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**

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 January 8, 2021 Application for Abandonment of the Four Corners Power Plant ("FCPP") and Issuance for a Securitized Financing Order ("Application") filed by Public Service Company of New Mexico ("PNM") as a matter of law on the grounds that PNM's Application:

(i) requests that the Commission act contrary to the New Mexico Renewable Energy Act ("REA"), NMSA § 62-16-4.B(4) (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 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 in subparagraphs (5) and (6) of NMSA § 62-16-4.A (2019), as amended by the ETA;

(ii) due to NMSA § 62-16.4.B(4) (2019), providing 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," PNM's Application and supporting direct 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; and

(iii) pursuant to NM PRC Case No. 20-00199-UT, *Recommended Decision*, In the Matter of the Application of Continental Divide Electric Cooperative, Inc. for the Approval of the Transfer of Certain Assets to the Pueblo of Acoma and for Abandonment of Such Assets and Service Therefrom Upon Transfer, 12/7/2020, (*Order Adopting Recommended Decision*, 12/30/2020) the Commission held that "in proceedings involving both the abandonment of assets and service and the sale or transfer of utility assets to another entity—the Commission must first consider "whether the transaction[is] in the public interest." P. 9. (citing Case No. 16-00119-UT, *Final Order*, p. 15.) The Commission has held that:

> "*[A]n application for approval of an abandonment must make a factual showing that a net benefit to the public is likely to be realized by the proposed abandonment."* Case No. 13-00395-UT, Final Order at 12. "The standard to be applied in considering abandonment is one of the 'no net detriment' to the public interest, where the quantifiable and

> unquantifiable benefits must outweigh the costs of the action." NMPRC Case No. 13-00395-UT Final Order p.11-12 ¶ 21. *There is then a second step in the analysis*.
> If the Commission determines that abandonment may be in the public interest, *the Commission then determines whether the proposed sale of utility assets is in the public interest.*" *Id.* "The standard to be applied in considering a sale of utility assets is one of 'no net detriment' to the public interest, where both the quantifiable and unquantifiable benefits at least balance against the costs of the transaction." *Id.* "The proposed abandonment and sale of public utility property may be approved if [the applicant] demonstrates there is a net public benefit. *Id.*
> In short, the statutes just referenced and the Commission's case law *require the applicant to show that the abandonment and transfer or sale produces a net public benefit*.

Emphasis supplied.

In its proposed notice PNM requests approval of two of the three requirements being sought 1) abandonment and 2) securitization. PNM also needs approval for the third and critical issue – the sale of assets under 62-6-12(4); under the applicable standard these questions *must* be addressed: Is PNM's sale of 200MW of coal to NTEC in the public interest? Will the sale produce a net public benefit? And is there no net public detriment from PNM's sale to NTEC? That required notice and evidence is missing.

Further, PNM's Application and direct testimony fails to satisfy the Commission's requirement because there is no mention of this specific requirement or supporting evidence about the whether PNM's sale to NTEC is a sale of 'no net detriment' to the public interest, pursuant to NMSA § 62-6-12(4) and Commission precedent. There **is** evidence, however, in TGF-2, p.45 of 135, Article 6, 6.1(d) (i) (A) Conduct Pending Closing that states: "Seller [PNM] shall Not … reduce the production or cease the operation of the Plant prior to the end of the Coal Supply Agreement [.]" 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.")

(iv) a failure by the Commission to dismiss PNM's Application for the foregoing reasons would result in a waste of resources by Joint Movants other parties and the Commission because it would require that parties and the Commission address the merits of a PNM 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) (2019) and PNM's prior participation in the drafting of and support for passage of the ETA, PNM knew, or reasonably should have known, that its 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. For that reason, Joint Movants also request 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 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, NEE states:

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 Application, supporting Direct Testimony 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 has held 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 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. Application, pp. 4, 30-31(¶¶ A, C & G of prayer for relief); Fenton Direct, p. 11 (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 Dir., pp. 11-16, 23-24 (addressing the terms of and consideration provided in the Purchase and Sale Agreement) and PNM Ex. TGF-2.

6. As set forth below, PNM's Application and supporting Direct Testimony incorrectly assert that PNM's Application "satisfies" and is "in accordance with" the provisions in the ETA. Application, pp. 3, 7 (¶ 1); Fenton Dir., p. 7 (asserting that the ETA, the Public Utility Act 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.").

