

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY)
OF NEW MEXICO'S ABANDONMENT OF) **Case No. 19-00018-UT**
SAN JUAN GENERATION STATION UNITS 1 & 4)

**NEW ENERGY ECONOMY'S REPLY IN SUPPORT OF AN INTERIM RATE CREDIT
OR THE CREATION OF A REGULATORY LIABILITY ACCOUNT AS A REMEDY
FOR PNM'S OVERCOLLECTIONS OF SAN JUAN GENERATING COSTS**

On February 28, 2022, Western Resource Advocates, Coalition for Clean Affordable Energy and Prosperity Works (collectively “Movants”) filed their *Joint Motion for Order to Show Cause and Enforce Financing Order and Supporting Brief* (hereafter “Show Cause Motion”). On March 14, 2022 Public Service Company of New Mexico (“PNM” or “Company”) filed its *Verified Response of Public Service Company of New Mexico to Joint Motion for Order to Show Cause and Enforce Financing Order and Supporting Brief* (hereafter “Verified Response”). New Energy Economy (“NEE”) hereby replies to the Show Cause Motion and the Verified Response pursuant to the Order issued by the New Mexico Public Regulation Commission (“PRC” or “Commission”) on March 4, 2022. For the reasons stated below NEE requests that immediately upon abandonment of San Juan Generating Station (“SJGS”) the Commission require PNM to either 1) issue a customer rate credit reflecting the removal of SJGS from PNM’s cost of service or 2) establish a regulatory liability deferral account that would continue to track costs accruing after the end of the San Juan Generating Station’s scheduled usage, respectively on July 1, 2022 for SJGS Unit 1 and October 1, 2022 for SJGS Unit 4, so that these amounts can be returned to ratepayers when costs are adjusted in PNM’s next rate case. Requiring PNM to either issue a rate credit or establish a regulatory account will serve to protect

ratepayers from PNM's overcollection, is an efficient way of doing so, and is consistent with the Commission's ratemaking authority to protect ratepayers.¹

INTRODUCTION

On December 16, 2015, in NM PRC Case No. 13-00390-UT, a predecessor to this case, the Commission approved PNM's plan to abandon two of the four units in SJGS, purchase coal from other fleeing co-owners in SJGS Unit 4 and re-purchase unprofitable nuclear assets in Palo Verde Nuclear Generating Station Unit 3. With the closure of SJGS Units 2 and 3, PNM shared the burden of that "early" closure and split the remaining undepreciated assets 50/50 between utility shareholders and ratepayers.² PNM promised as a result of the Modified Stipulation that it would hold a 2018 review hearing to determine if SJGS was economically viable post June 30, 2022. PNM didn't comply with the Modified Stipulation and never initiated the 2018 hearing. Instead, PNM made a "compliance filing" on December 31, 2018, asserting that there were no contractual obligations in place to continue SJGS operations post 2022 and thus that it would pursue the shutdown of SJGS, and called it done.

NM PRC Case No. 19-00018-UT was born as a result of PNM's failure to meet its obligation under the Modified Stipulation and because PNM had already commenced SJGS abandonment six months earlier. On 1/30/2019, the PRC ordered "an abandonment proceeding under NMSA 1978 §62-9-5 of the Public Utility Act ... to address the abandonment of PNM's

¹ *In re Tariff Filing of Central Vermont Pub. Serv. Corp.*, Docket Nos. 6946 & 6988, 2005 WL 756091, *35 (Vt. P.S.B. March 29, 2005), cited with approval in NM PRC Case No. 20-00104-UT, *Recommended Decision*, April 6, 2021, pp. 101-102; adopted in relevant part by *Order Adopting Recommended Decision with Modifications* (June 23, 2021). *See also*, NM PRC Case No. 21-00083-UT, *Recommended Decision on Motions to Dismiss*, August 2021, pp. 18-25.

² Cost sharing "fairly balances the interests of investors and ratepayers and is reasonable." 13-00390-UT, *Certification of Stipulation* (Nov. 16, 2015), p. 124, adopted by *Final Order* (Dec. 16, 2015), upheld unanimously in *New Energy Economy v. NM Public Regulation Commission*, 2018-NMSC-024, 416 P.3d 277.

interest in SJGS Units 1 and 4. The scope of the proceeding shall include all issues relevant to an abandonment proceeding under NMSA 1978 §62-9-5 and any other applicable statutes and NMPRC rules, including §62-6-12.”³ The Commission ordered PNM to file its abandonment application by 3/1/2019.⁴

On February 27, 2019, PNM appealed the PRC Order to the New Mexico Supreme Court in an Emergency Petition for Writ of Mandamus, S-1-SC-37552. On March 1, 2019, the NM Supreme Court issued a stay preventing NM PRC from taking further action in Commission Case 19-00018-UT, and ordered responses to PNM’s Writ. On March 22, 2019 SB 489, the Energy Transition Act (“ETA”) was signed into law, effective June 14, 2019.

On June 26, 2019, the NM Supreme Court denied PNM’s Emergency Petition and lifted the stay of the Commission’s 1/30 Order.

Then, on July 1, 2019, PNM filed its Consolidated Application for abandonment, securitized financing, and replacement power pursuant to the Energy Transition Act, in a new docket, Case 19-00195-UT, rather than in the existing docket in Case No. 19-00018-UT.⁵

Of particular relevance to this case is that the ETA provides a means whereby PNM may finance, through securitization, the energy transition costs (“ETCs”) associated with abandoning the remainder of SJGS. These securitized ETCs include “financing costs,” § 62-18-2(H)(1), and up to \$375 million in “abandonment costs,” § 62-18-2(H)(2)(a)-(d).

The ETA authorized PNM to control almost all aspects regarding the abandonment of qualifying facilities. If PNM desired to securitize these energy transition costs, it could apply to the Commission for a “financing order” that will “authorize[] the issuance of energy transition

³ 19-00018-UT, *Order Initiating Proceeding on PNM’s December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of SJGS*, 1/30/2019, ¶A.

⁴ *Id.*, at ¶B, ¶B5, and ¶¶B11-13.

⁵ See PNM’s Application, herein.

bonds,”⁶ which it did in this case for \$360.1 million dollars⁷; the largest single cost of PNM’s application was the full \$283 million estimate of undepreciated investment in the units, as of July 2022.⁸

“The commission shall issue a financing order approving the application if the commission finds that the qualifying utility’s application for the financing order complies with the requirements of Section 4 of the Energy Transition Act.” NMSA 1978 Section 62-18-5(E). Pursuant to NMSA 1978 Section 62-18-4, an application for a financing order shall comply with Section 62-9-5 and include a description of the facility that the qualifying utility proposes to abandon⁹; an estimate of the energy transition costs¹⁰; a description of other costs and “an estimate of timing of the issuance and term of the energy transition bonds” Section 62-18-4(7).

