extend the life of the Four Corners Power Plant ("FCPP"), PNM cannot now invoke a subsequent law (that PNM helped author), the ETA, to avoid their prior contractual obligations.

Joint Movants' Motion also requests that the Commission promptly dismiss PNM's Application for the foregoing reasons because a failure by the Commission to do so would result in a waste of resources by Joint Movants, other parties and the Commission by requiring that parties and the Commission address the merits of a PNM application that the Commission is prohibited by that applicable law from approving.

The legislative directive to the Commission in NMSA § 62-16.4.B(4) (2019) requiring that the Commission prevent a "qualifying utility" (PNM) from selling carbon-dioxide-emitting generation resources, such as PNM's interest in the FCPP, as a means of complying with the minimum 80% RPS standard by January 1, 2040 or the "zero carbon resources" requirement by

January 1, 2045 for investor-owned electric public utilities in New Mexico in the REA, as amended by the ETA in 2019, is clear and unambiguous. Moreover, due to PNM's prior participation in the drafting of and support for passage of the ETA and defense of its lawfulness and constitutionality, PNM knew of that statutory directive and that its Application asks the Commission to approve a sale of its ownership interest in the FCPP that the Commission is *expressly* prohibited by statute from approving before negotiating that sale and filing its Application. For those reasons, Joint Movants also requests that the Commission find in its order dismissing PNM's Application that none of the costs incurred by PNM in connection with its Application or proposed sale of its interest in the FCPP to NTEC were prudent or reasonable for purposes of any PNM request for recovery of those costs from its customers in any future rate case.

STANDARD FOR MOTIONS TO DISMISS

Commission Rule 1.2.2.12.A NMAC provides that motions may be made at any time during the course of a proceeding and that "[t]he commission discourages any delay in the filing of a motion once grounds for the motion are known to the movant." Commission Rule 1.2.2.12.B NMAC provides:

> **Motions to dismiss:** Staff or a party to a proceeding may at any time move to dismiss a portion or all of a proceeding for lack of jurisdiction, failure to meet the burden of proof, failure to comply with the rules of the commission, or for other good cause shown. The presiding officer may recommend dismissal or the commission may dismiss a proceeding on their own motion.

The New Mexico Supreme Court has held that the Commission may reject and dismiss any filing that "'patently is either deficient in form or a substantive nullity,'" for example, because it fails "to set forth all data relevant to the necessity and reasonableness of the relief

requested.'" *In the Matter of the Rates and Charges of U.S. West Communications, Inc. v. New Mexico State Corp. Comm'n*, 1993-NMSC-074, 865 P.2d 1192, 1194 ("U.S. West"), *quoting Municipal Light Bds. v. Federal Power Comm'n*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), cert. denied 405 U.S. 989 (1972) and *Intermountain Gas Co. v. Idaho Pub. Util. Comm'n*, 98 Idaho 718, 722, 571 P.2d 1119, 1123 (1977). *See, e.g.*, Case No. 14-00332-UT, 5/13/15 *Final Order Adopting Initial Recommended Decision Completeness of PNM's Filed Application* (dismissing PNM's 2014 GRC Application for its failure to comply with the Future Test Period Filing Requirements in 17.1.3 NMAC); *see generally* Case No. 16-00105-UT, 8/25/16 *Order Denying Motion to Dismiss* (addressing Commission's standards for dismissal under 1.2.2.12.B NMAC).

Joint Movants request that the Commission promptly dismiss PNM's Application with prejudice so that Joint Movants and other parties (including the Commission's Utility Division Staff) will not have to waste their time and limited resources conducting discovery or preparing testimony, and the Commission will not have to waste its time and limited resources, addressing the merits of an application that, accepting all of its factual claims as true, is patently inconsistent with applicable law because it asks the Commission to do that which it is expressly prohibited by law (the ETA and REA) from doing: approve PNM's proposed sale of its ownership interest in the FCPP to another owner of that CO_2-emitting coal-fired plant (NTEC) that will not result in any shut-down or diminution of the operating capacity of that plant or accelerated reduction of its CO2 or other GHG emissions in accordance with the environmental, public health and public interest objectives and goals of the ETA and its amendments to the REA.

BACKGROUND

In 2016, PNM filed a rate case, NMPRC Case No. 16-00276-UT. There was a Stipulation among other parties to which New Energy Economy objected. New Energy Economy objected among other grounds, that: 1) PNM's investments in and life extension of Four Corners were demonstrably imprudent and made without any economic analysis or comparison with costs of alternatives and the related FCPP costs should therefore not be included in rates. After an eight-day evidentiary hearing on the Revised Stipulation, both Hearing Examiners agreed that PNM made its investments in the coal plants without contemporaneous or comprehensive economic analysis or consideration of alternatives and therefore found them to have been imprudent.[31] The Hearing Examiners first concluded, *inter alia*, that "the appropriate remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the $90.1 million investment in the SCR [Selective Catalytic Reduction] investment and the $58 million of the additional life-extending capital improvements is the disallowance of all costs associated with the investment and improvements."[32] Specifically, as to the recovery of costs for Four Corners, the Hearing Examiners observed: "The issue of the prudence of the extension of PNM's participation in Four Corners . . . has been extensively litigated in this case. There is a substantial record on which to make a finding of imprudence and the inadequacy of [Revised Stipulation] paragraph 9[33] to address imprudence."[34] The Hearing Examiners determined that PNM's

[31] NM PRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation,* January 10, 2018, pp. 18-21, ¶¶ 53-60.
[32] NM PRC Case No. 16-00276-UT, 16-00276-UT, *Certification of Stipulation,* October, 31, 2017, p. 68.
[33] Revised Stipulation, paragraph 9, (in part): "The Signatories agree that PNM shall include in its rate base the return of its capital investment in the SCR equipment installed at Four Corners and PNM shall only collect a return on its Four Corners SCR investment equal to PNM's embedded cost of debt."

decision to continue participating in Four Corners without any contemporaneous economic analysis, risk evaluation, or consideration of alternatives, and PNM's related decisions to invest in costly pollution controls and capital improvements had not been prudent.[35] The Hearing Examiners noted (twice) the real motivation for PNM's decision to make further investments in Four Corners, articulated by PNM's Senior Vice President Patrick Apodaca, *at PNM's decision-making time,* on December 18, 2013: "Among other things, maintaining our same level of ownership at Four Corners avoids a possible distraction with our BART filing with the PRC next week and our negotiations with the owners at SJGS."[36] In other words, PNM needed the PRC to approve further coal investments at SJGS and didn't want to "distract" the Commission with a question about the validity of further coal investment by its neighboring Four Corners coal plant at the same time.