7. PNM's Application (¶ 8.A, p. 10), asserting that 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, and its Direct Testimony 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 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 Dir., pp. 2, 7, 9,14; Phillips Dir., pp. 3, 6, 111-12, 13-14, 15, 25.

8. PNM's Direct Testimony acknowledges 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.

9. Due to the ability of NTEC and the other remaining owners of the FCPP to continue operating the full capacity of that plant after PNM's proposed transfer of its interest in that plant to NTEC pursuant to PNM's proposed Purchase and Sale Agreement, 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 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 ownership interest in the FCPP to NTEC; nothing in PNM's Application or Direct Testimony asserts otherwise.

10. PNM's Application (p. 4) 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,[1] $4.3 million in "Plant decommissioning costs," $16.5 million in "Transition funds to be 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 witnesses Fallgren and Baker explain that, among the other consideration agreed to by PNM for the sale of its ownership interest in the FCPP to NTEC, in order to obtain NTEC's agreement to purchase that interest and resource, PNM had to agree in its proposed Purchase and Sale Agreement to pay NTEC for PNM's share of its remaining responsibility for take-or-pay coal costs, decommissioning costs which, after escalation and discounting, equals $13.6 million, which decommissioning costs are in addition to the FCPP decommissioning expenses PNM previously has recovered and currently is recovering from customers in rates as "accretion" expense and depreciation expense on its Asset Retirement Obligation associated with that plant. Fallgren Dir., pp. 20-24; Baker Dir., pp. 10-12.

12. 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

[1] 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. AND, notwithstanding, our Supreme Court's decision in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation 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.

for which PNM's Application requests treatment as FCPP abandonment and energy transition costs recoverable from customers pursuant to the ETA. Fallgren Dir., pp. 18-20.

13. Subparagraphs (5) and (6) of NMSA, § 62-16-4.A (2019) provide:

> (5) no later than January 1, 2040, renewable energy resources shall supply no less than eighty percent of all retail sales of electricity in New Mexico; provided that compliance with this standard until December 31, 2047 shall not require the public utility to displace zero carbon resources in the utility's generation portfolio on the effective date of this 2019 act; and
>
> (6) no later than January 1, 2045, zero carbon resources shall supply one hundred percent of all retail sales of electricity in New Mexico. Reasonable and consistent progress shall be made over time toward this requirement.

14. The REA, NMSA § 62-16-4.B (4) (2019), as amended by the ETA, provides that "[i]n administering the standards required by Paragraphs (5) and (6) of Subsection A of this section [§ 62-16-4.A(5) and (6) (2019)], 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 added).

15. The *purpose* of the ETA's amendments to the REA in NMSA, § 62-16-4.A (2019) was to serve the public interest in New Mexico by accelerating the *reduction* of CO_2 and other greenhouse gas emissions that are harmful to public health and the environment from electricity generating resources located in New Mexico, including the FCPP. Yet PNM's contract with NTEC forbids PNM from reducing the production of or ceasing the operation of the CO_2-producing plant.[2]

16. The clear intent and purpose of the legislative directive to the Commission in NMSA § 62-16-4.B(4) (2019), requiring that the Commission "prevent carbon dioxide emitting

electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the standard" in subparagraphs (5) and (6) of NMSA § 62-16-4.A (2019) is to protect the public interest by preventing a "qualifying utility" (as defined in the ETA) from circumventing the above-stated purpose of those standards by selling its interest in a "qualifying generating facility" to another party that is able and intends to continue operating such a facility after its abandonment by a qualifying utility or by reassigning or redesignating such a facility as so-called "merchant plant" that a qualifying utility or its affiliate or parent would be able to continue operating and 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 Public Utility Act ("PUA").

17. PNM participated in the drafting of the ETA and fully supported its passage during the 2019 Session of the New Mexico Legislature.

18. 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*

[2] TGF-2, p.45 of 135, Article 6, 6.1(d) (i) (A) Conduct Pending Closing

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.

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

20. 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 Testimony provide a lawful basis or justification for the Commission to violate the directive in NMSA § 62-16-4.B(4) (2019) by approving PNM's proposed sale of its interest in the FCPP to NTEC.