Within the ETA’s bounds of \$375 million for energy transition costs, the ETA granted PNM the right to name its price. Accordingly, PNM did so, and estimated \$360.1 million¹¹ and subsequently received approval to securitize bonds for its asking price.¹² At hearing, PNM testified, and the Hearing Examiners recorded in their Recommended Decision that the bonds would be issued shortly after the abandonment of PNM’s interest in the units on July 1, 2022.¹³

PNM wrote the Application and the testimony and Financing Order, and explicitly agreed to amendments, which were sufficiently specific and certain to require the issuance of the energy

⁶ Section 62-18-2(K), (L).

⁷ NM PRC Case No. 19-00018-UT, *Recommended Decision on PNM’s Request for Issuance of a Financing Order*, February 21, 2020, pp. 4, 20, 29.

⁸ *Id.*

⁹ Section 62-18-4 B(1).

¹⁰ Section 62-18-4 B(2).

¹¹ Application, July 1, 2019, p. 5.

¹² *Final Order on Request for Issuance of a Financing Order*, April 1, 2020, p. 10, ¶A, adopting the *Recommended Decision on PNM’s Request for Issuance of a Financing Order*, February 21, 2020.

¹³ NM PRC Case No. 19-00018-UT, *Recommended Decision on PNM’s Request for Issuance of a Financing Order*, February 21, 2020, p. 21

transition bonds in 2022, if at all, post SJGS abandonment. In reliance on PNM's Application and sworn testimony, the Commission, consistent with its own rules and ETA mandates, relied on that information and issued its Final Order and approval of the Financing Order. While PNM has some discretion on when to issue the bonds,¹⁴ **it does not have the right to unilaterally change the terms and conditions of the Final Order.**

Timing of the issuance of the energy transition bonds is a material term and condition of the Application, the Financing Order, the Recommended Decision and Final Order because expected savings were dependent on the low-cost securitized bond interest rate. According to PNM's bond expert, Mr. Atkins, testified that, *at that time*, the bond interest rate was "3.38 or 3.4%," less than the weighted average cost of capital of 7.2 %, thereby saving money for ratepayers who were required to pay interest on 100% of the balance of undepreciated investments.¹⁵ Those savings were estimates, as Mr. Atkins also testified that interest rates in the later years could be "quite high", and could even exceed PNM's weighted average cost of capital.¹⁶ Further, the issuance of energy bonds was to be timed at or shortly after abandonment to immediately capture the positive percentage difference in interest rate cost associated with undepreciated investments. Hence, PNM's postponement of the issuance of energy transition

¹⁴ Section 62-18- 11(C)

¹⁵ NM PRC Case No. 19-00018-UT, TR., Atkins, p. 956:

"Q. But how can PNM know that the ETA is more beneficial to customers if we don't know how the PRC would use those traditional tools to determine appropriate cost recovery for the company?

A. (Atkins)Well, again, we have a cost of capital about 7.2 percent, and compared to the expected interest rate that we're getting on these bonds, which is about 3.38 or 3.4, and so that's significantly lower than using the company's weighted average cost of capital."

¹⁶ NM PRC Case No. 19-00018-UT, TR., Atkins, p. 1056: "You could have an extremely steep -- you could have an extremely steep yield curve where -- where interest rates in the longer years are quite, quite high[.]" At 1062: At this time -- well, I would say that if interest rates were to rise to a particular level where they were equal to or exceeded the existing PNM-weighted cost of capital, there could be a possibility that the bonds might not be issued."

bonds is more financially risky than it would have been and compromises, maybe even sacrifices, its own estimated savings from low-interest bonds.

In the meantime, because PNM has not issued a rate adjustment to coincide with abandonment, as it testified was PNM's plan, the Company will continue to collect costs associated with SJGS after the plant is no longer providing electrical service – costs that currently remain in base rates.

According to PNM's Senior Counsel, PNM has decided that it will not be issuing energy transition bonds in 2022.¹⁷ PNM has voluntarily made the decision and it is within its control to not issue energy transition bonds in 2022.

In crafting a proper remedy for PNM's (temporary or permanent) delay in energy transition bond issuance, refusal to implement a rate credit, and PNM's violation of the Final Order, the PRC must protect ratepayers by deploying its Constitutionally mandated ratemaking authority, upheld again on January 10, 2022, in *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, and require that PNM issue an interim rate credit or create a regulatory liability account. The Commission has the authority to review and disallow PNM's expenditures at SJGS post abandonment by adjusting PNM's base rates.

- 1. PNM's Application and sworn testimony to the Commission and the New Mexico Supreme Court, promised that ratepayers would save money through low-interest bonds that would be issued in 2022.**

PNM made the following representations to the PRC and the New Mexico Supreme Court: That passage of the Energy Transition Act ("ETA") would save ratepayers money through

¹⁷ Show Cause Motion, p. 5, fn. 8, February 23, 2022 email from PNM counsel Stacey Goodwin to WRA counsel Steven Michel.

low-interest bonds,¹⁸ and that the bonds would issue on or shortly after 7/2/22,¹⁹ after the scheduled closing of SJGS.

A. PNM's Application stated the following, in pertinent part:

“PNM requests the Commission approve the abandonment of the San Juan coal plant as of July 1, 2022. More specifically, PNM requests that the Commission approve:

- Abandonment of the San Juan coal plant and facilities located at Waterflow, New Mexico;
- Decommissioning of the plant and facilities and mine reclamation; and
- Recovery of Energy Transition Act-defined abandonment and other energy transition costs in an estimated amount of approximately \$360.1 million[.]”²⁰

“Abandonment of the facilities when accomplished in conjunction with the issuance of energy transition bonds results in increased savings to customers and benefits impacted communities.”²¹

“The Company currently estimates the issuance of the Energy Transition Bonds would occur in 2022.”²²

¹⁸ No. S-1-SC-38247, *Answer Brief of Intervener-Appellee Public Service Company of New Mexico to Appellants' Brief-in-Chief*, October 5, 2020, pp. 20; Also see, Monroy Direct testimony, pp. 1, 5 (“Financing the abandonment of the San Juan coal plant using securitization saves customers an estimated additional \$22 million in 2023. These savings are generated by achieving a favorable credit rating under securitization to finance the undepreciated investment, which is lower than PNM's traditional weighted average cost of capital.”)

¹⁹ NM PRC Case No. 19-00018-UT, Settlege Direct testimony, p. 20. (“7/2/22 Bonds are issued”); Also see, Monroy Direct testimony, p. 39 (“Upon abandonment, the SPE will issue the Energy Transition Bonds.”) Atkins Direct Testimony, p. 14 (“While PNM's proposed securitization is not expected to occur until 2022, and costs may change, these estimated costs are within the ranges found in other utility securitization transactions.”); No. S-1-SC-38247, *Answer Brief of Intervener-Appellee Public Service Company of New Mexico to Appellants' Brief-in-Chief*, October 5, 2020, p. 1 (“The Act authorizes PNM to issue bonds to recover its allowed costs for the early abandonment of Units 1 and 4 of the San Juan Generating Station (“SJGS”), when the plant closes in 2022[.]”) Also, at p. 9, (“The bonds will be issued in 2022 through a Commission-authorized, PNM-owned special purpose entity[.]”) Lastly, at p. 11, (“The actual ETC will not go into effect until the bonds are sold in 2022, and the specific charges will be set by the Commission at that time.”)