As a consequence of this determination of imprudence, rather than exclude all costs associated with Four Corners as the law requires,[37] the Hearing Examiners decided that a "lesser disallowance might be reasonable in the context of a stipulation."[38] They modified Paragraph 9 of the Revised Stipulation to reduce recovery not only from the cost of PNM's SCR expenditures but also its expenditures in $58M other FCPP capital investments.

NEE filed its Exceptions to Certification of Stipulation and its Consolidated Response to Exceptions, arguing that if the investments were imprudent, the law required that there be no cost

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[34] NM PRC Case No. 16-00276-UT, 16-00276-UT, *Certification of Stipulation,* October, 31, 2017, p. 69.
[35] *Id*.
[36] *Id*., p. 51.
[37] "The Hearing Examiners find the appropriate remedy for PNM's imprudence in [] Four Corners [] is the disallowance of all costs with the investment and improvement." 16-00276-UT, *Certification of Stipulation,* October, 31, 2017, p. 68.

recovery from ratepayers.[39] As a result, on December 20, 2017, after reciting PNM's intentional omissions, failure to adhere to accepted utility practices, its misstatements, and obfuscations regarding its scheme to provide continued life-support to a failing FCPP at the expense of the New Mexico ratepayers, the PRC initially adopted the Hearing Examiners' Certification of Stipulation but *added* sanctions on PNM.[40] After Commissioner Lyons complained that the "lobbying" of the Commission had already begun, without citing any new evidence, PNM moved for reconsideration of the PRC's adoption of the Hearing Examiners' finding of imprudence and associated recommendations. On a 3-2 vote the PRC reversed itself and immediately granted PNM's motion without any new evidence, largely approved the stipulation, withdrew the finding of imprudence and deferred consideration of that issue until PNM's next

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[38] *Id*., p. 68.

[39] *Philadelphia Elec. Co. v. Pennsylvania P.U.C.*, 61 Pa. Comm. Ct., 325, 433 A.2d 620 (Pa. Comm. Ct. 1991) ("unit may be properly excluded from a utility's rate base if the investment in that unit is found to be a result of managerial imprudence occurring at the time the decision to invest was made.") *See also, Association of Businesses Advocating Tariff Equity v. Public Serv. Comm'n*, 527 N.W.2d 533, 158 P.U.R.4th 431 (Mich. Ct. App. 1995); *Appeal of Conservation of Law Foundation of New England, Inc*., 507 A.2d 652, 127 N.H. 606 (N.H. 1986); *In re Kansas City Power & Light Co*., 1980 WL 642585, 38 P.U.R.4th 1 (Mo. P.S.C. 1980); *Indiana-American Water Co., Inc. v. Indiana Office of Utility Consumer Counselor*, 844 N.E.2d 106, 116 (Ind. Ct. App. 2006) ("While the utility may incur any amount of operating expenses it chooses, the Commission is invested with broad discretion to disallow for ratemaking purposes any excessive or imprudent expenditures."); *Pennsylvania Power & Light Co. v. Pennsylvania Pub. Util. Comm'n*, 101 Pa. Comm. Ct. 370, 516 A.2d 426, 430 (Pa. Comm. Ct. 1986) (adjustments to a utility's rate base required exclusion of "a unit found to be a result of managerial misconduct."); *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n*, 726 So. 2d 870 (La. 1999), Util. L. Rep. 26,708, 98-0081 (La. 1/20/99) ("When the Commission reviews a utility's rates it is required to apply the 'prudence' standard." 723 So. 2d at 873, *citing Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n*, 578 So. 2d 71, 85 (La. 1991). The Court explained that "[t]he utility must demonstrate that its decisions and actions are prudent in order to counterbalance the monopolistic effects on ratepayers who do not have a choice about which company provides their utility service." *Id*. at 873-74.)

[40] Ordering "a further inquiry into the full scope of potential further disallowances." 16-00276-UT, *Order Partially Adopting Certification of Stipulation,* December 20, 2017, p. 33, ¶112.

rate case filing. On January 10, 2018, in the Commission's *Revised Order Partially Adopting Certification of Stipulation* it stated:

> Notwithstanding the Certification's findings supporting the conclusion that PNM acted imprudently in determining to continue its use of FCPP and assume further obligations under the renewed FCPP agreements requiring the installation of SCR and other additional capital investments in FCPP, the Commission acknowledges the Signatories' arguments that the Stipulation and its benefits should be viewed as a whole and within the context of the Commission's longstanding policies favoring settlement of cases.

At, p. 22, ¶65.

Furthermore,

> the benefits to ratepayers under the revised Stipulation were so significant that the Commission was 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.

Id., p. 23, ¶66. (emphasis supplied.)

According to the PRC, a deferral would permit consideration of sanctions outside a settlement process and would provide "a full opportunity for the Commission to consider the necessity and scope of any remedy in light of PNM's alleged imprudence." *Id.*

On January 19, 2018, PNM and the other Signatories filed the *Joint Notice by All Signatories of Acceptance of Commission's Modifications to Revised Stipulation*, and stated, on p.1: "By this pleading, the undersigned Signatories to the Revised Stipulation hereby accept the terms of the *Order on Notice of Acceptance* and all of the modifications to the Revised Stipulation contained in the Decretal Paragraphs of the Commission's *Revised Order Partially Adopting Certification of Stipulation issued on January 10, 2018*, as further clarified and modified by the Commission's January 17, 2018 *Order on Notice of Acceptance*."

Despite PNM's former agreement in NM PRC Case No. 16-00276-UT to be subject to a prudence review for its investments in and life extension of FCPP, PNM now claims that "the Energy Transition Act is controlling with regard to the abandonment costs for undepreciated investments in Four Corners that are to be recovered through the issuance of energy transition bonds."[41]

I. The Abandonment, Sale, and Securitization of $300 Million is a Requirement of the PNM/Avangrid Merger Yet PNM Omitted this Material Fact and Any Testimony About the Precondition in its Original or Amended Application. PNM has Misrepresented the Reason for FCPP Divestiture to the Commission. When Determining "Public Interest" the Commission is Entitled to Have All the Material Evidence Before It.

As Avangrid/Iberdrola witness, Pedro Azagra Blazquez makes clear in his testimony in support of the PNM/Avangrid Application for merger:

> **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.[42]

It is clear that PNM's application for FCPP abandonment, sale, and securitization of $300 Million is driven by the PNM/Avangrid merger. In response to discovery about contingencies underlying the merger agreement, Mr. Blazquez testified:

[41] Supplemental testimony Mark Fenton, p. 24.