21. 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 of the FCPP should have been for PNM to have acted prudently to abandon its interest in that plant by 2013, 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.

22. PNM witnesses Fenton and Fallgren assert that PNM's proposed sale of its ownership interest in the FCPP to NTEC is consistent with a provision in the settlement

Stipulation approved by the Commission in Case No. 16-00276-UT requiring that PNM evaluate the potential early abandonment of FCPP in 2024 and 2028. Fenton Dir., pp. 7-8; Fallgren Dir., pp. 10-11.

23. The Commission's approval of the settlement Stipulation in Case No. 16-00276-UT cannot and does not provide a lawful basis or justification for the Commission to violate the above-quoted legislative directive in NMSA § 62-16-4.B(4) (2019), which was enacted and became effective after the Commission issued its Final Order in that case, by approving PNM's proposed sale of its ownership interest in the FCPP to NTEC.

24. PNM's Application and Direct Testimony acknowledge that, in order for the Commission to approve PNM's Application, 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).

25. 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)

26. 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) (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") by approving PNM's proposed sale of its ownership interest in the FCPP to NTEC as a means of complying with the standards in NMSA, §§ 62-16-4.A(5) and (6), 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.

27. 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.

28. Notably, neither PNM witness Fenton, Executive Director of Regulatory Policy and Case Management for PNM, who addresses the "Regulatory Framework for Abandonment of FCPP" in his Direct Testimony (pp. 7-12), nor PNM witness Sanchez, an attorney who states in her Direct Testimony (pp. 1, 5) that, in her capacity as Chief Policy and Legal Advisor to

PNM Resources, Inc., is qualified as an expert witness to address PNM's Application's compliance with the ETA and applicable law, address or even acknowledge the above-quoted legislative directive to the Commission in the ETA codified in the REA as NMSA § 62-16-4.B(4) (2019) or the reason that both of these witnesses omitted the requirement to adhere to the regulatory requirement that PNM must show a net public benefit for the sale to NTEC, *in addition* to a net public benefit for abandonment.

29. Due to PNM's participation in the drafting of the ETA during the 2019 Session of the Legislature, PNM was doubtless aware, of the above-quoted language in NMSA § 62-16-4.B(4) (2019) requiring that the Commission "prevent carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the standard" in NMSA §§ 62-16-4.A(5) or (6)(2019) at the time it began negotiating with NTEC regarding a sale of its ownership interest in the FCPP to NTEC, and 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.

30. 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*.

31. 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) (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 Application 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.

32. A failure by the Commission to dismiss PNM's Application for the foregoing reasons would result in a waste of resources by Joint Movants, other parties and the Commission because it would require that parties and the Commission address the merits of a PNM application that the Commission is expressly prohibited by applicable statutes from approving.

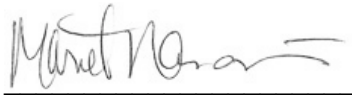
33. In support of this Motion, Joint Movants submit the accompanying legal brief below.

34. 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 and will respond in accordance with the commission rules. PRC Staff and Bernalillo County take no position. Sierra Club takes no position at this time. 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 January 28, 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 Application with prejudice in accordance with the Commission's procedural Rules (1.2.2.12.A and B NMAC) and applicable Commission precedent for three reasons. First, 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), as amended by the ETA (Senate Bill 489, NMSA §§ 62-18-1 to 23 (2019)) and 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 as a means of complying with the RPS and zero carbon requirements in subparagraphs (5) and (6) of NMSA § 62-16-4.A (2019), as amended by the ETA.

Second, 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 "[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" (Emphasis supplied), 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."

Third, as a matter of law, because PNM's Application is not complete on the grounds that it fails to meet Commission requirements to show that the abandonment and transfer or sale produces a net public benefit, as more fully set forth in recently adopted Case No. 20-00199-UT it should be dismissed. 14-00332-UT, *Final Order Adopting Initial Recommended Decision [on] Completeness of PNM's Filed Application*, 5/13/2015.

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.

I. The Commission Should Dismiss PNM's Application with Prejudice as a Matter of Law Because the REA, NMSA § 62-16-4 B (4) (2019), as Amended by Section 29 of 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.