²⁰ Application, July 1, 2019, p. 5.

²¹ *Id.*, p.14, ¶8c.

²² *Id.*, p. 34, ¶54.

Senior Vice President Ronald N. Darnell's direct testimony was included as part of PNM's Application, and he testified, in pertinent part:

"First, PNM is asking the Commission to authorize the Company to pursue the necessary actions for the future abandonment of its interests in San Juan Generating Station Units 1 and 4 as of July 1, 2022. This request includes: (1) the abandonment of the coal plant and facilities located at Waterflow, New Mexico; (2) the decommissioning of the coal plant and facilities and related mine reclamation; and (3) the recovery of abandonment costs and related costs through the issuance of securitized bonds. PNM estimates that it will issue securitized bonds in an amount of approximately \$361 million."²³

"The Energy Transition Act allows utilities to issue these bonds to investors with prior approval of the Commission to facilitate the transition from coal-fired generating resources to carbon-free resources. Under this approach, the Company will forgo its profit on its unrecovered investment in the San Juan coal plant and related facilities and the bonds will be "securitized" by a charge paid by its customers. The availability of securitization in this case significantly lowers the cost of a retirement scenario as compared to PNM's previous estimates, which makes this scenario even more economically attractive."²⁴

B. The Notice of Proceeding and Hearing on San Juan Abandonment and Securitization of Energy Transition Costs, required customer communication pursuant to the Commission's Procedural Order, included the following information regarding predicted bill impacts that was to take place prior to 2023.

"PNM estimates the net bill impact of these charges and credits will be a savings of \$7.11 for a residential customer using an average of 600kWh per month in 2023, the first full year PNM expects the resources in PNM's recommended replacement resource portfolio will be in service."²⁵

This sentence means that the charges and credits reflected on a customer's bill impact would have had to been in effect *before* 2023. Given the practical importance of the coordinated *timing* of events, to obtain low-interest rates and to protect ratepayers from the accrual of SJGS charges, including a debt and equity return on undepreciated investments, O&M and other associated

²³ Direct testimony of Ronald N. Darnell, p. 6.

²⁴ *Id.*, p. 7.

²⁵ Affidavit of Notices in Customer Bills and Notice of Proceeding and Hearing on San Juan Abandonment and Securitization of Energy Transition Costs, September 4, 2019.

costs after abandonment, and the fact that “an estimate of timing of the issuance and term of the energy transition bonds” is a requirement in the application pursuant to the ETA, NMSA 1978 §62-18-4B(7), and was included in the Notice as being issued before 2023, but now is not, violates ratepayers due process rights.²⁶

C. The Recommended Decision reflects PNM’s Application and testimony that:

“The bonds would be issued shortly after the abandonment of PNM’s interest in the units on July 1, 2022.”²⁷

“The ETA facilitates and ensures PNM’s recovery of the costs to abandon its interest in the remaining San Juan facilities. It provides for the issuance of Energy Transition Bonds to enable PNM to recover the *estimated* costs (Energy Transition Costs) of abandoning Units 1 and 4 shortly after the abandonment on June 30, 2022.”²⁸ (emphasis in the original.)

“PNM proposes to establish an ETA Rider to collect the ETC funds that will be paid to the SPE and used to pay the required semi-annual debt service payments and other ongoing financing expenses. PNM anticipates the ETA Rider will become effective 30 days after issuance of the Energy Transition Bonds. For example, if the bonds were issued on July 2, 2022, PNM anticipates the ETA Rider would become effective on

²⁶ NM PRC Case No. 16-00276-UT, *Order Rejecting Stipulation in Current Form*, May 12, 2017, fn. 11 (*Albuquerque Bernalillo County Water Utility Authority v. N.M. Pub. Reg. Comm’n*, 2010-NMSC-013, ¶21, 148 N.M. 21, 32, 229 P.3d 494 (2010) (“It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense.” *Jones v. N.M. State Racing Comm’n*, 100 N.M. 434, 436, 671 P.2d 1145, 1147 (1983) (internal quotation marks and citations omitted). Notice ‘should be more than a mere gesture; it should be reasonably calculated, depending upon the practicalities and peculiarities of the case, to apprise interested parties of the pending action and afford them an opportunity to present their case.’ *U.S. West Commc’ns, Inc.*, 1999-NMSC-016, ¶29, 127 N.M. 254, 980 P.2d 37 (internal quotation marks and citations omitted). General notice of the issues to be presented at a hearing is sufficient to comport with due process requirements. *Santa Fe Exploration Co. v. Oil Conservation Comm’n*, 114 N.M. 103, 111, 835 P. 2d 819 (1992).”)

²⁷ NM PRC Case No. 19-00018-UT, *Recommended Decision on PNM’s Request for Issuance of a Financing Order*, February 21, 2020, p. 21

²⁸ *Id.*, p. 27.

August 1, 2022 and would be assessed for electric service provided thereafter.” (citations to PNM Settlege testimony omitted.)²⁹

“PNM estimates that the 2022 abandonment of the San Juan plant and its replacement with PNM’s proposed portfolio of generation resources will produce \$80 million in net annual savings for customers in 2023. The savings are the result of (1) the subtraction of \$94 million in annual San Juan costs, approximately \$50 million in fuel savings with the replacement resources and approximately \$8 million in other cost savings and (2) the addition of \$23 million in annual ETCs and approximately \$49 million in new costs for the replacement resources.” (citations to PNM Monroy and Settlege testimonies omitted.)³⁰

D. The Financing Order specifically references PNM’s Application and “an example” ETA Rider, that indicates that the bonds are issued on 7/2/2022:

“In accordance with Section 8(A) of the ETA, this Financing Order has been issued as a separate order from any other order issued by the Commission on the approvals requested in the Consolidated Application with respect to the Energy Transition Bonds and is a final order of the Commission.”³¹

“PNM’s proposed ETA Rider as shown in PNM Exhibit MJS-2 is hereby approved.”³²

E. In its Compliance Filing, required by the Recommended Decision and adopted by the Commission, PNM agreed to the following, in pertinent part:

“PNM’s Consolidated Application is hereby amended as reflected in the attached Addendum, and PNM fully accepts and adopts the findings, conclusions and ordering paragraphs of the Final Order.”³³

Paragraph 61 of the Consolidated Application is amended as follows:

“If PNM has not adjusted its base rates charged to customers in a general rate case to reflect the abandonment of the remaining SJGS plant before the start date of the Energy Transition Charges, PNM shall implement an immediate credit to customers in the amount of its cost of service related to SJGS Units 1 and 4 (including capital, operations and maintenance, and all other expenses) as an interim rate adjustment mechanism upon

²⁹ *Id.*, p. 65.

³⁰ *Id.*, p. 105.