> Avangrid's internal policies precluded Avangrid from pursuing this transaction with PNMR in the absence of a clear and achievable path for PNM out of its ownership and operation of coal-fired generation. Avangrid determined that the planned imminent retirement of the remaining San Juan Generating units, which has already received abandonment authorization from the Commission was consistent with its internal policies. However, a continued minority interest in the Four Corners Power Plant (even if only for a 200 MW stake) was inconsistent with Avangrid's policies. Accordingly, Avangrid made it clear to PNMR that it would not agree to the Merger in the absence of PNM having a clear and achievable plan to exit the Four Corners Plant by no later than 2024.[43]

Recently, in NM PRC Case No. 20-00222-UT, the Hearing Examiner ordered Avangrid to reveal the history of "penalties and disallowances" and "management audits" due to "customer service failures," which was omitted in testimony. "The service deficiencies of Avangrid's electric utility subsidiaries are relevant to the Commission's review of the potential impact Avangrid's influence will have on the adequacy of PNM's service if the merger is approved. The Joint Applicants' failure to disclose this information to the Commission in this proceeding is troubling and is also relevant to the credibility of their witnesses' testimony and the transparency by which Avangrid and PNM would conduct their business in New Mexico if the merger is approved." *Order Regarding Avangrid Service Quality Issues and Management Audits and Suspension of the Filing Date for Statement in Opposition to the May 7, 2021 Stipulation*, May 11, 2021, p. 2-4.

The Commission should, at minimum, require PNM to submit testimony about the impact of the Avangrid/PNM merger on the Application herein, but because PNM has already had two

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[42] *See*, Exhibit B, NM PRC Case No. 20-00222-UT, Direct Testimony of Pedro Azagra Blazquez, 11/23/2020, p. 14. *See*, *also*, Exhibits A and C.
[43] Joint Applicants' Objections and Responses to CCAE1-1, December 11, 2020. *See*, *also*, Exhibits A, B and C.

bites at the apple and there are other reasons for dismissal the insufficient and inaccurate filing should be dismissed.

II. The "Seasonal Operation" Agreement is Relied on by PNM Witnesses to Justify, at least in Part, that the Abandonment and Sale Results in a Public Benefit, but this Agreement which necessarily affects other Key Issues is not in the Record and Necessarily Precludes Adequate Commission Review.

As more fully stated above, PNM has failed to include the seasonal operation agreement in its Amended Application because the co-owners at FCPP have not yet executed it. Apparently PNM has been working on an exit, partial exit or earlier closure for some years now, but hasn't been successful in negotiations despite the uneconomic nature of continuing at the plant. Just two years after PNM committed nearly a billion dollars of ratepayer money to FCPP it found that it was stuck with high-costs (increasing rates, associated capital expenditures, and pollution controls) at a non-performing plant. "PNM was unable to find a willing buyer that would pay any, much less a significant amount of money, to purchase an interest in a long-lived generation facility with a firm fuel supply that ends in 2031."[44] How can this Commission evaluate PNM's application when the seasonal operation agreement will necessarily impact coal costs, the co-tenancy and operating Agreements, and who knows what else? Will the seasonal operation agreement lock in the burning of coal despite the failing economics contrary to the dictates of the ETA? A public interest determination cannot be made without this crucial evidence and who knows how long it will take to obtain this information. It is unreasonable to subject ratepayers to these risks, especially without having a full picture of the FCPP situation.

PNM's original and Amended Application is lacking in relevant evidence, and untimely;

[44] Supplemental Testimony of Thomas Fallgren pp.12-13.

the Commission should dismiss it as incomplete and inaccurate.

III. The Commission Should Dismiss PNM's Application with Prejudice as a Matter of Law Because the REA, NMSA § 62-16-4 B (4) (2019) and NMSA § 62-16-4(D) (2019), as Amended by the ETA, Expressly Prohibits the Commission from Approving PNM's Proposed Sale of its Ownership Interest in the FCPP to NTEC as Requested in PNM's Application.

The purpose of those amendments to the Renewable Energy Standard ("REA") of the ETA was to serve the public interest in New Mexico by accelerating the reduction of CO_2 and other GHG emissions that are harmful to public health and the environment from electricity generating resources located in New Mexico, including the FCPP.[45] The REA, NMSA § 62-16-4.B(4) (2019), and consistent with the Governor's pronouncement about the importance of the ETA, provides that "the commission *shall prevent* carbon dioxide emitting electricity-generating resources from being reassigned, redesignated *or sold* as a means of complying with the standard." (emphasis supplied).

The legislative directive to the Commission in NMSA § 62-16-4.B(4) (2019) is clear and unambiguous. Its clear intent and purpose is to protect the public interest by preventing a "qualifying utility"[46] from circumventing the above-stated purpose of the RPS and "zero carbon

[45] https://www.governor.state.nm.us/2019/03/22/governor-signs-landmark-energy-legislation-establishing-new-mexico-as-a-national-leader-in-renewable-transition-effort ("Gov. Michelle Lujan Grisham on Friday signed Senate Bill 489, the Energy Transition Act, landmark legislation that sets bold statewide renewable energy standards and *establishes a pathway for a low-carbon energy transition away from coal* while providing workforce training and transition assistance to affected communities. … The law transitions New Mexico away from coal and toward clean energy…. This legislation is a promise to future generations of New Mexicans, who will benefit from both a cleaner environment. …") Mar 22, 2019 | Press Release (emphasis supplied.)

[46] ETA's relevant provisions apply only to PNM; the Hearing Examiners found that "[t]he San Juan and Four Corners stations are the only facilities in New Mexico that satisfy the ETA's definition of 'qualifying generating facility." 19-00195-UT, *Recommended Decision on*

resources" requirements in NMSA §§ 62-16-4.A(5) and (6) (2019) by selling its interest in a "qualifying generating facility" such as the FCPP to another entity that is able and intends to continue operating such a facility after its abandonment by the "qualifying utility," or by reassigning or redesignating such a facility as so-called "merchant plant" that the qualifying utility or its affiliate or parent would be able to continue operating or relying on for sales of power to customers other than the retail customers of the qualifying utility that are beyond the Commission's regulatory jurisdiction under the PUA. The Commission previously has held that a public utility's proposal, after the effective date of the ETA, to acquire a CO_2-emitting generation resource with a useful life that would extend beyond 2045 that it could use for sales outside the Commission's jurisdiction to customers outside New Mexico to allegedly comply with the ETA appeared to be contrary to NMSA § 62-16-4.B(4) (2019) and the intent of the ETA.[47]

Under established rules of statutory construction, the language in NMSA § 62-16-4.B(4) (2019) must be given its plain meaning and may not be interpreted in a manner that would have an unreasonable or absurd result. *See, e.g.*, *Las Cruces v. Garcia*, 102 N.M. 25, 26-27, 690 P.2d 1019 (1984). Interpreting the plain meaning of the language in that section of the REA to allow the Commission to approve PNM's proposed abandonment and sale of its interest in the FCPP to

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Replacement Resources, Part II, 6/24/2020, p.11, fn. 18, *Final Order*, adopted unanimously, 7/29/2020.