Subparagraphs (5) and (6) of NMSA, § 62-16-4.A (2019), amendments to the REA by Section 29 of the ETA, provide:

(5) no later than January 1, 2040, renewable energy resources shall supply no less than

> eighty percent of all retail sales of electricity in New Mexico; provided that compliance with this standard until December 31, 2047 shall not require the public utility to displace zero carbon resources in the utility's generation portfolio on the effective date of this 2019 act; and
>
> (6) no later than January 1, 2045, zero carbon resources shall supply one hundred percent of all retail sales of electricity in New Mexico. Reasonable and consistent progress shall be made over time toward this requirement.

The purpose of those RPS requirements in the ETA amending the REA 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. The REA, NMSA § 62-16-4.B(4) (2019), provides further that "[i]n administering the standards required by Paragraphs (5) and (6) of Subsection A of this section [§§ 62-16-4.A(5) and (6) (2019)], 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 added).

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" from circumventing the above-stated purpose of the RPS and "zero carbon 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.[3]

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 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

[3] 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.

(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 Application makes clear that it requests, *inter alia*, Commission approval of a proposed sale and transfer of PNM's 13% ownership interest in the FCPP 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 . Application, pp. 4, 30-31(¶¶ A, C & G of prayer for relief); Fenton Direct, p. 11 (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 on 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*.") (Emphasis supplied); Fallgren Dir., pp. 11-16, 23-24 (addressing the terms of and consideration provided in the Purchase and Sale Agreement, PNM Ex. TGF-2.

PNM's Application and Direct Testimony also 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 and inexplicably, neither PNM's Application nor any of its Direct Testimony address or even mention the legislative directive in NMSA § 62-16-4.B(4) (2019) that the Commission "prevent carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the standard" in subsections (5) or (6) of NMSA § 62-16-4.A (2019). Therefore, as a matter of applicable law, the Commission must dismiss PNM's Application with prejudice as patently defective and a "substantive nullity" because it asks the Commission to approve a proposed sale of a CO_2-emitting generation resource that the Commission is expressly required to prevent and is prohibited from approving.

PNM's Application (pp. 3, 7 (at ¶ 1) asserts that it "satisfies" and is "in accordance with" the provisions in the ETA. 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 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.[4]

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 Direct Testimony asserts or shows tha 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 using their control of that plant, which will remain beyond the Commission's jurisdiction under the ETA, to continue operating it beyond the date in 2031 when its current coal supply contract is currently due to expire, contrary to the 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)

[4] Sanchez Dir., p. 7.

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.

PNM also asserts that PNM's proposed sale of its interest in the FCPP to NTEC is consistent with a provision in the settlement Stipulation approved by the Commission in Case No. 16-00276-UT requiring that PNM evaluate the potential early abandonment of FCPP in 2024 and 2028. Application, p. 10; Fenton Dir., pp. 7-8; Fallgren Dir., pp. 10-11. The Commission's approval of the settlement Stipulation in Case No. 16-00276-UT, however, also cannot and does not provide a lawful basis or justification for the Commission to violate the above-quoted legislative

directive in NMSA § 62-16-4.B(4) (2019), which was enacted and became effective after the Commission issued its Final Order in that case, by approving PNM's proposed sale of that CO_2 emitting resource to NTEC.

Neither Commission approval of that non-precedential settlement Stipulation nor Commission "acceptance" of PNM's 2017 Integrated Resource Plan as being compliant with the Commission's IRP Rule justify or allow the Commission to violate that law. As NEE explained in its briefs in Case Nos. 16-00276-UT and its pleadings in Case No. 20-00210-UT, the appropriate way for PNM to have addressed the cost-effectiveness of its continuing reliance on the FCPP in its statutorily-mandated integrated resource planning process *in accordance with the Commission's IRP Rule* would and should have been for PNM to have reasonably modeled (i.e., using reasonable assumptions) the projected costs and benefits of that resource *prior to 2013* when it decided, imprudently, as NEE asserted, to have abandoned FCPP *at that time*.

II. 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 Application and Direct Testimony acknowledge that, for the Commission to approve PNM's Application, PNM bears the burden of showing that 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). As noted earlier, PNM witness Fenton asserts in his Direct Testimony (p. 7) that the ETA "establishes the comprehensive

framework for PNM's requested approvals in this case." Joint Movants do not contest that PNM assertion.