³¹ NM PRC Case No. 19-00018-UT, *Financing Order*, February 21, 2020, p. 148, ¶58.

³² *Id.*, p. 151, ¶12. (Settlege Direct Testimony, p. 20: “PNM Chart MJS-2 displays the timing of the bond payments and the effective dates of the adjusted energy transition charges. 7/2/2022 Bonds are issued”)

³³ NM PRC Case No. 19-00018-UT, *Compliance Filing of Public Service Company of New Mexico with Conforming Amendments to Consolidated Application Pursuant to Final Order* (“Compliance Filing”), April 6, 2020, p. 2.

the start date of the Energy Transition Charges. This credit shall remain in effect until the conclusion of PNM's general rate case that includes the full cost impact of the abandonment of SJGS in PNM's base rates."³⁴

2. The Commission should hold PNM to its own the terms and conditions that the Commission relied on in when it granted the Financing Order.

Any pleading before the Commission including applications,³⁵ requires "a concise and explicit statement of the facts which said party or the staff is prepared to prove by competent evidence and upon *which the commission is expected to rely in granting the authorization or other relief sought.*" 1.2.2.11 A (3) NMAC. (emphasis supplied.) In this case, PNM's Application in this case, included the written testimony of PNM's witnesses, including, in particular Mr. Darnell, Mr. Monroy, Mr. Settlage and Mr. Atkins. The Recommended Decision on PNM's Request for Issuance of a Financing Order, including the Statement of the Case, Discussion, Findings of Fact and Conclusions of Law, Decretal Paragraphs and the Financing Order recommended by the Hearing Examiner, were adopted, approved and accepted in the Commission's Final Order.³⁶ But now PNM has indicated, in effect, that it declines to abide by the terms and conditions authorized by the Final Order based upon the Recommended Decision (to which PNM never excepted), and the Financing Order that referred to PNM's Application

³⁴ NM PRC Case No. 19-00018-UT, *Compliance Filing of Public Service Company of New Mexico with Conforming Amendments to Consolidated Application Pursuant to Final Order* ("Compliance Filing"), April 6, 2020, *Attachment A, Addendum Amendments to Consolidated Application*, p. 5, ¶F.

³⁵ 1.2.2.7 P (3) NMAC.

³⁶ NM PRC Case No. 19-00018-UT, *Final Order*

and testimony. In PNM's Compliance Filing, it stated that "PNM acknowledges and states the Final Order shall control."³⁷

PNM authored the Application, Testimony, and the Financing Order it wanted. In its final order, the Commission adopted the recommendation of the hearing examiners and approved PNM's recovery for the costs for SJGS and issued a Financing Order. It based that approval on PNM's Application, Testimony, and the Financing Order it presented and the adjustments to which PNM acquiesced. Now PNM doesn't want to adhere to the terms and conditions to which it not only agreed, but which it extracted from the PRC based on its own request, testimony and filings. In another case where PNM agreed to a Commission Order, then failed to comply with its edict yet sought cost recovery anyway, the New Mexico Supreme Court upheld the Commission's denial of compensation from ratepayers:

PNM's argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating the prudence of the balanced draft costs in its general rate case. Given this prior stipulation and the evidence indicating that balanced draft was in PNM's permits primarily at its own request, it was lawful for the Commission to reject PNM's argument that the balanced draft costs were entitled to a presumption of prudence.

For the foregoing reasons, we conclude that the Commission's denial of PNM's balanced draft costs was within the Commission's authority to regulate the rates of public utilities and was not contrary to law.³⁸

In *Qwest Corporation v. New Mexico PRC*, 2006-NMSC-042, 143 P.3d 478, 140 N.M. 440, the PRC approved a five-year alternative form of regulation (AFOR) plan for the Qwest Corporation. During the plan's third year, the PRC investigated whether Qwest was in

³⁷ NM PRC Case No. 19-00018-UT, *Compliance Filing of Public Service Company of New Mexico with Conforming Amendments to Consolidated Application Pursuant to Final Order* ("Compliance Filing"), April 6, 2020, p. 7.

³⁸ *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶¶88-89.

compliance with a key component of the AFOR plan: a commitment by Qwest to invest \$788 million in its New Mexico telecommunications infrastructure. The PRC found Qwest was not in compliance and ordered Qwest to issue credits or refunds to customers in an amount equal to any shortfall at the end of the five-year plan. Qwest appealed and argued that the credit or refund order was outside the PRC's statutory authority, an improper form of retroactive remedy, motivated by improper objectives, and was premature and speculative. The PRC averred that it had the statutory authority to approve Qwest's AFOR plan; the \$788 million investment provision was a key compromise in the AFOR plan; Qwest failed to timely object to the investment provision at the time the plan was negotiated and approved, and therefore waived the ability to challenge it later.

The New Mexico Supreme Court upheld the PRC's authority to regulate the utility even when Qwest argued it was "substantially compliant."

The PRC's consumer credit or refund order was based primarily on the AFOR plan terms and is not a prohibited form of retroactive remedy. The incentive order is neither premature nor speculative because Qwest admitted it would not meet the \$788 million investment commitment[.]³⁹

The Court cited statutes and case law for its broad authority to regulate the utility:

The PRC "shall administer and enforce the laws with which it is charged and has every power conferred by law." Section 8-8-4(A). The PRC is also given discretion to "take administrative action by issuing orders not inconsistent with law ... and to enforce those orders by appropriate administrative action and court proceedings." Section 8-8-4(B)(5).
...

Similarly, this Court has recognized the PRC's broad authority to regulate telecommunications, and to take appropriate measures to protect consumers. *Att'y Gen. v. Pub. Reg. Comm'n (In re Proposed Merger of Qwest)*, 2002-NMSC-006, ¶ 6, 131 N.M. 770, 42 P.3d 1219.⁴⁰

³⁹ *Qwest Corporation v. New Mexico PRC*, 2006-NMSC-042, 143 P.3d 478, 140 N.M. 440, ¶17.

⁴⁰ *Id.*, ¶21.

Qwest also argued that the Commission order “violates the rule against retroactive remedies.” The Court disagreed: “Qwest had proper notice of its \$788 million infrastructure investment commitment, and therefore, the credit or refund incentive is not an impermissible retroactive remedy.”⁴¹ It also held that because the case was one of first impression, like the ETA, the “AFOR plans are new forms of regulation that the PRC has not previously enforced. This is the first time that the PRC has dealt with Qwest’s non-compliance with AFOR plan terms.”⁴² Further, the PRC “is not departing from established rules, but simply following AFOR plan terms. The AFOR plan explicitly empowers the PRC to add incentives should they be necessary to ensure that Qwest fulfills its obligations.”⁴³ This is similar to the circumstances herein, where PNM authored the ETA, then wrote the terms included in the Application, testimony, and the Financing Order, and PNM agreed to comply with the Final Order even after the Commission amended it (to include the potential requirement of interim rate credit issuance). PNM remains obligated to fulfill the terms, including, critically, the timing of the issuance of energy transition bonds and the rate adjustment upon abandonment.