[47] Case No. 19-00349-UT, *Recommended Decision*, pp. 46 (n. 100), 62 (ns. 145 &146) and 77, adopted by *Final Order,* rejecting EPE's argument that its proposed acquisition of a new gas-fired resource with a useful life that would extend beyond the January 1, 2045 "zero carbon resources" requirement in the ETA would not be contrary to the intent of the ETA because, beginning in 2045, EPE could use that CO_2-emitting plant to serve its customers in Texas for the remainder of that plant's useful life.

NTEC to help or allow PNM to comply with the 80% RPS by January 1, 2040 or the "zero carbon resources" requirement by January 1, 2045 in the REA, by effectively off-loading that plant's polluting CO_2 and other GHG emissions to another entity that intends to rely on the continuing (post- PNM "abandonment") operation of that plant would have such an unreasonable and absurd result, contrary to the intent and purpose of those statutes.

Statutes are to be interpreted in order to facilitate their operation and the achievement of their goals. *See, e.g., Miller v. N.M. Dep't. of Transportation*, 106 N.M. 253. 255, 741 P.2d 1374 (1987); NMSA 1978, § 12-2A-18 ("A statute or rule is construed, if possible, to…give effect to its objective and purpose."). Each part of a statute should be construed in connection with every other part to produce a harmonious whole. *See, e.g., State v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). All of the provisions of a statute, together with other statutes in *pari materia*, must be read together to ascertain legislative intent. *See, e.g., Allen v. McClellan*, 1965-NMSC-094, 75 N.M. 400, 405 P.2d 405, 406-07, *overruled on other grounds, N.M. Livestock Bd. v. Dose*, 1980-NMSC-022, 94 N.M. 68, 607 P.2d 606 ("Particular words, phrases and provisions must be construed with reference to the leading idea or purpose derived from the whole statute.").

PNM's original Application and Direct Testimony repeatedly make clear that a purpose of PNM's proposed abandonment and sale of its ownership interest in the FCPP to NTEC is to allow or help PNM to comply with the 80% RPS by January 1, 2040 and the "zero carbon resources" requirement in NMSA §§ 62-16-4.A(5) and (6) (2019), as amended by the ETA. PNM Application, ¶ 8.A, p. 10 (asserting that, with PNM's proposed abandonment and sale of its interest in the FCPP to NTEC, PNM "anticipates it will be in compliance with the environmental standards of performance for PNM's portfolio used to serve customers as contained in § 62-18-10(D) of the"

ETA; *see also* Fenton Dir., p. 2 (stating that PNM's proposed abandonment and sale of the FCPP "represents the second phase of PNM's implementation of the" ETA) and pp. 7, 9 & 14; Phillips Dir., p. 3 ("By abandoning its interest in FCPP and replacing that capacity with other resources, PNM's portfolio of resources will be capable of meeting the demand and energy requirements of PNM's customers at the lowest reasonable cost while reducing future carbon emissions from the generation portfolio used to serve PNM's customers."), p. 6 ("The proposed transaction will not only reduce customer costs and reduce carbon emissions associated with PNM's generation portfolio, but when replacement resources are approved, PNM's system should be in a better position to reliably manage the transition required by the Energy Transition Act."), pp. 11-12 ("In all scenarios analyzed, PNM required the resulting portfolio to meet all required laws and regulations – such as the updated RPS and portfolio carbon emission requirements prescribed by the Energy Transition Act– as well as PNM's planning criteria for reliability."), p. 13 ("All scenarios examined were required to comply with New Mexico's RPS revised in 2019 to require 20% of retail sales to be served by renewable resources by 2020, 40% by 2025, 50% by 2030 and 80% by 2040; with zero carbon resources serving 100% of retail sales by 2045."), p. 15 ("The various analysis scenarios include forecast assumptions regarding PNM demand and energy requirements, the costs and output characteristics of resources within PNM's existing generating fleet, fuel prices, RPS and carbon emission requirements, and financial factors such as inflation, taxes and interest rates."), p. 25 (explaining that it would be possible for PNM to abandon its interest in the FCPP in 2031 under the ETA it the Commission does not approve its proposed sale to NTEC).

PNM's ownership interest in the FCPP is indisputably a "carbon dioxide emitting

electricity-generating resource" in PNM's existing supply-side resource portfolio. Nevertheless PNM's Amended Application asserts that it "satisfies the standard for approval of the abandonment,"[48] and poses "no net detriment' to the public".[49] As explained above, as a matter of law, that assertion is not correct.

In that regard, PNM witness Fenton asserts in his Direct Testimony (p. 7), that the ETA, the PUA and the Commission's rules and orders "all inform" the "process for abandoning FCPP and issuing a financing order to recover PNM's energy transition costs," and that the ETA "establishes the comprehensive framework for PNM's requested approvals in this case." The legislative directive in NMSA § 62-16-4.B(4) (2019) that the Commission "prevent carbon dioxide emitting electricity-generating resources from being…sold as a means of complying with" the standards in NMSA §§ 62-16-4.A(5) and (6) (2019) is part of that "comprehensive" regulatory "framework" in the ETA.

PNM's witnesses also acknowledge that PNM's proposed abandonment and sale of its ownership interest in the FCPP to NTEC will not result in any temporary or permanent retirement, shut-down, closure or decommissioning of the FCPP or of any portion or capacity of that plant and will allow NTEC and the other remaining owners of that plant to continue operating the full capacity of that plant until at least 2031, if not longer. Fenton Dir., pp. 13, 17; Fallgren Dir., pp. 7-10 (also stating that the existing Navajo Nation Land Lease and Supplement Lease for the FCPP requiring decommissioning of that plant does not expire until July 6, 2041) and p.17. Consequently, none of the existing royalty payment, employment, tax or other economic benefits to the Navajo Nation resulting from the current operation of the FCPP described by PNM

[48] Supplemental Testimony of Mark Fenton, p. 7.

witness Fallgren in his Direct Testimony (pp. 6-7) will terminate or be diminished as a result of PNM's proposed abandonment and sale of its interest in the FCPP to NTEC. PNM's Application and Direct Testimony do not assert otherwise.