Indeed, for better or worse, the drafters of the ETA and the Legislature established the comprehensive framework for the Commission to determine if PNM's proposed abandonment and sale of its ownership interest in the FCPP to NTEC provides a net public benefit and therefore is in the public interest. NMSA § 62-16-4.B(4) (2019), is one element of that "comprehensive" framework—a significant one intended to serve the public interest 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 Application requests that the Commission violate the express directive in Section 29 of the ETA amending the REA, codified as NMSA § 62-16-4 B(4) (2019), by approving PNM's proposed sale of its ownership interest in the FCPP to NTEC. Therefore, PNM's 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 this legal conclusion. PNM acknowledges that its proposed abandonment and sale of its interest in the FCPP to NTEC will not result in the closure or any reduction of the existing capacity, operations or emissions of CO_2 or other GHG emissions from that plant or in New Mexico prior to 2031 when the existing coal supply agreement for that plant is currently due to expire; frankly, a license to pollute. PNM's proposed abandonment and sale of its interest in the FCPP to NTEC allows NTEC and other remaining owners of that plant to continue operating that plant, beyond the Commission's regulatory jurisdiction under the PUA and ETA, after 2031, which would result in continuing and additional CO_2 and other GHG emissions from that plant in New Mexico.

PNM's Application and Direct Testimony allegedly assert benefits to *particular* segments of the (Navajo Nation) public in New Mexico, however, would not be balanced by any

accelerated reduction of CO_2 and other GHG emissions from that plant, consistent with public interest goals and objectives of the ETA and its amendments to the REA.

As also noted earlier, PNM's Application (p. 4) requests Commission approval of PNM's recovery from customers of an estimated $271.3 million in PNM's undepreciated investments in the FCPP as of December 31, 2024, the day before PNM would transfer its interest in the FCPP to NTEC pursuant to its proposed Purchase and Sale Agreement, which amount includes an estimated $73 million in capital expenses by PNM between July 2020 and December 2024, pursuant to the ETA. Fallgren Dir., pp. 18-20. As noted by the Commission in Case No. 19-00018-UT, Sections 2 and 4 of the ETA eliminated the Commission's authority under the PUA to deny a "qualifying utility" recovery of any of its undepreciated investments in a "qualifying generating facility" *for which abandonment authority from the Commission is requested in accordance with the ETA* based on a showing that such investments were imprudent or unreasonable.[5]

As discussed above, however, 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 the ETA's amendment to the REA, NMSA § 62-16-4(B) (2019). Moreover, due to the continuing operation of the FCPP after that proposed sale, that economic (capital cost recovery) benefit to PNM's investors under the ETA would not be balanced by any 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.

[5] *See* Case No. 19-00018-UT, *Recommended Decision on PNM's Request for Issuance of A Financing Order*,

As also noted above, PNM's Application (p. 4) requests Commission approval of PNM's recovery from customers of an estimated $4.3 million in "Plant decommissioning costs," to be paid by PNM to NTEC pursuant to the proposed Purchase and Sale Agreement, based on an estimated $18 million (in 2020 dollars) in PNM's remaining plant decommissioning responsibility, which decommissioning costs would be in addition to the FCPP decommissioning expenses PNM already has recovered and is currently recovering from customers in rates as "accretion" expense and depreciation expense on its Asset Retirement Obligation associated with that plant. Fallgren Dir., pp. 20-24; Baker Dir., pp. 10-12. Here again, PNM's Application and Direct Testimony provide no evidence 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 that (in PNM witness Fenton's words) provides the "comprehensive framework for PNM's requested approvals in this case," those costs to PNM's customers and benefits to NTEC also would not be balanced by any accelerated reduction of CO_2 and other GHG emissions from the FCPP, consistent with public interest goals and objectives of the ETA and its amendments to the REA.

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.

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."

III. The Commission's case law requires the applicant to show that the abandonment and sale produces a net public benefit but PNM's Application has failed to included that complete required information.