Qwest cited a number of cases in which an administrative commission’s order of a consumer refund or credit was found to be outside the commission’s authority, but the Court rejected the utility’s argument because “the cases cited were all under the previous rate of return scheme. The PRC’s consumer credit or refund incentive was made under an alternative form of regulation. Unlike the different administrative commissions listed above, we have already found

⁴¹ *Id.*, ¶29.

⁴² *Id.*, ¶30.

⁴³ *Id.*

that the PRC had the implied statutory authority to order the credit or refund incentive in this case.”⁴⁴

Requiring rate relief is consistent with the Commission obligations to protect the public.⁴⁵

3. PNM told the New Mexico Supreme Court and assured the Commission in testimony that the PRC maintained its right of ratemaking review; a regulatory liability post SJGS abandonment will provide needed consumer safeguards, yet PNM now resists such ratemaking oversight

When Citizens for Fair Rates and the Environment (CFRE) and NEE filed a challenge to the constitutionality of the ETA in the New Mexico Supreme Court, PNM answered our claim that the ETA removed PRC Authority and infringed on the due process rights of ratepayers by stating in pertinent part as follows:

The ETA also does not preclude NMPRC review of PNM’s abandonment costs that have not yet been subject to a ratemaking review. ... Once PNM incurs the cost for abandonment of SJGS, the Commission and interested parties will again have a chance to review the prudence and reasonableness of PNM’s final abandonment costs, including decommissioning and mine reclamation expenses, as well as any investments in SJGS from 2019 and beyond. Any true-up or adjustments due to any findings of imprudence related to these costs will be accounted for in PNM’s base rates.⁴⁶ (citations omitted.)

⁴⁴ *Id.*, ¶31.

⁴⁵ See, e.g., *In re the Matter of Avista Corp., d/b/a Avista Utilities Request Regarding the Recovery of Power Costs Through the Deferral Mechanism*, Sixth Supp. Order Rejecting Tariff Filing; Granting Temporary Rate Relief, Subject to Refund; and Authorizing Compliance Filing, Washington Utilities and Transportation Commission Docket No. UE-010395, 2011 Wash. UTC Lexis, *6, 213 P.U.R.4th 177 (“The rate relief we order is the minimum we believe to be immediately necessary for the Company to preserve its ability to fulfill its service obligations to the public. *These rates are to be in effect for a limited period of time.* We make no ultimate judgment in today’s action about the appropriateness or prudence of management decisions made by the Company to respond to this extraordinary situation. *The Company remains responsible for proving that the costs it has incurred are appropriate and prudent. The rates we order today are subject to refund, should the Company fail to carry this burden in the context of a full examination of the Company’s management decisions and costs. That examination will commence with the filing of a general rate case, which we order to be filed by December 1, 2001.*”) (emphasis added). Cited with approval by the Hearing Examiner in his *Recommended Decision on PNM’s Request for Issuance of a Financing Order*, in NM PRC Case No. 21-00017-UT.

⁴⁶ No. S-1-SC-38247, *Answer Brief of Intervener-Appellee Public Service Company of New Mexico to Appellants’ Brief-in-Chief*, October 5, 2020, pp.20-21.

While NEE does not agree with PNM that the PRC's ratemaking review is limited to only the above-described costs, the Company convinced the Supreme Court that PNM had acquiesced to PRC authority's ratemaking authority over SJGS costs.⁴⁷

Additionally, during the case itself, PNM's witness, Henry E. Monroy, Controller, Utility Operations for PNM Resources, Inc. testified that 1) the plan was to coordinate the timing of abandonment, the Energy Transition Charge and a rate adjustment to deduct SJGS charges; and 2) that if there was a timing issue between SJGS closure and base rate adjustment consumer safeguards would be preserved through a regulatory liability:

Q. DOES PNM ANTICIPATE ADJUSTING PNM'S BASE RATES TO REFLECT THE ABANDONMENT OF THE SAN JUAN COAL PLANT THROUGH A GENERAL RATE CASE AT THE SAME TIME THAT CUSTOMERS BEGIN TO PAY THE ENERGY TRANSITION CHARGE?

A. Yes. PNM intends to file a general rate case to reflect the abandonment of the San Juan coal plant for rates to go into effect at the same time as the Energy Transition Charge are collected from customers. In this instance, there would be no need for a regulatory liability to be recorded.

However, if there is a timing difference between commencement of the collection of the energy transition charge from customers when bonds are issued upon the abandonment and the time that base rates are adjusted to reflect the abandonment of the San Juan coal plant, then a regulatory liability will protect customers from double recovery of the undepreciated investments. (emphasis added)⁴⁸

PNM should be held accountable to its testimony and representations. We now know that there will be no coordinated abandonment and rate base adjustment, therefore, the PRC should require PNM to compensate customers for any ongoing actual SJGS charges and associated carrying charges post abandonment through a rate credit or the creation of a regulatory liability account.

⁴⁷ *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶26. (PNM concludes that the Commission will have the statutory authority to review and potentially disallow PNM's final expenditures at SJGS by adjusting PNM's base rates.)

⁴⁸ NM PRC Case No. 19-00018-UT, Monroe Direct testimony, pp. 40-41.

4. The PRC should order PNM to immediately issue an interim rate credit, but if not, to continue amortizations into a regulatory liability account and overcharges be paid back to ratepayers at the next rate case.

Absent an interim rate credit, PNM will continue to recover through rates the costs of its undepreciated investments and its associated return on equity (ROE), O&M, which effects taxes, ADIT, and more in SJGS Units 1 and 4 until those costs are removed from PNM's revenue requirement in PNM's next general rate case. "PNM admits that it controls the timing of its next rate case."⁴⁹ "PNM has repeatedly refused to state when it will file its next general rate case."⁵⁰ The Commission does not need PNM's permission to require an interim rate credit or create a reverse deferral account for any overcollections of the costs of PNM's SJGS Interests.⁵¹ NMSA 1978 § 62-10-1 (the Commission has the authority to require PNM to establish a regulatory liability or initiate a case to investigate PNM's rates.). *Qwest Corporation v. New Mexico PRC*, 2006-NMSC-042, *supra*, ¶¶17, 20. NMSA 1978 §§ 8-8-4(A) and 8-8-4(B)(5).

When the Hearing Examiner reviewed whether a regulatory liability should be created regarding other PNM assets, she recommended the following:

PNM's refusal to agree to create such a liability account, while requesting approval of four regulatory asset accounts,⁵² shows a disregard for the balancing of investor and

⁴⁹ NM PRC Case No. 21-00083-UT, *Recommended Decision on Motions to Dismiss*, July 28, 2021, p. 23. *See also*, "PNM's plan for the 2020 rate case appears to have changed, but the facts remain that PNM controls the timing of its base rate increase requests, such that the timing of the recovery of the capacity costs is within PNM's control." *Recommended Decision, Part II, Replacement Resources*, in NM PRC Case No. 19-00195-UT, at p. 168.