Addressing alleged benefits, PNM witness Sanchez testifies:

> **Q. WHY IS PNM SEEKING TO ABANDON ITS INTEREST IN FCPP UNDER THE ENERGY TRANSITION ACT NOW RATHER THAN IN 2031?**
>
> **A.** The opportunity for PNM to exit FCPP now, rather than in 2031 as previously anticipated, emerged because the Navajo Transitional Energy Company, LLC ("NTEC") is willing to acquire PNM's interest in the plant at the end of 2024. Local communities can take advantage of the Energy Transition Act's funding resources earlier to plot their own course going-forward. Meanwhile, NTEC will have a stronger voice regarding the electric output from FCPP, which uses Navajo Nation-sourced coal and is located on Navajo Nation land.[50]

Nothing in PNM's Application or proposed Purchase and Sale Agreement, however, asserts or shows that PNM's proposed abandonment and sale of its interest in the FCPP to NTEC, which already owns a 7% interest in that plant (EPE's shares), will result in any reduction of the operation or capacity of that plant or its CO_2 or other GHG emissions in New Mexico prior to 2031, the year when PNM previously announced (in its 2017 Integrated Resource Plan) it planned to abandon its interest in that plant. To the contrary, PNM acknowledges that it expects NTEC and the remaining owners of the FCPP to continue operating that plant until at least 2031. Fenton Dir., pp. 13-17; Fallgren Dir., pp. 7-10, 17; Sanchez Dir., p. 9. Moreover, nothing in PNM's Application or supporting Testimony asserts or shows that PNM's proposed abandonment and sale of its interest in the FCPP to NTEC will prevent NTEC or any of the other remaining owners of that plant from burning coal, contrary to the

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[49] *Id.*
[50] Sanchez Direct, p. 7.

environmental and public health goals and objectives of the ETA.

More importantly for the purpose of this Motion, as a matter of law, accepting them as true for the purpose of this Motion, none of the alleged cost saving, regional control, economic or other benefits of PNM's proposed abandonment and sale of its interest in the FCPP to NTEC, or any other facts asserted in PNM's Application and Direct Testimony, provide a lawful basis or justification for the Commission to violate the express directive in NMSA § 62-16-4.B(4) (2019) quoted above by approving PNM's proposed sale of the FCPP to NTEC.

NEE previously explained to the Commission in Case Nos. 16-00276-UT and 20-00210-UT that the appropriate way for PNM to have saved its customers money, in accordance with applicable law and regulatory principles, due to the economic obsolescence of the FCPP should have been for PNM to have acted prudently to abandon its interest in that aging and poorly performing GHG-emitting plant by 2013, prior to investing more money in that plant and prior to passage of the ETA. *See, e.g.*, Case No. 16-00276-UT, *NEE's Brief-in-Chief*, 9/8/2017, *Certification of Stipulation*, pp. 68; *NEE Response to Sierra Club's Motion to Re-open Docket No. 16-00276-UT to Implement the Revised Final Order,* 1/11/21; Case No. 20-00210-UT, *NEE Complaint,* 10/31/2020.

Unfortunately for PNM's customers and the public interest, PNM failed to do so. PNM's claims in its Application and Direct Testimony that it is authorized by and consistent with the ETA for it to save its customers money by asking the Commission to approve a proposed sale of its interest in the FCPP that the ETA *expressly* directs the Commission to prohibit is plainly and patently contrary to applicable law.

As Mr. Long testified: "It is contrary to the public interest for PNM to negotiate an

agreement with NTEC that includes provisions impeding an early closure of the plant by other parties in other states, which would effectively block other states from reducing their own emissions.

The New Mexico Legislature passed Senate Bill 489 (2019) not just to get utilities to "exit coal" but to reduce emissions overall, not just in utilities' own territories, as evidenced by the inclusion of this provision in the Renewable Energy Act:

> Upon a motion or application by a public utility the commission shall, or upon a motion or application by any other person the commission may, open a docket to develop and provide financial or other incentives to encourage public utilities to produce or acquire renewable energy that exceeds the applicable annual renewable portfolio standard set forth in this section; results in reductions in carbon dioxide emissions earlier than required by Subsection A of this section; *or causes a reduction in the generation of electricity by coal-fired generating facilities, including coal-fired generating facilities located outside of New Mexico*. NMSA § 62-16-4(D).

The legislature did not intend emissions reductions to be on paper only, yet that is an apt characterization of the situation presented here, where PNM proposes to exit the Four Corners Power Plant by investing $73 million more to keep it running and entering into agreements to ensure its continued success[.]"[51]

IV. Because PNM's Application Requests that the Commission Violate the Directive in the ETA, Codified as NMSA § 62-16-4 B (4) (2019), as a Matter of Law, PNM Cannot Satisfy its Burden of Showing that its Proposed Abandonment and Sale of its Interest in the FCPP to NTEC Will Result in a "Net Public Benefit" or Is in the Public Interest.

PNM's original and Amended Application and associated testimony acknowledge that, for the Commission to approve PNM's Application, PNM bears the burden of showing that

[51] NM PRC Case No. 20-00222-UT, CCAE's *Direct Testimony of Noah Long*, 4/2/2021, p. 5-6.

Commission approval of its proposed abandonment and sale of its ownership interest in the FCPP to NTEC is in the public interest because it will result in a net public benefit. Fenton Dir., p. 10, *citing* Case No. 19-00018-UT *Recommended Decision* at 26 (February 21, 2020).

Indeed, the drafters of the ETA and the Legislature established the comprehensive framework for the Commission to determine if the public interest was served by accomplishing the ETA's goal of *accelerating* the reduction of CO_2 and GHG emissions from power generation plants in New Mexico.

The Commission may not ignore or violate that clear legislative directive when assessing or determining the public interest with respect to PNM's Application. Nor may PNM ignore that element of the ETA's "framework."

PNM witness Sanchez argues in her Direct Testimony (pp. 9-10) that "[a]lthough FCPP may not ultimately be shut down by its other co-tenants, including majority owner and operator Arizona Public Service Company, until 2031, PNM is furthering the Energy Transition Act goals for New Mexico public utilities by transitioning the energy used for retail sales of electricity away from coal in favor of a more sustainable generation portfolio." That argument, however, is plainly contrary to and inconsistent with the plain meaning of the language in NMSA § 62-16-4.B(4) (2019) and, if accepted by the Commission, would make it a meaningless nullity, contrary to established rules of statutory construction. *See, e.g., Inc. County of Los Alamos v. Johnson*, 108 N.M. 633, 776 P.2d 1252, 1253 (1989); *City of Roswell v. Mt. States Tel. & Tel. Co.*, 78 F.2d 379, 383 (10th Cir. 1935); *see also* NMSA §§ 12-2A-18.A(1) and (2) ("A statute or rule is

construed, if possible to: (1) give effect to its objective and purpose; (2) give effect to its entire text;…").

As discussed above, PNM's original and Amended Application request that the Commission violate the express and implied directives in the ETA amending the REA, by approving PNM's proposed sale of its ownership interest in the FCPP to NTEC. Therefore, PNM's original and Amended Application must be dismissed with prejudice by the Commission because, as a matter of law, PNM cannot satisfy its burden of showing that its proposed abandonment and sale of its interest in the FCPP to NTEC will result in a net public benefit and thus is in the public interest.