In NM PRC Case No. 20-00199-UT, *Recommended Decision*, In the Matter of the Application of Continental Divide Electric Cooperative, Inc. for the Approval of the Transfer of Certain Assets to the Pueblo of Acoma and for Abandonment of Such Assets and Service Therefrom Upon Transfer, 12/7/2020, pp.13-14, (*Order Adopting Recommended Decision*, 12/30/2020), the Hearing Examiner found that abandonment and transfer of the utility assets will result in a net public benefit and will produce no net-public detriment therefore, recommended approval:

> The abandonment and transfer of the assets is proceeding in accordance with the settlement agreement reached by CDEC and the Pueblo. It will bring the parties' dispute over the right-of way to an end and will do so in a way that is cost effective, benefits both parties, ensures that CDEC's ratepayers are minimally impacted, and allows the Pueblo to take control over the production and supply of energy in its territory for its tribal members.
> The transfer and abandonment are not unlawful or inconsistent with the public interest; to the contrary, the testimony supports the finding that abandonment of the utility assets is in the public interest.

In the case at bar, PNM fails to even raise, in its Notice, Application and Testimony, the requirement, set forth in the "second step in the analysis" required by Case No. 20-00199-UT and Section 62-6-12(A)(4) that PNM's sale to NTEC is consistent with the public interest. For all the reasons stated above, including the specific provision prohibiting the reduction or cessation of coal burning PNM's 200MW sale of FCPP coal to NTEC cannot be in the public interest. Purchase and Sale Agreement with NTEC (PNM Ex. TGF-2 to PNM witness Fallgren's Direct Testimony, TGF-2, p.45 of 135, Article 6, 6.1(d) (i) (A) Conduct Pending Closing that states:

"Seller [PNM] shall Not … reduce the production or cease the operation of the Plant prior to the end of the Coal Supply Agreement [.]") Given this omission PNM's Application is patently defective as a matter of law.

IV. The Commission's Order Dismissing PNM's Application for the Foregoing Reasons Should Also 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.

PNM participated in the drafting of the ETA and fully supported its passage during the 2019 Session of the New Mexico Legislature. Moreover, PNM previously has argued and insisted to the Commission and to the New Mexico Supreme Court that the ETA was a lawful exercise of the Legislature's authority and does not violate any provisions in the New Mexico Constitution, and that the Commission must fully comply with all of its applicable provisions. As the Commission is aware, as a result of a petition for a writ against it by PNM and other petitioners, the New Mexico Supreme Court has determined that the Commission must fully comply with the ETA.

For the foregoing reasons, PNM must have known, or reasonably should have known of the legislative directive in the ETA's amendment the REA, NMSA § 62-16-4.B (4) (2019), prior to initiating negotiations with NTEC for the sale of its interest in the FCPP, prior to execution of the proposed Purchase and Sale Agreement with NTEC (PNM Ex. TGF-2 to PNM witness Fallgren's Direct Testimony), and prior to preparing and filing its Application and supporting Direct Testimony in this case. This raises a number of questions for Joint Movants and, we think, other stakeholders and the Commission.

Why then did PNM not bother to mention or address that legislative directive in the ETA to

the Commission in its Application or any of its Direct Testimony? Did PNM's management figure that neither the Commission's Staff, other parties or the Commission's Office of General Counsel would not bring that legislative directive to the Commission's attention, or that political pressure, public relations ads[6] in the media or lobbying outside the Commission would persuade them to ignore, or support circumvention of, that provision in the ETA and REA?[7]

Did PNM's management deliberately decide to ignore that statutory provision in the ETA and REA and proceed with its proposed abandonment and sale of PNM's interest in the FCPP in order to try to prevent the Commission from addressing the prudence and reasonableness of its investments in the FCPP as provided in the Commission's January 10, 2018 *Revised Order Partially Adopting Certification of Stipulation* (p. 23 ¶ 66) in PNM's last general rate case, Case No. 16-00276-UT? *See also* Case No. 16-00276-UT, 12/29/20 Sierra Club Motion to Re-open Case No. 16-00276-UT "to conduct the prudence review of certain Four Corners Power Plant expenditures that the Commission deferred" addressing in that *Revised Order,* and NEE's 1/11/21 Response to that Sierra Club Motion; NEE's Complaint in Case No. 20-00210-UT.