⁵⁰ *Id.*

⁵¹ *Id.*, citing, NM PRC Case No. 20-00104-UT, *Recommended Decision* at 101-05 (4-6-21), adopted in relevant part by Order Adopting Recommended Decision with Modifications (6-23-21).

⁵² In NM PRC Case No. 19-00018-UT, *Recommended Decision on PNM's Request for Issuance of a Financing Order*, February 21, 2020, p. 102. PNM requested and was granted permission to fund certain severance, job training, and energy transition fund payments prior to the abandonment of the facility on June 30, 2022 and the creation of a regulatory asset for these

ratepayer interests. For all of these reasons, the motion to dismiss with prejudice PNM's requests to create two regulatory assets for its undepreciated investment for improvements to its Leased Interests in PVNGS Units 1 and 2 should be granted.

Denying PNM's requests for approval to create two regulatory assets for recovery of the costs of undepreciated PVNGS improvements does not preclude PNM from otherwise seeking recovery of those costs. *PNM's remedy is to seek recovery of the costs in a general rate case in which the test year period includes the time period in which PNM incurs its so-called "stranded costs."* This is consistent with the Commission's recent statement in its order in EPE's general rate case that "[i]t is true that a general principle of ratemaking is that 'the chips fall where they will' between rate cases, and this can be a good thing for ratepayers." [NM PRC Case No. 20-00104-UT, *Recommended Decision*, April 6, 2021,] at 105. It is also consistent with Mr. Sander's testimony in support of PNM's refusal to agree to create a regulatory liability for the cost of any overcollection of cost recovery of the PVNGS Leased Interests after those Leased Interests terminate. Mr. Sanders said, "PNM believes a general rate case is the appropriate avenue to address these types of changes where the Commission can completely assess a utility's cost of service." Sanders Supp. at 13. As the Intervenors' Joint Reply aptly states, "PNM's strategic reasons for not timing the filing of a rate case to preserve its [ability] to recover undepreciated investments from Palo Verde is not the Commission's emergency." Intervenors' Joint Reply at 8.

If the Commission does not adopt the recommendation to deny with prejudice PNM's request to create regulatory assets for the undepreciated costs of improvements in its Leased Interests in PVNGS Units 1 and 2, the Commission should order the parties to address in posthearing briefs whether PNM is entitled to recover such costs in light of the fact that PNM will no longer own the undepreciated improvements.

Unlike the case at bar, in the 21-00083-UT case the Hearing Examiner and the Commission dismissed with prejudice PNM's request for approval to abandon and decertify those PVNGS assets.⁵³ Here, of course, PNM's request for abandonment of SJGS Units 1 and 4 has been granted.⁵⁴

advance payments. Like Case 20-00083-UT, PNM wanted approval to create a regulatory assets account, but resisted the creation of regulatory liability account.

⁵³ *Id.*, p. 24; *Partial Order on Recommended Decision*, August 25, 2021, Decretal Paragraph A, pp. 5-6.

⁵⁴ NM PRC Case No. 19-00018-UT, *Final Order on Request of Public Service Company of New Mexico for Authority to Abandon Its Interests in San Juan Generating Station Units 1 and 4 and to Recover Non-Securitized Costs*, April 1, 2020.

PNM argues: “any attempt to implement a customer rate credit or establish a regulatory liability upon abandonment of San Juan is directly contrary to the Financing Order requirements and would violate the ETA. Verified Response p. 10. While it may be true that the ETA, on its face and without reference to other provisions of the PUA, eviscerated PRC’s authority to modify or change PNM’s Financing Order⁵⁵ the New Mexico Supreme Court emphasized “once again” that:

- A. The Commission is “constitutionally tasked with the responsibility for regulating public utilities”⁵⁶;
- B. It is “policy of the state” that utilities be regulated so “that reasonable and proper services shall be available at fair, just and reasonable rates”⁵⁷;
- C. The Commission must “balance the interests of a utility and energy consumers”⁵⁸;
- D. The Commission is duty bound to allow only charges within the “significant zone of reasonableness in which rates are neither ratepayer extortion nor utility confiscation.”⁵⁹

Alive and well is the regulatory principle that just and reasonable rate determinations are “the heart” of the regulatory system. *State ex rel. Sandel v. New Mexico Public Utility Commission*, 1999–NMSC–019, ¶18, 127 N.M. 272, 980 P.2d 55.

Ironically, PNM argues: “Movants’ proposal for the Commission to require PNM to implement a rate credit for the costs of San Juan at time of abandonment rather than when the energy transition charges become effective is a blatant attempt at an end run around this prohibition, and an end run of the Financing Order itself.” Verified Response p. 10. If PNM hadn’t acted contrary to the rules it set for itself and hadn’t manipulated the legal and legislative process to its own financial advantage and to the detriment of ratepayers then the Commission wouldn’t have to find a narrow path in which to protect customers from PNM’s disingenuous

⁵⁵ NMSA 1978, §62-18-7, § 62-18- 11(C).

⁵⁶ *Citizens for Fair Rates & the Env’t v. N.M. Pub. Regulation Comm’n*, 2022-NMSC-010, ¶45.

⁵⁷ *Id.*, ¶42, citing Section 62-3-1(B) and *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm’n (PNM v. PRC)*, 2019-NMSC-012, ¶ 10, 444 P.3d 460.

⁵⁸ *Id.*

⁵⁹ *Id.*

actions, but alas this is the situation we find ourselves in, again. Not only is there no prohibition against the PRC controlling rates, as a matter of fact the New Mexico Supreme Court has upheld the Commission's responsibility to do so, even when the Court decided that the ETA was constitutional it noted: "it is possible to construe the provisions of the ETA as new legislation that exists either in harmony with or as an alternative to other provisions governing the Commission's authority to regulate a "public utility in respect to its rates and service regulations and in respect to its securities. Section 62-6-4(A)."⁶⁰ Again, also see, *Qwest Corporation v. New Mexico PRC*, 2006-NMSC-042, *supra*, ¶¶29-31.

PNM argues further: "an order requiring PNM to implement a rate credit or establish a regulatory liability for San Juan at the time of abandonment rather than when the energy transition charge is effective as provided in the Financing Order would constitute an impermissible amendment to the Financing Order. The Commission does not have the unilateral authority under the ETA to amend a financing order." Verified Response p. 12. PNM unconvincingly claims that protecting ratepayers from unjust rates (which is PRC's duty) is akin to amending a financing order (which the ETA prohibits). PNM's argument is fallacious because if the PRC requires PNM to institute a refund or establish a regulatory liability account it would *not* be an *impermissible amendment to the Financing Order*, it would be holding PNM accountable for charging ratepayers for costs associated with a plant that is no longer in service, is no longer "used and useful,"⁶¹ and attempted price gouging by utility management. The

⁶⁰ *Id.*, ¶66.