PNM's factual assertions in its Direct Testimony addressed above, accepted as true for the purpose of this Motion, simply confirm that PNM (and Avangrid) have bought a license to pollute. PNM's proposed abandonment and sale of its interest in the FCPP to NTEC would result in continuing and additional CO_2 and other GHG emissions from that plant in New Mexico.

PNM's requests for Commission approval of PNM's recovery from customers of an estimated $300 million plus interest, amortized over 25 years in a non-bypassable charge on ratepayers monthly bills for at least 25 years pursuant to the ETA, especially when PNM's investments were imprudent or unreasonable[52] is the epitome of injustice.

As discussed above, PNM's request for Commission authority to abandon and sell its interest in the FCPP to NTEC in its Application is patently *not* in accordance with our laws to

[52] *See* Case No. 19-00018-UT, *Recommended Decision on PNM's Request for Issuance of A Financing Order*, 2/21/2020, p. 94 ("The Commission will not have the authority to *modify the ETCs* based upon findings that some or all of the expenses that have been securitized were unreasonable or imprudently incurred."

balance the interests between shareholder investors and ratepayers,[53] or by the ETA, preferring an accelerated reduction of CO_2 and other GHG emissions from that plant in accordance with public interest goals and objectives of the ETA and its amendments to the REA.

As also noted above, PNM's Application requests Commission approval of PNM's recovery from customers of an estimated $300 million, plus interest, amortized over 25-years, which will cause ratepayers shock. Here again, PNM's evidence provides no justification that, as a result of PNM's proposed abandonment and sale of its 13% ownership interest in the FCPP, that plant or any of its capacity will be shut down and decommissioned in 2031 or by any other specific time. Thus, in the context of the ETA there would be NO balancing of interests: potential but no assured accelerated reduction of CO_2 and other GHG emissions from the FCPP, and certainly an increase in illegal or unjustified rate increases.

In sum, where PNM requests Commission approval of a sale of that resource which that statute expressly prohibits the Commission from approving, as a matter of law, PNM cannot show that such abandonment will provide a net public benefit or is in the public interest even accepting as true all of its factual claims.

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[53] The "important regulatory principles and practices" violated by the PNM's original and Amended Application include the Commission's obligation under the New Mexico Public Utility Act ("PUA") to *reasonably* balance the interests of a utility's customers with those of its investors. "By statute, the Commission must balance

> the interest of consumers and the interest of investors ... to the end that reasonable and proper services shall be available at fair, just and reasonable rates … without unnecessary duplication and economic waste[.]

NMSA 1978, § 62-3-1(B) (2008)." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*, supra*, ¶10.

V. Parties to the 16-00276-UT believed in and relied upon the Modified Stipulation and the right of all stakeholders to review the prudence determination of PNM in investing in and extending the life of the Four Corners Power Plant.

On January 8, 2021, PNM filed its Application for Abandonment of the Four Corners Power Plant and Issuance for a Securitized Financing Order – NM PRC Case No. 21-00017-UT. Pursuant to the Hearing Examiner's Order in this case on February 1, 2021, Public Service Company of New Mexico ("PNM") filed *Consolidated Response of Public Service Company of New Mexico Pursuant to Order Requesting Briefing on Sufficiency of PNM's Application and Scope of Issues in Proceeding and Motions to Dismiss of Sierra Club and New Energy Economy and Citizens for Fair Rates and the Environment.* In its filing, PNM stated: "The Energy Transition Act is the applicable legal framework governing PNM's request to recover its FCPP abandonment costs. While the final order in Case No. 16-00276-UT anticipated that issues related to FCPP would be considered in a later rate proceeding, it specifically rejected any finding of imprudence and allowed PNM to recover its FCPP investments in rates that became effective February 1, 2018. The [Energy Transition Act] ETA is now the law and provides that PNM may recover its undepreciated investments in FCPP that were in rates as of January 1, 2019, and other undepreciated investments incurred[.] PNM's request for recovery and securitization of its undepreciated investments in FCPP fall within the provisions of the ETA."[54] "Parties seek to litigate the prudence of PNM investments in FCPP that have been included in rates prior to January 1, 2019. However, the ETA expressly precludes this."[55]

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[54] *Consolidated Response of Public Service Company of New Mexico Pursuant to Order Requesting Briefing on Sufficiency of PNM's Application and Scope of Issues in Proceeding and Motions to Dismiss of Sierra Club and New Energy Economy and Citizens for Fair Rates and the Environment,* February 18, 2021, pp. 6-7.
[55] *Id*., p. 20.

NEE agrees with Western Resource Advocates that PNM cannot shirk this commitment to have a prudence review because it was a signatory to the Modified Stipulation in 16-000276-UT[56] and further that ratepayers' have a vested right in potential associated cost disallowances. "WRA would point out that PNM, by agreeing to the terms of the Modified Stipulation in Case 16-00276-UT, has waived any claim to recover imprudent costs through securitization or otherwise. Parties to an approved stipulation, and the Commission, have vested rights pursuant to that agreement, and can enforce the terms of an approved stipulation. *Qwest v. NMPRC,* 140 N.M. 440, 143 P.3d 478 (2006). The Commission is charged with the responsibility for enforcing these commitments and the violation of these commitments has serious implications for the public interest. *Duke Power Co. v. F.E.R.C.,* 864 F.2d 823, 830 (D.C. Cir. 1989) (citations omitted)."[57]

"Having acquiesced to Commission authority to continue and conclude a prudence review of certain FCPP investments, PNM is now estopped from challenging the legitimacy of that review just three years later – irrespective of an intervening law that provides an opportunity for PNM to pursue a position in contravention of their previous agreement. *Johnson v. Lindon City Corp.,* 405 F. 3d 1065, 1069 (10th Cir. 2005) '[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice

[56] NM PRC Case No. 16-00276-UT, *Joint Notice by All Signatories of Acceptance of Commission's Modifications to Revised Stipulation,* January 19, 2018, p. 1.
[57] NM PRC Case No. 21-00017-UT, *Response of Western Resource Advocates to the Joint Movants' Motion to Dismiss Application and Supporting Brief and to Sierra Club's Motion for an Order Requiring PNM to file Supplemental Testimony Addressing the Prudence of Four Corners Investments, or in the Alternative, to Dismiss PNM's Application*, February 18, 2021, p. 5, ¶7.

of the party who has acquiesced in the position formerly taken by him.' (Internal citation omitted.)"[58]

PNM was a prime mover and proponent of the Modified Stipulation in Case 16-00276-UT; therefore, PNM is estopped from arguing that it is not subject to a prudence review. According to *Santa Fe Pac. Tr., Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶¶ 32-33, 285 P.3d 595, 604:

> Judicial estoppel is a doctrine that prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Keith v. ManorCare, Inc.,* 2009–NMCA–119, ¶ 36, 147 N.M. 209, 218 P.3d 1257 (internal quotation marks and citation omitted). Three elements must be addressed for a party to prevail under the doctrine of judicial estoppel.
> First, the party against whom the doctrine is to be used must have successfully assumed a position during the course of litigation. Second, that first position must be necessarily inconsistent with the position the party takes later in the proceedings. Finally, while not an absolute requirement, judicial estoppel will be especially applicable when the party's change of position prejudices a party who had acquiesced in the former position. *Id.* ¶ 37 (internal quotation marks and citations omitted). The purpose of the doctrine of judicial estoppel is to stop "a party from playing fast and loose with the court" during litigation. *Id.* ¶ 36 (internal quotation marks and citation omitted).