Did PNM's management mention or discuss that unambiguous legislative directive to the Commission in the ETA and REA with any Navajo Nation or NTEC representatives during any of its negotiations that resulted in the proposed Purchase and Sale Agreement with NTEC, or before PNM made its initial "CSA Assignment" payment of $15 million to NTEC the day after executing

[6] *See*, ad in the Santa Fe New Mexican, 1/24/2021, p. A-3.
[7] PNM has already begun purchasing half-page printed ads in local media touting the benefits to its customers and "the Navajo Nation region" of its proposed sale of interest in the FCPP to NTEC without mentioning the statutory directive to the Commission in NMSA § 62-16-4.B(4) (2019). *See, e.g.,* 1/24/21 edition of the *Santa Fe New Mexican*, p. A-3 entitled "We're Making Your Energy Bill Greener, Sooner." What legitimate public interest purpose are such media ads intended to serve?

that Agreement pursuant to § 3.3(a) of that Agreement (PNM Ex. TGF-2, p. 25? And, if not, why not?

Did PNM's management mention or discuss that statutory directive to the Commission in the ETA and REA with any representatives of Iberdrola or Avangrid during their negotiating of the proposed Merger Agreement of which they have, as Joint Applicants, requested Commission approval in pending Case No. 20-00222-UT? That question arises because Section 6.19 of that Merger Agreement includes the following "Four Corners Divestiture" conditions:

> Accordingly, the Company agrees that, as soon as reasonably practicable following the date of this Agreement, PNM, shall (a) enter into definitive agreements providing for exit from all ownership interests in the Four Corners Power Plant, substantially in the form made available to Parent prior to the date of this Agreement or in such other form as is reasonably acceptable to Parent (collectively, the "Four Corners Divestiture Agreements") 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.[8]

The fact that PNM was aware of the legislative directive to the Commission codified as NMSA § 62-16-4.B(4) (2019) prior to negotiating its proposed sale of its interest in the FCPP, prior to executing its proposed Purchase and Sale Agreement with NTEC and prior to filing its Application in this case is relevant to another regulatory matter within the Commission's jurisdiction under the PUA. The Commission should find in its order dismissing PNM's

[8] Case No. 20-00222-UT, 12/18/20 Blanquez Dir., JA Ex. PAB-3, p. 68, § 6.19; *see also id*., p. 71, § 7.2(g) (providing that those PNM FCPP "divestiture" commitments are "Conditions to Obligations of Parent and Merger Sub"). PNM's awareness of the legislative directive to the Commission in NMSA § 62-16-4.B(4) (2019) was a reason, if not *the* reason, why those "Four Corners Divestiture" conditions in that proposed Avangrid-PNM Merger Agreement were drafted in that manner rather than providing, as a condition of that proposed merger, that PNM shall have received *Commission approval* of its proposed abandonment and sale of its interest in the FCPP.

Application that none of PNM's costs incurred in connection with its Application or proposed sale of its interest in the FCPP to NTEC were prudent or reasonable.

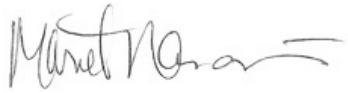
Parties and the Commission must review and, where appropriate, address literally hundreds of cost recovery claims by PNM in a general rate case. Considering the limited resources available to Joint Movants and other parties and the Commission to do so and the proposed transfer of ownership and management of PNM proposed by the Joint Applicants in pending Case No. 20-00222-UT, this finding is appropriate to put PNM (and Avangrid) on notice, that PNM will not be allowed to recover those costs from customers as regulatory expenses in any future rate case.[9]

CONCLUSION

For the foregoing reasons, accepting all facts plead in PNM's Petition and Direct Testimony as true, PNM's 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 January 28, 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

[9] Addressing their Joint Application for approval of the proposed Avangrid-PNM merger in pending Case No. 20-00222-UT, Joint Applicants have represented that PNM intends to defer filing its next general rate case until the Commission issues a final order in that merger case. *See* Case No. 20-00222-UT, Kump Dir., p. 17.

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.	)	

I hereby certify that a true and correct copy of:

JOINT MOVANTS' MOTION TO DISMISS APPLICATION AND SUPPORTING BRIEF

was emailed to the parties listed below on January 28, 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;

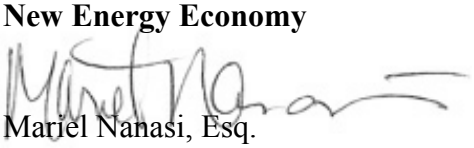
Stephanie Dzur Stephanie@Dzur-law.com;

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;

Dated this 28th day of January, 2021.

New Energy Economy



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