⁶¹ *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, 444 P.3d 460, ¶21: "the Commission has considered whether expenditures were prudently incurred and whether the asset is used-and-useful in providing service when determining the ratemaking treatment of expenditures on utility plants. The prudent investment theory provides that ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith. To be considered 'used and

Company should be required to issue a rate credit or create a regulatory liability to prevent over-earning on regulatory asset amortizations for any and all costs associated with SJGS for Unit 1 post July 1, 2022 and Unit 4 post September 30, 2022; This type of tracking device is used when regulators want to ensure ratepayers pay only the costs they are obligated to pay, and nothing more.

As the New Mexico Supreme Court found with respect to one of the Commission's predecessor agencies, considering the broad and exclusive regulatory authority granted to it, the Commission:

...has a duty to be a prime mover *in the procedure* to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate it could hardly be envisioned that the commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a "thumbs-up or thumbs-down" judgment after the dust of battle settles in the arena.⁶²

Additionally, as our Chief Examiner has found:

Indeed, the New Mexico Court of Appeals has held that administrative agencies have the inherent authority to control quasi-judicial proceedings held before it. Referring to the Workers Compensation Administration ("WCA"), the Court stated that "[b]ecause the WCA, as created by the Legislature, has characteristics and qualities similar to courts in fulfilling its functions, we see no reason why its ability to control its own proceedings should differ from a trial judge's ability."⁶³

useful' a property must either be used, or its use must be forthcoming and reasonably certain; and it must be useful in the sense that its use is reasonable and beneficial to the public."

(citations omitted.); *See also, In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, And/Or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity*, April 5, 1989, p. 53:

"[F]or rate base inclusion expenditures must satisfy not only the necessary condition of prudent investment but also must be 'used and useful' in providing service."

⁶² *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n*, 1977-NMSC-32, 563 P.2d 588, 593, 594.

⁶³ NM PRC Case No. 20-00222-UT, *Order Granting Joint Motion for Joinder*, June 8, 2021, p. 25, citing, *Chavez v. State Workers' Comp. Admin.*, 2012-NMCA-060, ¶15, 280 P.3d 927, 932, citing, *In re Timofai Sanitation Co.*, 252 N.J. Super. 495, 600 A.2d 158, 162-163 (1991).

In fact, in another forum, PNM has acknowledged the PRC's right to regulate and supervise rates:

In determining the scope of the NMPRC's authority, the Court looks to the PUA as a whole. *Sandel*, 1999-NMSC-019, ¶ 13. PNM acknowledges the NMPRC has general and exclusive power and jurisdiction to regulate and supervise public utilities with respect to rates and service. NMSA 1978, § 62-6-4 (2003). These general powers include the authority to issue orders to assure implementation of and compliance with the PUA, to conduct investigations, and conduct necessary hearings in the administration of its authority. NMSA 1978, § 8-8-4(B)(5), (7) (1999); NMSA 1978, § 62-10-2 (1941).⁶⁴

5. A PRC requirement for ratepayer protection, either in the form of a rate credit or the establishment of a regulatory liability account is not piecemeal ratemaking

NEE will not reargue the importance of the *Qwest* case cited above, except to say that: a rate credit or refund is “squarely the within the authority of the Commission under Section 62-6-4(A) to regulate the rates of public utilities and the obligation of the Commission under Section 62-8-1 to ensure that those rates are just and reasonable.”⁶⁵

- A. The ETA is an alternative form of regulation, authored, at least in part by PNM;
- B. PNM has not abided by the terms it set for itself and to which the Commission relied when it approved PNM's Application and Financing Order;
- C. PNM testified that it would “file a general rate case to reflect the abandonment of the San Juan coal plant for rates to go into effect at the same time as the Energy Transition Charge are collected from customers [and if there was a timing problem it

⁶⁴ *Emergency Verified Petition of PNM for Writ of Mandamus Request for Emergency Stay and Request for Oral Argument*, No. S-1-SC-37552, February 27, 2019, p. 10.

⁶⁵ *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, 444 P.3d 460, ¶86.

would establish] a regulatory liability will protect customers from double recovery of the undepreciated investments”;⁶⁶

- D. PNM didn't follow the ETA's requirements, the Application's or Financing Order's terms. Amendments to the Financing Order explicitly added the PRC's authority to institute immediate credit to customers in the amount of its cost of service related to SJGS Units 1 and 4 (including capital, operations and maintenance, and all other expenses) as an interim rate adjustment mechanism,⁶⁷ should they be necessary to ensure that PNM fulfills its obligations and to protect ratepayers.
- E. The PRC has the statutory authority to control rates, order the credit or refund, to protect ratepayers from overcollection and is an available remedy to control PNM's malfeasance.

A regulatory liability account for SJGS Units 1 and 4 post operation is a means to track liabilities to refund or credit amounts to customers through rates and charges in future periods (together with any interest or return thereon, as applicable) not provided for in other accounts. The records supporting the entries to this account must be so kept that the Company can furnish full information as to the nature and amount of each regulatory liability included in this account, including justification for inclusion of such amounts in this account. PNM argues that: “requiring PNM to implement a credit for the costs of San Juan outside of the terms of the Financing Order and ETA constitutes improper piecemeal ratemaking.” Verified Response p. 13. It is true that this accounting is outside the terms of the Financing Order and

⁶⁶ NM PRC Case No. 19-00018-UT, Monroe Direct testimony, pp. 40-41.

⁶⁷ NM PRC Case No. 19-00018-UT, *Compliance Filing of Public Service Company of New Mexico with Conforming Amendments to Consolidated Application Pursuant to Final Order* (“Compliance Filing”), April 6, 2020, *Attachment A, Addendum Amendments to Consolidated Application*, p. 5, ¶F.

ETA, and that is the point. This accounting for ratemaking purposes is central to the Commission's requirement to balance the interests of "consumers and the interest of investors ... to the end that reasonable and proper services shall be available at fair, just and reasonable rates."⁶⁸ However it does *not* constitute piecemeal ratemaking because any adjustment to amounts collected from or refunded to ratepayers will occur in the context of PNM's next general rate case where the Commission can assess the costs alongside all the other costs of service elements. This would allow for "a complete picture"⁶⁹ and the Commission can fulfill its duty to fairly balance the interests of ratepayers and shareholders and result in just and reasonable rates as required by Section 62-8-7(A) of the PUA.

6. There is no good reason why PNM shouldn't be required to issue a rate credit or create a regulatory liability account

PNM argues: "[A]ny overlap in time between PNM's continued collection of the San Juan costs in base rates and the recovery of the limited PPA energy costs under the FPPCAC is quite limited." Verified Response pp. 25-26. Tacitly admitting that there **is** "double-recovery" of San Juan costs in base rates, as claimed by Joint Movants, PNM attempts to downplay the "overlap" as "*quite limited*," whatever that means. Is PNM challenging the Commission to open a docket to investigate these estimated costs now outside of a rate case? Again, PNM doesn't deny that that there is "double-recovery" just not "*impermissible* double-recovery." Verified Response p. 23. PNM cannot be trusted.⁷⁰ If all other arguments fail, PNM maintains that the

⁶⁸ *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, 444 P.3d 460, ¶10, citing NMSA 1978, § 62-3-1(B) (2008).