All elements of judicial estoppel apply to the situation herein.

Here PNM is playing fast and loose with the court by, aptly put by Staff, "invoking the provisions of the Energy Transition Act to undo a stipulation agreed to in 16-00276-UT in order to guarantee full recovery of its undepreciated investment in the FCPP." *Staff's Brief on Sufficiency of PNM's Application and Scope of Issues in Proceeding*, February 11, 2021, p.4.

Justice demands that PNM's original and Amended Application should be dismissed. And, ratepayers deserve to have the promised long-awaited FCPP prudence review, because it

[58] *Id.*, pp. 5-6, ¶8.

would be manifestly unjust for ratepayers to continue to pay for FCPP in rates, including rising cost of capital expenditures and other costs, in a non-performing plant. Like the Hearing Examiner found when PNM imprudently invested in other (nuclear) resources (with no meaningful comparison of alternatives): NM PRC Case No. 15-00261-UT, *Corrected Recommended Decision*, August 15, 2016, pp. 110-111.

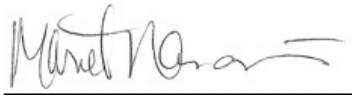
> [W]hether the Commission should consider the financial effects of a prudence disallowance is questionable. A used and useful disallowance may be appropriate even if a utility is prudent. And under the circumstances of a used and useful test, the Commission should balance the interests of shareholders and ratepayers and determine just and reasonable rates that are in the public interest. In addressing the interests, the Commission may appropriately consider financial effects on the utility. A disallowance due to imprudence is, however, quite different; and to consider financial harm in determining a disallowance founded on the utility being imprudent would, in essence, be rewarding a utility for its imprudent acts.
>
> However, the disallowances of costs from PNM's revenue requirement in this case, as a result of the findings of imprudence, are not necessarily permanent disallowances. PNM in its next base rate case filing can attempt to show that the PV repurchase and lease extensions are the most cost effective resources among available alternatives to meet customers' needs *at that time*. PNM did not attempt to make that showing in this case. In PNM's next base rate case, the PRC will consider any evidence and arguments submitted as to what type of resources are needed and represent the most cost effective alternatives *at that time*. At a minimum, any such evidence presented by PNM shall include the average cost per kWh of each option considered.
>
> Because PNM's decisions to extend the five PV leases and purchase the 64.1 MW of PV2 were not prudent, it is not necessary to address whether these PV capacities are used and useful, whether PNM's request for an acquisition adjustment should be approved, or the NBV of the 64.1 MW.

CONCLUSION

For the foregoing reasons, accepting all facts plead in PNM's original and Amended Application should be promptly dismissed with prejudice by the Commission pursuant to 1.2.2.12.B NMAC and the Commission's order dismissing PNM's Application should find that none of the costs incurred by PNM in connection with its Application or proposed sale of its interest in the FCPP to NTEC were prudent or reasonable for purposes of any PNM request for recovery of those costs from its customers in any future rate case.

Respectfully submitted May 17, 2021.

New Energy Economy,



Mariel Nanasi, Esq.
600 Los Altos Norte St.
Santa Fe, NM 87501-1260
(505) 469-4060
mariel@seedsbeneaththesnow.com

Citizens for Fair Rates and the Environment

_____/s/_____

Thomas Manning, Director
406 S. Arizona St. Silver City N.M. 88061
cfrecleanenergy@yahoo.com
575-538-2123

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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 PUBLIC SERVICE COMPANY OF NEW MEXICO, **Applicant.**	))))))))	**Case No. 21-00017-UT**

I hereby certify that a true and correct copy of the following documents:

JOINT MOVANTS' MOTION TO DISMISS APPLICATION AND SUPPORTING BRIEF, AND EXHIBITS A-C

AND

EXHIBIT A, FILED UNDER SEAL, EXCERPTS FROM 20-00222-UT, CONFIDENTAL PNM EXHIBIT NEE 4-11 (ONLY TO THOSE PERSONS WHO SIGNED THE CONFIDENTIALITY AGREEMENT)

was emailed to the parties listed below on May 17, 2021.

Amanda Edwards-Adrian	AE@Jalblaw.com;
Ana Kippenbrock	Ana.kippenbrock@state.nm.us;
Andrea Crane	ctcolumbia@aol.com;
Andrew (Andy) Harriger	akharriger@sawvel.com @sawvel.com;
Anna Sommer	ASommer@energyfuturesgroup.com;
April Elliott	april.elliott@westernresources.org;
April Elliott	ccae@elliottanalytics.com;

Barry Dixon	bwdixon953@msn.com;
Bradford Borman	Bradford.Borman@state.nm.us;
Brian Buffington	Brian.buffington@pnm.com;
Bruce C. Throne	bthroneatty@newmexico.com;
Camilla Feibelman	Camilla.Feibelman@sierraclub.org;
Carey Salaz	Carey.Salaz@pnm.com;
Carla R. Najjar	Csnajjar@virtuelaw.com;
Carol Davis	caroljdavis.2004@gmail.com;
Charles F. Noble	Noble.ccae@gmail.com;
Chelsea Hotaling	CHotaling@energyfuturesgroup.com;
Cholla Khoury	ckhoury@nmag.gov;
Christopher Sandberg	cksandberg@me.com;
Cydney Beadles	Cydney.Beadles@westernresources.org;
Dahl Harris	dahlharris@hotmail.com;
Dan Akenhead	DAkenhead@mstlaw.com
David Ortiz	DOrtiz@montand.com;
David Schwartz	david.schwartz@lw.com;
Debra Doll	Debra@doll-law.com;
Dhiraj Solomon	Dhiraj.solomon@state.nm.us;
Don Hancock	sricdon@earthlink.net;
Donald Gruenemeyer	degruen@sawvel.com;

Doug Gegax	dgegax@nmus.edu;
Douglas J. Howe	dhowe@highrocknm.com;
Edward A. Montoya	eamontoya@cabq.gov;
Elizabeth Ramirez	Elizabeth.Ramirez@state.nm.us;
Erik Schlenker-Goodrich	eriksg@westernlaw.org;
Georgette Ramie	georgette.ramie@state.nm.us;
Gideon Elliott	gelliot@nmag.gov;
Germaine R. Chappelle	Gchappelle.law@gmail.com;
Gilbert Fuentes	GilbertT.Fuentes@state.nm.us;
Greg Sonnenfeld	greg@sonnenfeldconsulting.com;
Heather Allen	Heather.Allen@pnmresources.com;
Jack Sidler	Jack.Sidler@state.nm.us;
James Montalbano	james@youtzvaldez.com;
James R. Dauphinais	jdauphinais@consultbai.com;
Jane Yee	jyee@cabq.gov;
Jason Marks	lawoffice@jasonmarks.com;
Jeffrey H. Albright	JA@JalbLaw.com;
Jeffrey Spurgeon	spurgeonJ@southwestgen.com;
Jennifer Breakell	jbreakell@fmtn.org;
Jennifer VanWiel	jvanwiel@nmag.gov;
Joan Drake	jdrake@modrall.com;

Jody García	JGarcia@stelznerlaw.com;
Jody Kyler Cohn	jkylercohn@BKLlawfirm.com;
John Bogatko	john.bogatko@state.nm.us;
John F. McIntyre	jmcintyre@montand.com;
John Reynolds	John.Reynolds@state.nm.us;
Joseph Yar	joseph@yarlawoffice.com;
Justin Lesky	jlesky@leskylawoffice.com;
Katherine Coleman	Katie.coleman@tklaw.com;
Katherine Lagen	Katherine.lagen@sierraclub.org;
Keith Herrmann	kherrmann@stelznerlaw.com;
Kelly Gould	kelly@thegouldlawfirm.com;
Kevin Higgins	khiggins@energystrat.com;
Kevin Powers	Kevin.Powers@lacnm.us;
Kurt J. Boehm	kboehm@bkllawfirm.com;
Kyle Tisdel	tisdel@westernlaw.org

Larry Blank	lb@tahoeconomics.com;
Lisa Tormoen Hickey	lisahickey@newlawgoup.com;
Lorraine Talley	ltalley@montand.com;
Marc Tupler	Marc.Tupler@state.nm.us;
Mariel Nanasi	mariel@seedsbeneaththesnow.com;

Mark Fenton	Mark.Fenton@pnm.com;
Mark K. Adams	mkadams@rodey.com;
Martin Hopper	mhopper@msrpower.org;
Matt Gerhart	matt.gerhart@sierraclub.org;
Michael C. Smith	MichaelC.Smith@state.nm.us;
Michael Gorman	mgorman@consultbai.com;
Michael I. Garcia	mikgarcia@bernco.gov;
Michel Goggin	MGoggin@gridstrategiesllc.com;
Mike Eisenfeld	mike@sanjuancitizens.org;
Milo Chavez	Milo.Chavez@state.nm.us;
Nann M. Winter	nwinter@stelznerlaw.com;
Noah Long	nlong@nrdc.org;
Pat O'Connell	pat.oconnell@westernresources.org;
Peggy Martinez-Rael	Peggy.Martinez-Rael@state.nm.us;
Peter Auh	pauh@abcwua.org;
Peter J. Gould	peter@thegouldlawfirm.com;
Philo Shelton	Philo.Shelton@lacnm.us;
PRC Records Management Bureau	Prc.records@state.nm.us;
Ramona Blaber	Ramona.blaber@sierraclub.org;
Randy Bartell	rbartell@montand.com ;
Rep. Anthony Allison	Anthony.Allison@nmlegis.gov;

Rep. James Strickler	jamesstrickler@msn.com;
Rep. Paul Bandy	paul@paulbandy.org;
Rep. Rod Montoya	roddmontoya@gmail.com;
Richard L. C. Virtue	rvirtue@virtuelaw.com;
Rick Alvidrez	ralvidrez@mstlaw.com;
Rob Witwer	witwerr@southwestgen.com;
Robert Cummins	Robert.Cummins@lacnm.us
Robert Lundin	rlundin@nmag.gov;
Robyn Jackson	Robyn.jackson@dine-care.org
Ryan Jerman	Ryan.Jerman@pnmresources.com;
Saif Ismail	sismail@cabq.gov;
Senator Steve Neville	steven.neville@nmlegis.gov;
Senator William Sharer	bill@williamsharer.com;
Shane Youtz	shane@youtzvaldez.com;
Sharon Shaheen	sshaheen@montand.com;
Stacey Goodwin, Esq.	Stacey.Goodwin@pnmresources.com;
Stephanie Dzur	Stephanie@Dzur-law.com;
Stephen Curtice	stephen@youtzvaldez.com;
Steve W. Chriss	Stephen.chriss@wal-mart.com;
Steven Gross	gross@portersimon.com;
Steven S. Michel	smichel@westernresources.org;

Thomas Domme	Thomas.domme@nmgco.com;
Thomas Manning	cfrecleanenergy@yahoo.com;
Thomas Singer	Singer@westernlaw.org;
Thompson & Knight	Tk.eservice@tklaw.com;
Todd Hixon	THixon@tep.com;
Tom Champion	tom@tomchampion.biz;
Vicky Ortiz	V ortiz@montand.com;
Commissioner Cynthia Hall	Cynthia.Hall@state.nm.us;
Collin Gillespie	Collin.Gillespie@state.nm.us;
Commissioner Jefferson Byrd	Jeff.Byrd@state.nm.us;
Deborah Bransford	Deborah.Bransford@state.nm.us;
Commissioner Joseph Maestas	Joseph.Maestas@state.nm.us;
Jonas Armstrong	Jonas.Armstrong@state.nm.us;
Commissioner Theresa Becenti-Aguilar	T.Becenti@state.nm.us;
Jennifer Baca	JenniferA.Baca@state.nm.us;
Commissioner Stephen Fischmann	Stephen.Fischmann@state.nm.us;
Brian Harris	Brian.Harris@state.nm.us;

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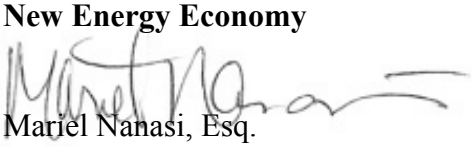
New Energy Economy



Mariel Nanasi, Esq.
600 Los Altos Norte St.

Santa Fe, NM 87501-1260
(505) 469-4060
mariel@seedsbeneaththesnow.com