⁶⁹ NM PRC Case No. 10-00086-UT, *Certification of Stipulation*, p. 114, (citing Case No. 2361, *Recommended Decision* (Sept. 30, 1991) at 25).

⁷⁰ PNM's Application, at p. 8. stated: "The bonds are to be issued at or around the time the San Juan coal plant is closed." (similarly repeated at p. 21, ¶22.) *If* PNM issues securitized bonds 16-

regulatory liability account shouldn't issue because whatever over-collection there may be, ratepayers will still owe those amounts to the Company because between 2018 and 2024 PNM has and plans to invest \$2.4 billion.⁷¹ PNM fails to cite to any of these investments that it expects will result in cost recovery. Further, the Financing Order approved in 19-00018-UT was a snapshot of estimated costs, including, most significantly full compensation for undepreciated investments⁷² and other costs, based on an assumption that abandonment would occur on 7/2/2022⁷³ or "around that time".⁷⁴ Without a Commission requirement for tracking of costs post SJGS abandonment and whether or when PNM will issue securitized bonds, and knowing that the Financing Order amount cannot be adjusted (except for mathematical or transcription errors⁷⁵), PNM is asking the Commission to ignore potential rate extortion. To the extent that PNM is implicitly arguing that the ETA abolished the PRC's authority to establish just and reasonable rates associated with plant abandonment, the Supreme Court has disagreed. *Citizens*

20 months or more after the time of abandonment that is not a reasonable definition of *around the time*. PNM's argument that PNM was appropriately restrained during COVID from filing a rate case hasn't stopped the Company from re-starting to disconnect customers for not having the money to pay their bills. The company's *inner* motivations cannot be trusted.

⁷¹ Verified Response pp. 21-22.

⁷² NM PRC Case No. 19-00018-UT, *Recommended Decision on PNM's Request for Issuance of a Financing Order*, February 21, 2020, p. 30. ("PNM forecasted the net book value of \$283 million for San Juan Units 1 and 4 as of June 30, 2022, including common plant.")

⁷³ NM PRC Case No. 19-00018-UT, *Recommended Decision on PNM's Request for Issuance of a Financing Order*, February 21, 2020, p. 126 ("PNM has proposed that the Energy Transition Charges will be collected by the servicer through an Energy Transition Charge that is separate and apart from PNM's other rates, in the manner described in the Supporting Testimony and in the proposed ETA Rider included as PNM Exhibit MJS-2."); *See also*, (Settlage Direct Testimony, p. 20: "PNM Chart MJS-2 displays the timing of the bond payments and the effective dates of the adjusted energy transition charges. 7/2/2022 Bonds are issued")_

⁷⁴ PNM's Application, at p. 8 and p. 21.

⁷⁵ NM PRC Case No. 19-00018-UT, *Recommended Decision on PNM's Request for Issuance of a Financing Order*, February 21, 2020, p. 14 ("The Commission's role with respect to the future adjustment of the ETC charges is limited to the review and correction of the arithmetic proposed by PNM." Citing, NMSA 1978, 62-18-6(G)) Adopted by *Final Order on Request for Issuance of a Financing Order*, April 1, 2020.

for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n, 2022-NMSC-010, ¶¶26-27: The Commission and PNM “point out that the final order concludes that the Commission will have the statutory authority to review and potentially disallow PNM’s final expenditures by adjusting PNM’s base rates. ... The Commission’s final order indicates that it intends to review and *potentially* disallow PNM’s finally incurred energy transition costs in future ratemaking proceedings.” (emphasis in the original.)⁷⁶

If the overlap in SJGS costs is quite limited then there is no prejudice to PNM from the Commission protecting ratepayers and requiring a deferral account. There is no actual burden to PNM. This is mere *actual regulation*. Ratepayers must be protected from overcharging whether PNM is mistaken or intentionally price gouging.

Why is PNM opposing the establishment of a regulatory deferral account? How much effort could this possibly be? Ratepayers are required to reimburse PNM for its staff time anyway. Ratepayers are entitled to this going-forward protection. Requiring this accounting exercise will speak for itself. As this Commission is by now fully aware: When PNM resists regulation this vociferously then there is likely a good reason to assume that implementing the proposed protective measures will serve the public interest, especially in the current instance where PNM is proposing to continue charging customers for an inoperable plant that will provide no service.⁷⁷

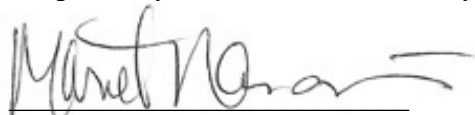
⁷⁶ See also, ¶¶ 42-45, affirming the Commission’s duty to ensure that “that utilities be regulated so ‘that reasonable and proper services shall be available at fair, just and reasonable rates.’”

⁷⁷ NM PRC Case No. 20-00222-UT, *Order Granting Joint Motion for Joinder*, June 8, 2021, p. 20. (“Indeed, the vigor with which the Joint Applicants are fighting in this case to resist Iberdrola’s submission to the Commission’s jurisdiction as a party in this case suggests that Iberdrola will not easily submit to the Commission’s jurisdiction in the future -- under paragraph 15 of the Stipulation or otherwise. One has to question the reasons for this resistance.”)

CONCLUSION

Everyone knows that interest rates are rising, affidavit or no affidavit. PNM admitted in its testimony that the interest rate for the securitized bonds was not fixed and could rise, even above PNM's WACC. Here NEE agrees with PNM, there is no need for a prudence hearing – this risk vulnerability was inherent in the ETA and there is little the Commission can do because the legislature and the Supreme Court removed PRC's ability to regulate many aspects of the Financing Order including timing of bond issuance. However, one critical aspect remains intact, and *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶¶ 42-45 upheld the Commission's overarching Constitutional duty and that is to regulate rates. Therefore, it should discharge its responsibility by requiring PNM to institute a rate credit, or in the alternative, establish a regulatory liability account as of July 1, 2022 for SJGS Unit 1 and October 1, 2022 for SJGS Unit 4.

Respectfully submitted this 24th day of March 2022,

A handwritten signature in dark ink, appearing to read 'Mariel Nanasi', written over a horizontal line.

Mariel Nanasi, Esq.
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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY)	
OF NEW MEXICO'S ABANDONMENT OF)	
SAN JUAN GENERATION STATION UNITS 1 & 4)	19-00018-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent to the parties and individuals listed here, via email only, a true and correct copy of:

**NEW ENERGY ECONOMY'S REPLY IN SUPPORT OF AN INTERIM RATE CREDIT
OR THE CREATION OF A REGULATORY LIABILITY ACCOUNT AS A REMEDY
FOR PNM'S OVERCOLLECTIONS OF SAN JUAN GENERATING COSTS**

issued on March 24, 2022.

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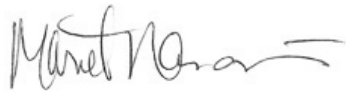
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